SOCIAL SECURITY ADMINISTRATION, Petitioner, v. MARK SHAPIRO, Respondent.

DOCKET NUMBER CB-7521-11-0024-T-1

MERIT SYSTEMS PROTECTION BOARD

2012 MSPB LEXIS 6123

October 18, 2012

COUNSEL:
[*1]

Michael Murray, Esq., Meeka Drayton, Esq., On Behalf of Petitioner

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ALJ:

SMITH

ALJ-DECISION:

INITIAL DECISION

I. STATEMENT OF THE CASE

A. Procedural History and Initial Decision

The proceeding in docket number CB-7521-11-0024-T-1 began with the filing of a Complaint by the Social Security Administration (Agency or SSA) pursuant to *5 U.S.C. §§ 3105* and *7521*, and the underlying regulations at *5 C.F.R. § 1201.137*. In the Complaint, the Agency requested the Merit Systems Protection Board (MSPB or Board) to determine that good cause exists to remove Mark Shapiro (Respondent) from his position as an Administrative Law Judge (ALJ) with the Agency. *See* Petitioner's Written Closing Argument at 85.

On August 2, 2011, the Office of the Clerk of the Board issued an Acknowledgement Order, assigning the case a caption and docket number, and informing Respondent of his right, pursuant to *5 C.F.R. § 1201.139(c)* and *(d)*, to file a response to the Complaint by September 2, 2011. Respondent, through counsel, filed a Response to the Agency's Complaint on September 2, 2011.

On September 14, 2011, the [*2] Office of the Clerk of the Board issued an Order informing the parties the case had been assigned to the undersigned ALJ for hearing and disposition.

On October 18, 2011, the court convened a telephonic pre-hearing conference with the parties. During the conference, the court discussed discovery with the parties and also set the matter for hearing.

On July 11, 2012, the hearing commenced in Baltimore, Maryland, after a lengthy discovery process. The hearing was recessed on July 16, 2012, to allow the Agency to respond to additional discovery requests from Respondent.

On August 28, 2012, the hearing reconvened in Baltimore, Maryland, and adjourned on the afternoon of August 29, 2012.

The parties received final hearing transcripts on September 17, 2012. Respondent

submitted his closing brief on October 5, 2012, and the Agency submitted its closing brief on October 12, 2012. Thereafter, the court closed the administrative record. n1

n1 The court acknowledges and thanks student-legal externs Brett Carpenter, Elizabeth Wilkinson and John Long, Jr., all of the Campbell University Norman Adrian Wiggins School of Law, for their research contributions in this case.

[*3]

The court admitted hundreds of pages of documents into evidence; a complete listing of which is found in Attachment A. n2 Many of those documents contain references to conduct outside of the time periods alleged in Charges I and II of the Complaint; *i.e.*, uncharged misconduct. The court informed the parties it would not, and did not give probative consideration to that conduct, except as necessary to understand the context of the events actually charged in the Complaint. (Tr. Vol. VI at 1169).

n2 Because both the Agency and Respondent pre-marked their respective exhibits numerically, the court maintained those designations throughout the hearing of this matter.

During the hearing, the court carefully noted the demeanor of each witness as a factor in determining that witness' credibility. n3

n3 In making credibility determinations, the court is to: 1) Identify the factual questions in dispute; 2) summarize all of the evidence on each disputed question; 3) state which version is more credible; and, 4) explain in detail why the chosen version was more credible than alternative versions of the event. *Hillen v. Dep't of the Army, 35 M.S.P.R. 453, 458 (1987)*.

[*4]

Having considered all of the admissible documentary evidence, the testimonies, and the arguments of counsel, the court determined that:

Charge I -- **PROVED**

Specification 1 -- **NOT PROVED**

Specification 2 -- **NOT PROVED**

Specification 3 -- **PROVED**

Charge II -- **DISMISSED**

Specification 1 -- **DISMISSED**

Specification 2 -- **DISMISSED**

Specification 3 -- **DISMISSED**

The Agency, having **PROVED** Charge I, established that good cause exists to **REMOVE** Respondent Mark Shapiro from his position as an Administrative Law Judge with the Social Security Administration.

B. The Complaint

The Agency's Complaint begins with a five-page recitation of the political environment that serves (at least, in part) as a background for this

removal action. Thereafter, the Complaint contains two Charges: Charge I, "Unacceptable Performance" and Charge II, "Neglect of Duties." Each Charge is supported by three enumerated Specifications.

