

EXPERT REPORT OF MARK I. HARRISON

I. BACKGROUND FACTS

1. I am a member of the law firm of Osborn Maledon, P.A. and have been licensed to practice law in the State of Arizona since 1961 and in the State of Colorado since 1991.
2. Over the past 59 years, with the exception of a judicial clerkship following graduation from law school, I have been continuously engaged in the active practice of law. The bulk of my practice has been in civil litigation and trial work. For the past two decades, my practice has focused increasingly on matters involving legal ethics, lawyers' licensure, professional liability, judicial ethics and discipline, and risk management.
3. During the course of my practice, I was involved in the management of my own law firm for more than 25 years and was then a partner and a member of the Ethics Committee of Bryan Cave LLP, an international law firm of more than 1500 lawyers, from April 1, 1993 through January 16, 2004. Since January 20, 2004, I have been a member of Osborn Maledon and serve as one of two principal ethics partners for that firm. My professional and extra-curricular activities are set forth in greater detail in my resume, which is attached to this Declaration as Exhibit A. I have been retained as an expert witness in matters involving legal and judicial ethics in more than 175 cases and have attached as Exhibit D a list of seven cases in which I have testified at trial or by deposition in the past seven years.
4. My work in the field of judicial ethics and discipline started in 1993 with the representation of judges in judicial-conduct proceedings. I represented several judges who were charged with judicial misconduct and then, in approximately 1995, was asked by the Supreme Court of Arizona to serve as Special Counsel for the Arizona Commission on Judicial Conduct ("the Commission") to prosecute judges charged with misconduct.¹ During my tenure as pro bono Special Counsel to the Commission, I prosecuted several judges charged with misconduct. My tenure as Special Counsel ended when the Court employed full-time staff counsel for the Commission, and at that point, I resumed representing judges in judicial conduct cases and have continued to the present time to represent judges charged with misconduct. In 2003, I was asked to Chair the American Bar Association

¹ I served as pro bono Special Counsel for approximately three years, (1995-1998). In 2011, I was again asked by the Supreme Court of Arizona to serve as Special Counsel to prosecute one high-profile matter against a judge because the permanent Commission counsel had a conflict of interest.

(“ABA”) Commission to Revise the Model Code of Judicial Conduct (“the Model Code”) which had not been revised since 1990. The Model Code is used as the basis for the Code of Judicial Conduct adopted in whole or in part by the Supreme Court in nearly every state in the country. My role as Chair of the ABA Commission lasted until February 2007, when the revised Model Code developed by the Commission was unanimously adopted by the House of Delegates of the ABA.² The 2007 Model Code has now been adopted in whole or in large part by 45 states.³ In 2008, I was asked to join the Board of Justice at Stake, a national non-profit organization dedicated to preserving fair and impartial courts. I served as a Board member and then as Chair of Justice at Stake until 2016. During the past five years, I have been asked and did sign several *amicus* briefs in the Supreme Court of the United States dealing with issues of judicial conduct and have participated on national panels dealing with issues relating to judicial ethics and fair courts.

5. I was retained by the *pro se* petitioner, Joseph P. Carson, PE, in *Carson v. Merit Systems Protection Board* no. 20-3459, US Court of Appeals for the Sixth Circuit to express opinions about the underlying decision of Merit Systems Protection Board (MSPB or Board) in *Carson v. Department of Energy*, MSPB No. AT-1221-19-0536-W-2. In that decision an MSPB Administrative Judge (AJ) determined that the appellant, Mr. Carson, failed to establish Board jurisdiction for a hearing on the merits of his whistleblower reprisal appeal. Mr. Carson’s whistleblower appeal to MSPB involved his long-standing whistleblower disclosure against MSPB. I have been asked to express an opinion whether MSPB should have assigned Mr. Carson’s appeal to an Administrative Law Judge (ALJ) consistent with controlling case law, relevant codes of judicial ethics, and its own regulations, because MSPB, as an entity, has a disqualifying conflict of interest. I have been asked to express an opinion as to whether the MSPB decision being reviewed by the 6th Circuit deprived him of a

² For a more detailed explanation of the work of the ABA Commission, see my article: *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257 (2007) (discussing and comparing the 1990 and 2007 Model Codes).

³ According to a status report dated August 22, 2016 issued by the Center for Professional Responsibility of the ABA, thirty-five (35) states (Ariz., Ark., Cal., Colo., Conn., Del., D.C., Ga., Haw., Idaho, Ind., Iowa, Kan., Me., Md., Mass., Minn., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.D., Ohio, Okla., Or., Pa., S.D., Tenn., Utah, Wash., W.Va., and Wyo.) have approved a revised Judicial Code; ten (10) states have established committees to review their code (Alaska, Ill., Ky., La., N.Y., N.C., R.I., S.C., Tex., and Vt. and one (1) state (Miss.) has proposed final revisions to their Judicial Code.

fair and impartial adjudication, as required by the US Constitution and other controlling law.

6. I am being compensated for my services in this matter at the rate of \$400.00 per hour for my study, analysis, preparation of this Report and testimony. I have no stake in the outcome of the matter.
7. In formulating my opinions in this matter, I have relied upon documents and information provided to me by Mr. Carson to the extent that those materials contain factual and legal information pertinent to the issues about which I was asked to express an opinion. The documents that I have reviewed, in relevant part, include the following:

II. PROCEDURAL HISTORY

- A. Documents Filed in *Carson v. Department of Energy*, MSPB docket no. **AT-1221-19-0536-W-1**:
 - i. Initial Individual Right of Action (IRA) Appeal, dated June 2, 2019.
 - ii. MSPB Jurisdiction Order, dated June 12, 2019.
 - iii. Mr. Carson's Motion for Substitution of Tribunal and Extension of Time, dated June 20, 2019.
 - iv. MSPB Order Denying Motion for Recusal and for Extension, dated June 21, 2019.
 - v. Mr. Carson's Objection; reconsideration; motion to certify interlocutory appeal, dated July 1, 2019.
 - vi. MSPB's Initial (now final) Decision, dismissing the appeal without prejudice to refile, dated July 2, 2019.
- B. Documents Filed in *Carson v. Department of Energy*, MSPB docket no. **AT-1221-19-0536-W-2**:
 - i. Mr. Carson's Refiled Individual Right of Action (IRA) Appeal, also requesting recusal by MSPB, dated October 3, 2019.
 - ii. MSPB Order Denying Recusal dated October 28, 2019.
 - iii. Mr. Carson's Objection and request for reconsideration of the MSPB Order of October 28, 2019, dated November 1, 2019.

- iv. MSPB Order, denying Mr. Carson’s request for reconsideration, dated November 4, 2019.
- v. Mr. Carson’s Motion for disqualification of Judge and recusal by MSPB, dated November 13, 2019, pursuant to 5 CFR §1201.13 and 1201.42.
- vi. MSPB Order, denying Mr. Carson’s motion for recusal, dated November 18, 2019.
- vii. Mr. Carson’s Motion to certify interlocutory appeal of MSPB’s Order of November 18, 2019, dated November 24, 2019.
- viii. MSPB’s Denial of motion to certify interlocutory appeal dated November 25, 2019.
- ix. Mr. Carson’s Response to Jurisdictional Order of June 12, 2019, dated November 25, 2019.
- x. Mr. Carson’s Amended motion for subpoena for discovery from MSPB, dated January 9, 2020.
- xi. MSPB’s Initial (now final) decision, dated January 28, 2020.

III. PROCEDURAL AND FACTUAL HISTORY IMPLICATED BY JOSEPH CARSON’S WHISTLEBLOWER DISCLOSURE AGAINST MSPB IN HIS APPEAL, *CARSON V. DEPARTMENT OF ENERGY*, AT-1221-19-0536-W-1 AND 2.

- A. Mr. Carson’s whistleblower appeal contains over a dozen specific whistleblower disclosures, only one of which is against MSPB. Specifically, his whistleblower disclosure regarding MSPB is that since its creation in 1979, 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.”
- B. Mr. Carson has pursued resolution of his whistleblower disclosure for many years. It is apparently undisputed that MSPB has not, in its history, ever made the report referenced in Mr. Carson’s whistleblower disclosures. Despite Mr. Carson’s repeated efforts to obtain a resolution of his whistleblower disclosure against MSPB and the apparent undisputed nature of his whistleblower disclosure, there has been no “reasonable belief” determination about it to date as required and implicated by 5 U.S.C. §2302(a)(2)(D) and (b).