Per *5 C.F.R. § 1201.56(a)(ii)*, the Agency bears the burden of proving the Charges and Specifications by a preponderance of the evidence. *See Brennan v. Dep't of Health & Human Serv., 787 F.2d 1559, 1561 (Fed. Cir. 1986),* [*5] *cert, denied*, *479 U.S. 985, 107 S. Ct. 573, 93 L. Ed. 2d 577 (1986)*. The Agency is not required to prove all of the Specifications under a given Charge for that Charge to be proven. Proof by a preponderance of the evidence of any one of the Specifications under a Charge constitutes proof of that Charge. *Burroughs v. Dep't of the Army, 918 F.2d 170, 172 (Fed. Cir. 1990)*; *Miller v. U.S. Postal Serv., 117 M.S.P.R. 557, 2012 M.S.P.B. 40 (2012)*; *Crawford-Graham v. Dep't of Veterans Affairs, 99 M.S.P.R. 389, 397 (2005)*.

1. Charge I

Charge I alleges Respondent's performance was unacceptable during Fiscal Years 2008, 2009, and 2010. Charge I also alleges that a SSA ALJ "is required to provide timely and legally sufficient hearings and decisions for the public. The agency communicated these requirements to Respondent."

Charge I alleges three Specifications. The first two Specifications allege Respondent failed to provide timely and legally sufficient hearings and decisions for the public. The third Specification alleges Respondent did not manage his cases acceptably.

a) Specification 1

The first Specification of Charge I alleges in Fiscal Years 2008, 2009, and [*6] 2010, Respondent did not provide timely hearings. The first Specification identifies four case files by name and redacted Social Security number wherein Respondent is alleged to have failed to provide a timely hearing. The first Specification also incorporates Appendix 1 to the Complaint: a listing of cases wherein Respondent is alleged to have failed to provide a timely hearing. n4

n4 The court specifically notes that an Appendix to the Complaint constitutes neither evidence nor proof of the Charge.

b) Specification 2

The second Specification alleges that in Fiscal Years 2008, 2009, and 2010, Respondent did not provide timely dispositions. The second Specification identifies the same four case files by name and redacted Social Security number wherein Respondent is alleged to have failed to provide a timely disposition. The second Specification also incorporates Appendix 1 to the Complaint: a list of those cases wherein Respondent is alleged to have failed to provide a timely disposition. n5 [*7]

n5 *See* note 4.

c) Specification 3

The third Specification alleges in Fiscal Years 2008, 2009, and 2010, Respondent did not "acceptably manage his cases." The third Specification incorporates Appendices 1 through 8 to the Complaint: a list of those cases Respondent is alleged to have failed to manage acceptably. n6 The third Specification also compares, by Fiscal Year, the numbers of cases Respondent scheduled or disposed of, to the numbers of cases scheduled or disposed of by other ALJs in both/either the New York City or New York State, New Jersey, and Puerto Rico (Region II) SSA disability adjudication offices.

n6 *See* note 4.

Further, the third Specification alleges that in Fiscal Years 2008, 2009, and 2010, Respondent's case processing times were 7.19 "standards of deviation above the mean" of those processing [*8] times by other ALJs in the Region II SSA disability adjudication offices. *See*, *p.* 68 *infra*.

2. Charge II

The second Charge essentially alleges Respondent was negligent in the performance of his duties during Fiscal Years 2008, 2009, and 2010, in that he failed to exercise due care to provide timely and legally sufficient hearings and decisions for the public.

a) Specification 1

The first Specification of Charge II alleges Respondent did not exercise due care to ensure he held timely hearings in or about Fiscal Years 2008, 2009, and 2010.

b) Specification 2

The second Specification of Charge II alleges Respondent did not exercise due care to ensure he provided timely decisions in or about Fiscal Years 2008, 2009, and 2010.

c) Specification 3

The third Specification of Charge II alleges Respondent did not exercise due care to ensure he adequately managed his cases in or about Fiscal Years 2008, 2009, and 2010.

C. The Answer and Affirmative Defenses

Respondent's Answer specifically denies good cause exists to remove him from his position as a United States ALJ, a position he has held since 1997. Except for those allegations in [*9] the Agency's Complaint specifically admitted (in whole or in part), Respondent either specifically denies or states he is without knowledge or information of the allegations contained in any paragraph not otherwise specifically admitted.

Respondent's Answer also pleads twenty-six "Defenses" most of which are factual rebuttals rather than cognizable "affirmative defenses." n7 Respondent, however, did plead three discernible affirmative defenses: 1) the Agency's action was politically-motivated; 2) the Agency interfered with his decisional independence; and 3) Charges I and II are multiplicious.

n7 An "affirmative defense" is "[a] matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. [It is] a response to a plaintiff's claim which attacks the plaintiff's [legal] right to bring an action, as opposed to attacking the truth of [the] claim." *National Union Fire Ins. Co. of Pittsburgh, Pa, v. City Savings, F.S.B. 28 F.3d 376, 393 (3d Cir. 1994)* (quoting Black's Law Dictionary (6th ed. 1990)). "The purpose of requiring a defendant [or respondent] to plead available affirmative defenses in an answer is to avoid surprise and prejudice by providing the plaintiff [or agency] with notice and the opportunity to demonstrate why the affirmative defense should not succeed." *Robinson v. Johnson, 313 F.3d 128, 134-135 (3d Cir. 2002)*.

[*10]

Pursuant to the terms of *5 C.F.R. § 1201.56(a)(2)(iii)*, Respondent bears the burden to prove, by a preponderance of the evidence, the affirmative defenses he pled.

II. FINDINGS OF FACT and CONCLUSIONS OF LAW

The court, pursuant to its obligation set forth in *5 C.F.R. § 1201.111* and having considered the entire administrative record, makes the following Findings of Fact:

1. Respondent Mark Shapiro has served as a United States ALJ in the employ of the SSA in New York City, New York, since 1997. (Tr. Vol. VI at 1176).

2. Respondent Mark Shapiro was never the subject of formal disciplinary action by the SSA prior to the filing of the instant Charges and Specifications. (Tr. Vol. I at 142; Vol. II at 387; Vol. III at 838).

3. The SSA bears the responsibility to provide timely and legally sufficient hearings and dispositions in response to claimants' disability applications. (Tr. Vol. I at 79).

4. On February 14, 2007, former New York City Hearing Office Chief ALJ, Newton Greenberg, sent a letter to Respondent Mark Shapiro, describing management's concerns regarding Respondent's continued failures to process cases in a timely fashion and his continued [*11] failures to produce an adequate number of dispositions. Respondent received and understood Judge Greenberg's concerns (Tr. Vol. VII at 1492; Agency Ex. 11).

5. On October 31, 2007, SSA Chief ALJ Frank Cristaudo sent a letter to all SSA ALJs outlining a "goal" of 500 - 700 case dispositions per ALJ, per year. (Tr. Vol. I. at 87; Agency Ex. 2).

6. Respondent Mark Shapiro received Judge Frank Cristaudo's October 31, 2007, letter and understood that letter to mean 500 - 700 case dispositions per ALJ, per year, was the SSA's "goal." (Tr. Vol. VI at 1216 - 1217).

7. A "fixed quota" of disability case dispositions was never imposed upon Respondent Mark Shapiro by the SSA. (Tr. Vol. VI at 1217; Vol. VII at 1615 - 1616).

8. On January 8, 2008, the SSA Regional Chief ALJ for the New York State, New Jersey and Puerto Rico Region (Region II), Mark Sochaczewsky, tasked Assistant Regional Chief ALJ for Region II, Robert Wright, to conduct a series of meetings with Respondent Mark Shapiro in an effort to increase both the numbers of hearings Respondent scheduled and the case dispositions he issued. (Tr. Vol. I at 181; Agency Ex. 13).