- C. Mr. Carson has created a website which extensively documents his multi-year effort to obtain a resolution of his whistleblower disclosure against MSPB. The website is https://whsknox.blogs.com/mspb_watch and confirms that
- i. The MSPB recused from Mr. Carson’s earlier appeal involving this whistleblower disclosure and assigned it to an ALJ in the US Coast Guard pursuant to a Memorandum of Agreement (“MOA”). The Initial Decision of the ALJ of November 6, 2014 in Mr. Carson’s whistleblower appeal about 5 USC section 1204(a)(3) took no exception to his having a “reasonable belief” in the disclosure.⁴
 - ii. In its subsequent Order of December 23, 2014 three members recused themselves from considering Mr. Carson’s whistleblower disclosure that they were breaking the law in refusing or failing to “report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.”
 - iii. MSPB’s FOIA response of April 11, 2017 stated that it has no unpublished statements of policy regarding its statutory duty to “report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.”
 - iv. Dan Meyer, Mr. Carson’s then attorney, in a June 14, 2019 email to the Senate Homeland Security and Governmental Affairs Committee (HSGAC) reported his concerns about Mr. Bungard’s apparent role in directing or concurring with DOJ having made a false claim to a federal judge in litigation about MSPB’s duty to “report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.”
 - v. Mr. Carson’s July 24, 2019 letter to HSGAC, elaborating on concerns about Mr. Bungard’s suitability and his 15 years-long effort to obtain a resolution of his whistleblower disclosure against MSPB.
- D. Mr. Carson repeatedly filed motions with the Board to disqualify itself and its employees from adjudicating his appeal and to reassign it to an Administrative Law Judge (ALJ) pursuant to its relevant regulation and

⁴ Carson v. MSPB, docket no. AT-1221-14-0637-W-1

policy. The Board, through the AJ assigned to the case, repeatedly denied these motions. Mr. Carson preserved his objection to the Board's denial of his motions for the Board to recuse by filing a motion to certify an interlocutory appeal, which was also denied.⁵

- E. The AJ to whom the Board delegated adjudication responsibility issued an initial decision of January 28, 2020 that made no specific mention of Mr. Carson's whistleblower disclosures against the Board and no mention whatsoever of Mr. Carson's efforts to have the Board recuse itself.
- F. That initial decision automatically became the final Board decision on March 3, 2020 when Mr. Carson did not seek its review by the full MSPB.
- G. On April 28, 2020, proceeding in *pro per*, Mr. Carson timely filed a petition for review of the Board's decision with the US Court of Appeals for the Sixth Circuit, *Carson v. Department of Energy*, No. 20-3459.
- H. On May 26, 2020, the Department of Energy, the respondent in the appeal, filed an unopposed motion to recaption the appeal and name MSPB as the respondent.⁶
- I. Mr. Carson was represented by licensed attorneys including Dan Meyer and Cheri Cannon of Tully-Rinckey, PLLC during the initial portion of his whistleblower appeal at MSPB.
- J. The Department of Energy, represented by a licensed attorney, Kristopher Muse, refused to support Mr. Meyer's motion that MSPB recuse.
- K. Although it is not a matter of record, it is reasonable to believe MSPB's determination that it would not disqualify or recuse is the result of the decision of MSPB's General Counsel and Acting Executive Director, Tristan Leavitt. In November 2019, Mr. Carson made a freedom of information act (FOIA) request for information about Mr. Tristan's possible involvement. To this point, MSPB has refused to provide this information.
- L. The MSPB AJ who repeatedly denied Mr. Carson's motions to recuse is a licensed attorney, as are all of the MSPB employees in the AJ's supervisory

⁵ MSPB no longer employs any ALJs and has not for many years. Instead, MSPB has MOAs with a few other agencies about assigning appeals to one of their ALJ's when MSPB has a disqualifying conflict of interest.

⁶ This motion was granted on July 27, 2020. The Department of Energy was also named an intervenor

chain who were involved in or knowledgeable about MSPB's determination not to recuse.

IV. PERTINENT STATUTES, RULES AND REGULATIONS

A. The Merit Systems Protection Board (MSPB)

- i. The U.S. Merit Systems Protection Board was created by the Civil Service Reform Act (CSRA) of 1978 (Pub.L. 95-454), the most far reaching overhaul of the federal civil service from its creation by the Pendleton Act of 1883 to the present day.
- ii. The "Findings and Statement of Purpose" of the CSRA is codified in the "notes" of 5 U.S.C. section 1201. is the policy of the United States that—
 - (1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;
 - (2) **the merit system principles** which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and **prohibited personnel practices** should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;
 - (3) Federal employees should receive appropriate protection through increasing the authority and powers of the **Merit Systems Protection Board** in processing hearings and appeals affecting Federal employees;

B. The Statutory Duties and Authorities of the MSPB

- i. "... hear, **adjudicate**, or provide for the hearing or **adjudication**, of all matters within the jurisdiction of the Board...and.... take final action on any such matter." 5 U.S.C. §1204(a)(1).

- ii. “...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;” §1204(a)(3).
- iii. “...any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence. §1204(b)(1).
- iv. “...any employee of the Board designated by the Board may, with respect to any individual—
 - (1) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and
 - (2) order the taking of depositions from, and responses to written interrogatories by, any such individual.” §1204(b)(2).

C. Composition of the MSPB:

- i. “The Merit Systems Protection Board is composed of three members appointed by the President, by and with the advice and consent of the Senate...” §1201.
- ii. “The term of office of each member of the Merit Systems Protection Board is 7 years.” §1202(a).
- iii. “Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office” §1202(d).
- iv. “The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.” §1203(a).

V. PERTINENT STATUTES, REGULATIONS AND RULES GOVERNING JUDICIAL ETHICS

A. Duties of MSPB Administrative Judges (AJs)

- i. MSPB hires its Administrative Judges 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. They are subject to normal supervisory direction within MSPB. MSPB, which employs the lawyers appointed to serve as AJs, is their employer with whom they have an attorney-client relationship.
- ii. Pursuant to its statutory authority, MSPB delegates its adjudicatory authority to its AJs, subject to its review of their initial decisions. General Definitions Pertinent to Administrative Judges,” 5 CFR §1204(a):
- iii. **Judge.** Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including.... other employee of the Board designated by the Board to hear such cases...”
- iv. 5 CFR §1201.41 Judges.
 - (1) Authority. Judges will conduct **fair and impartial hearings** and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges’ powers include, but are not limited to, the authority to:...
 - (2) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:...
 - (3) To otherwise ensure a **fair and just adjudication** of the case;...
 - (4) Issue initial decisions...
- v. MSPB regulations address one situation when it must recuse and assign an appeal to an ALJ. See 5 USC section 1201.13, which expressly addresses appeals only filed by MSPB employees. Apparently, when this regulation was written, MSPB did not anticipate that other situations could arise which mandate it to recuse and assign the appeal to an ALJ, based on the law at 28 USC section

455(b) and/or controlling court precedent. Another MSPB regulation at Section 1201.42 addresses situations in which a particular AJ recuses, but this regulation anticipates that if one AJ recuses, another AJ could impartially adjudicate the appeal – it does not address situations in which MSPB, as an entity, must recuse.

- B. Several key legal principles govern the parties’ dispute and my opinions in this matter. I do not believe that any party disagrees with any of these principles, which I summarize below.
- C. In all judicial proceedings, including adjudications conducted pursuant to administrative law, relevant laws, rules and controlling case law govern the conduct of the judges (or adjudicating entities) and define their ethical obligations.
- D. Throughout its provisions, the Code of Conduct for Federal Judges and the Model Code of Judicial Conduct describe the affirmative obligations of judges to meet the required and expected standards and ensure a properly functioning judicial system. For example, the Code explains that “[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”. It further provides that “[a] judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- E. The governing Codes of Conduct also discuss the circumstances under which a judge should recuse or disqualify himself or herself from a matter. The ABA Model Code of Judicial Conduct, provides that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. *Id.*,
- F. The Supreme Court of the United States and other state and federal courts have analyzed and discussed this rule (or its federal counterpart) in numerous opinions. These cases make clear that the appropriate test is not whether the judge *subjectively* believed that his or her impartiality could be questioned, but whether a reasonable person, *aware of all pertinent facts*, would have *objectively* believed the judge was impartial. This test mandates disqualification when a reasonable person might question the judge’s ability to rule impartially.”); See also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988); *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 750-751 (7th Cir. 2015).

G. More specifically, the case law also confirms that

* “[t]he onus is *on the judge* to ensure any potentially disqualifying information is brought to the attention of the litigants.” *Listecki*, 780 F,3d at 750; (emphasis added).

* “[J]udges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside.” *Liljeberg* , 486 U.S. at 862 n.9.

* “It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially disqualifying piece of information about every judge before whom they appear.” *Listecki*, 780 F,3d at 750.

H. 28 U.S.C. §455(a) and (b), with controlling case law, also determine whether MSPB, as an entity and the AJs it assigned to hear Mr. Carson’s appeal, was mandated to recuse and assign Mr. Carson’s appeal to an ALJ as described in 5 CFR §1201.13.