9. From January, 2008, through June, 2008, [*12] SSA Assistant Regional Chief ALJ for the New York State, New Jersey and Puerto Rico Region, Robert Wright, conducted a series of performance "improvement meetings" with Respondent Mark Shapiro. The substance of each of the six "improvement meetings" was essentially the same. (Tr. Vol. I at 200 - 201; Tr. Vol. II at 458 - 616; 460 - 461; 471 - 496, 595 - 622; Agency Ex. 14 - 19):

> a. The first "improvement meeting" was conducted on January 15, 2008. This meeting included a review of Respon-

dent's disposition productivity, a frank discussion about management's recommended efficiencies, case-processing "benchmarks," and a clear explanation of management's "goal" of 500 - 700 case dispositions per ALJ, per year. This meeting also included a discussion of Respondent's then-pending cases and the numbers of cases he had disposed of in the prior month. This meeting also included a warning to Respondent about possible disciplinary action, including removal, if he did not improve his productivity.

b. The second "improvement meeting" was conducted on February 6, 2008. This meeting focused on Respondent's pending cases, his pre-hearing development practices, his difficulties obtaining [*13] pre-hearing evidence, and a discussion of Respondent's habit of performing clerical, support work. Judge Wright specifically directed Respondent to cease performing his own case development. The meeting included a discussion of Respondent's prior cases. This meeting also included a review of management's case-processing "benchmarks," and a review of management's "goal" of 500 - 700 case dispositions per ALJ, per year. Finally, the meeting included a warning to Respondent about possible disciplinary action, including removal, if he did not improve his productivity.

c. The third "improvement meeting" was conducted on February 21, 2008. This meeting included a review of management's expectations that SSA ALJs produce between 500 and 700 case dispositions per year. Judge Wright repeated his insistence that Respondent cease performing clerical functions and reiterated his concerns that Respondent spent too much time performing clerical activities.

d. The fourth "improvement meeting" was conducted on March 18, 2008. This meeting included a

review of management's expectations SSA ALJs should produce 500 to 700 case dispositions per year. Judge Wright noted that, given Respondent's [*14] rate of productivity, the best Respondent could expect to produce was only 240 cases per year. Judge Wright also noted while Respondent had curtailed performing clerical functions, an anticipated increase in case dispositions did not materialize. After a discussion of file development, Judge Wright reasserted his expectations concerning productivity and encouraged Respondent to continue to improve.

e. The fifth "improvement meeting" was conducted on April 8, 2008. This meeting included a reiteration of management's productivity expectations, specifically: the "goal" of 500 - 700 case dispositions per ALJ, per year. In this meeting, Judge Wright noted that in the preceding month, March, Respondent had produced only 13 dispositions. Judge Wright again emphasized poor performance could serve as the basis for disciplinary action against Respondent, including termination.

f. The sixth "improvement meeting" was conducted on June 30, 2008. This meeting featured management's overriding concern Respondent did not schedule enough hearings to result in an adequate number of case dispositions. As a result, Judge Wright ordered cases be removed from Respondent's office and given to other [*15] judges in the New York City hearing office for review and potential disposition.

10. During each of the six "improvement meetings," conducted from January, 2008, through June, 2008, between the SSA Assistant Regional Chief ALJ for the New York State, New Jersey, and Puerto Rico Region, Robert Wright, and Respondent Mark Shapiro, Respondent never expressed a belief that he was being scrutinized either for an improper purpose or because he was following the dictates of controlling federal appellate law. (Agency Ex. 14 - 19).

11. Respondent Mark Shapiro's case disposition productivity declined after the series of performance "improvement meetings" he attended with the SSA Assistant Regional Chief ALJ for the New York State, New Jersey and Puerto Rico Region (Region II), Robert Wright, from January, 2008, through June, 2008. Respondent scheduled significantly fewer hearings and produced significantly fewer disability case dispositions than his colleagues in both the New York City and Region II SSA hearing offices during Fiscal Years 2008, 2009, and 2010. (Agency Ex. 36, 37, 38).

12. On August 11, 2008, the SSA Regional Chief ALJ for the New York State, New Jersey and [*16] Puerto Rico Region, Mark Sochaczewsky, sent a letter to SSA Chief ALJ Frank Cristaudo, expressing concern that Respondent Mark Shapiro's disposition productivity was "unacceptably low" and requesting Respondent Mark Shapiro's removal from service as an ALJ with the SSA. (Agency Ex. 24).

13. During Fiscal Years 2008, 2009, and 2010, the disability cases assigned to Respondent Mark Shapiro for hearing and disposition were the same or similar, in terms of file size, complexity, legal and/or factual issues, and time requirements, as those cases assigned to all other judges in the New York City and New York State, New Jersey and Puerto Rico Region SSA hearing offices. (Tr. Vol. I at 190, 194 - 196, 255, 302; Tr. Vol. II at 375 - 385, 1420, 1523).