I. For MSPB, both as a three-person Board and the individuals to which it delegates its adjudication responsibility, the requirements of due process apply. *Bieber v. Department of the Army*, 287 F.3d 1358, 1361 (Fed. Cir. 2002) states “The requirements of due process, of course, apply to administrative proceedings,” citing *Utica Packing Co. V. Block*, 781 F.2d 71, 77(6th Cir. 1986). In *Bieber*, 1362-63, the criteria of *Liteky v. United States*, 510 U.S. 540 (1994) for judicial disqualification, pursuant to 28 U.S.C. §455(a) and (b), was applied to the Board and those within its supervision to whom it delegates adjudication responsibility.

J. The Supreme Court of the United States and federal courts have analyzed and discussed 28 U.S.C. §455 (a) and (b) in numerous opinions. These cases make clear that the appropriate test is not whether the judge - or the members of an administrative body charged with adjudicating authority - subjectively believed that the impartiality of its employee assigned to adjudicate could be questioned, but whether a reasonable person, aware of all pertinent facts, would have objectively believed the administrative body, as a whole, and the employee assigned to serve as the adjudicator of the entity’s interests, was impartial. As noted above, the Court of Appeals for the Seventh Circuit set forth a test for determining the appearance of partiality: whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial.”) (citation omitted). See also *Liljeberg v. Health Servs.*

Acquisition Corp., 486 U.S. 847, 860-61 (1988); Listecki v. Official Comm. of Unsecured Creditors, 780 F.3d 731, 750-751 (7th Cir. 2015).

- K. More specifically, the law is explicit at 5 U.S.C. §455(b)(5) (as applied to the Full Board as an entity) (emphasis added):

(The Board, as an entity, including anyone under its supervisory direction to whom it has delegated adjudication responsibility) **shall** also disqualify itself in the following circumstances:

- i. is a **party** to the proceeding.
- ii. is acting as a **lawyer** in the proceeding;
- iii. is known by the Board to have an **interest** that could be **substantially affected** by the outcome of the proceeding;
- iv. is to the Board’s knowledge likely to be a **material witness** in the proceeding.

- L. All of these criteria mandated that the MSPB recuse. Had the MSPB complied with this statutory mandate and assigned the adjudication of Mr. Carson’s whistleblower appeal to an ALJ, then MSPB could 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. Even if it did not intervene after recusing, the MSPB would have been a material witness regarding its interpretation and application of the disputed law as part of the “reasonable belief” determination about Mr. Carson’s whistleblower disclosure against the MSPB.

VI. DUTIES OF MSPB ADMINISTRATIVE JUDGES (AJS)

- A. MSPB appoints its Administrative Judges after posting vacancy announcements for “Attorney Examiners.” It uses the honorific “Administrative Judges” for these individuals.
- B. However, these appointees lack the statutory tenure and judicial independence of ALJ’s and they are subject to normal supervisory direction within the MSPB. Moreover, since they are attorneys employed by MSPB they presumably have an attorney-client relationship with MSPB.

- C. Pursuant to its statutory authority, MSPB delegates its authority to adjudicate matters to these AJs, subject to MSPB review of the AJs' decisions.

VII. GENERAL DEFINITIONS PERTINENT TO ADMINISTRATIVE JUDGES

- A. Administrative Judges (AJs) are defined in 5 CFR §1204(a) as follows:
 - i. “Judge. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including . . . other employees of the Board designated by the Board to hear such cases.”
 - ii. 5 CFR §1201.41-Judges
 - iii. Authority. Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges’ powers include, but are not limited to, the authority for . . .
 - (1) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary.
 - (2) To otherwise ensure a fair and just adjudication of the case . . .
 - (3) issue initial decisions.
- B. The assignment of an appeal initiated against MSPB (like Mr. Carson’s disclosure and related appeal) -- which affects the interests of MSPB -- to an MSPB employee to adjudicate as an AJ in the matter implicates an obvious and untenable conflict of interest which negates the assigned AJ’s duty of impartiality as required by all pertinent ethical rules governing judges as well as 5 CFR §1201.13 and 1201.42.

VIII. RULES GOVERNING THE CONDUCT OF JUDGES

- A. In MSPB cases in which AJs are required to adjudicate issues presented to them for resolution, it is reasonable to believe that rules govern the conduct of the AJs and define their ethical obligations. The rules applicable to all judges in both state and federal court are the rules which require judges to uphold the integrity and independence of the judiciary and most pertinent to the present situation, to “perform the duties of the office fairly, impartially and diligently.” E.g., Canon 3. Code of Conduct for United States Judges. This rule is also specifically articulated in Rule 1.2 of the Model Code of Judicial Conduct (“A judge shall act at all times in a manner that promotes

public confidence in the independence, integrity and impartiality of the judiciary. . . .”) and this duty of impartiality is a theme which runs throughout the Model Code of Judicial Conduct.

- B. Since MSPB is a federal agency and its employees serving as judges are federal employees, 28 USC §455(a) and (b) apply to the MSPB employee-judges (AJs) resolving matters assigned to them for adjudication pursuant to 5 CFR §1201.
- i. 28 USC §455(a) provides:
 - (1) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
 - ii. 28 USC §455(b)(5) provides:

He shall also disqualify himself in the following circumstances: (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. . . . “
- C. The Supreme Court of the United States and other state and federal courts have analyzed and discussed the rules governing the duty to be impartial (or its federal counterpart) in numerous opinions. These cases make clear that the appropriate test is not whether the judge *subjectively* believed that his or her impartiality could be questioned, but whether a reasonable person, *aware of all pertinent facts*, would have *objectively* believed the judge was impartial. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-861 (1988); *Listecki v. Official Com. Of Unsecured Creditors*, 780 F.3d 731, 750-751 (2015).
- D. More specifically, the case law also confirms that
- i. “the onus is *on the judge* to ensure any potentially disqualifying information is brought to the attention of the litigants.” *Listecki*, 780 F.3d at 750 (emphasis added).
 - ii. “It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially

disqualifying piece of information about every judge before whom they appear.” *Listecki, supra*.

iii. In *Marriage of O’Brien*, 354 Ill. Dec. 715, 743-44, 958 N.E.2d 647, 675-76 (2011), then Justice Lloyd Karmeier acknowledged “The law may presume that judges are impartial (citations omitted) but there is no presumption that they are in the best position to make an objective assessment of whether their own actions present an appearance of impropriety. To the contrary, individual judges may often be in the worst position to make such assessments. The robes of office after all, confer no special exemption from the very basic human trait that it is difficult for people to see themselves as others see them.” This reality has also been recognized and confirmed by several federal Circuit courts. E.g., *Matter of Mason*, 916 F. 2d 384, 386 (7th Cir. 1990)(“ . . .it is essential to hold in mind that . . . outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be”).

- E. The provisions of 28 USC §455(a) and (b) apply to this situation. Mr. Carson’s whistleblower disclosure against MSPB implicated an obvious and significant conflict of interest which made it clearly untenable for an MSPB employee to serve as the AJ assigned to impartially adjudicate Mr. Carson’s “reasonable belief” in his whistleblower disclosure against MSPB.
- F. When denying Mr. Carson’s repeated motions to recuse, the MSPB AJ did not address the reasons mandating MSPB’s recusal as required by 5 USC §455(b) and controlling case precedent. Instead, the AJ’s denials of Mr. Carson’s motions either cited one of Mr. Carson’s previous whistleblower reprisal appeals that did not involve a whistleblower disclosure against MSPB or which determined that since Mr. Carson is not an employee of MSPB, MSPB did not need to recuse pursuant to 5 CFR §1201.13.

IX. OPINIONS

Based on the facts, rules, regulations and statutes listed in this report and on the basis of my knowledge and experience in the field of judicial ethics, my opinions are as follows:

- A. It is obvious, based upon the pertinent law, rules, regulations and cases that the assignment by MSPB of Mr. Carson’s whistleblower appeal with its whistleblower disclosure against it to an MSPB employee to serve as the AJ to adjudicate Mr. Carson’s complaint, rather than assigning the matter to an independent ALJ, consistent with its regulation at 5 CFR section 1201.13, implicated an obvious and egregious conflict of interest.

- B. The conflict of interest caused by the MSPB's assignment of Mr. Carson's whistleblower appeal with its whistleblower disclosure against it to an MSPB employee violated (a) regulations which specifically mandate that the MSPB AJ's disqualify themselves when required by law and controlling case law, (b) 28 USC 455(b), and (c) rules and case law specifically requiring both MSPB as an entity and those to whom MSPB delegates responsibility to adjudicate appeals to be "impartial".
- C. The conflict of interest caused by MSPB's failure to assign Mr. Carson's whistleblower appeal to an ALJ denied Mr. Carson of his constitutional right to due process and precluded him from having his whistleblower appeal, with its whistleblower disclosure against MSPB adjudicated by an impartial judge as required by the law, controlling case law and established codes of judicial ethics.

DATED this 25th day of August, 2020



Mark I. Harrison