14. In Fiscal Year 2008, Respondent Mark Shapiro scheduled 176 SSA disability hearings, compared to the SSA's New York City judges' average of 551 hearings and the SSA's New York State, New Jersey and Puerto Rico Region judges' average of 659 hearings for the same Fiscal Year. (Agency Ex. 38).

15. In Fiscal Year 2008, Respondent Mark Shapiro issued 149 disability case dispositions. Of the nine other judges in the SSA's New York City [*17] hearing office, six judges produced at least 500 dispositions; one judge produced 481 dispositions; one judge produced 392 dispositions and one judge produced 282 dispositions for the same Fiscal Year. (Tr. Vol. IV at 925; Agency Ex. 36).

16. In Fiscal Year 2008, Respondent Mark Shapiro issued 149 disability case dispositions, compared to the SSA's New York City judges' average of 567 decisions and the SSA's New York State, New Jersey and Puerto Rico Region judges' average of 613 decisions for the same Fiscal Year. (Agency Ex. 37).

17. In Fiscal Year 2009, Respondent Mark Shapiro scheduled 146 SSA disability hearings, compared to the SSA's New York City judges' average of 597 hearings and the SSA's New York State, New Jersey and Puerto Rico Region judges' average of 710 hear-

ings for the same Fiscal Year. (Agency Ex. 38).

18. In Fiscal Year 2009, Respondent Mark Shapiro issued 122 disability case dispositions. Of the eleven other judges in the SSA New York City hearing office, ten judges produced at least 500 dispositions; and one judge produced 283 dispositions for the same Fiscal Year. (Agency Ex. 36).

19. In Fiscal Year 2009, Respondent issued 122 disability case [*18] dispositions, compared to the SSA's New York City judges' average of 611 decisions and the SSA's New York State, New Jersey and Puerto Rico Region judges' average of 608 decisions for the same Fiscal Year. (Agency Ex. 37).

20. In Fiscal Year 2010, Respondent Mark Shapiro scheduled 155 SSA disability hearings, compared to the SSA's New York City judges' average of 591 hearings and the SSA's New York State, New Jersey and Puerto Rico Region SSA's judges' average of 646 hearings for the same Fiscal Year. (Agency Ex. 38).

21. In Fiscal Year 2010, Respondent Mark Shapiro issued 111 disability case dispositions. Of the ten other judges in the SSA New York City hearing office, eight judges produced at least 500 dispositions; one judge produced 428 dispositions and one judge produced 277 dispositions for the same Fiscal Year. (Agency Ex. 36).

22. In Fiscal Year 2010, Respondent issued 111 disability case dispositions, compared to the SSA's New York City judges' average of 630 decisions and the SSA's New York State, New York State, New Jersey and Puerto Rico Region judges' average of 622 decisions for the same Fiscal Year. (Agency Ex. 37).

23. In Fiscal Years 2008, 2009, [*19] and 2010, SSA staff decision writers in the New York City hearing office drafted approximately ninety-five percent of the dispositions Respondent issued. (Tr. Vol. VII at 1625 - 1626).

24. Even if Respondent Mark Shapiro were presently assigned fifty SSA disability cases a month, for twelve months, he could not produce more than 200 dispositions per year. (Tr. Vol. VII at 1514, 1620).

The court, having made the foregoing Findings of Fact and pursuant to its obligation set forth in *5 C.F.R. § 1201.111*, enters the following Conclusions of Law:

1. Respondent Mark Shapiro is a proper party before the Merit Systems Protection Board, and the undersigned ALJ, pursuant to the provisions of *5 U.S.C. §§ 3105*, *7521* and *5 C.F.R. § 1201, et seq.*

2. The SSA is obligated to produce a reasonable number of timely and legally sufficient disability dispositions per year, in light of the increasing demands placed upon the Agency by the public and Congress. *See Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 471 (1996)*.

3. A SSA ALJ is required to provide a reasonable number of timely and legally sufficient hearings and disability case [*20] dispositions for the public. This obligation was communicated to Respondent Mark Shapiro. *See Social Sec. Admin. v. Boham, 38 M.S.P.R. 540, 543 (1988)*.

4. The SSA properly set a reasonable "goal" of 500 - 700 disability case dispositions, per ALJ, per year. Likewise, in 2007, the Agency communicated its expectations to Respondent Mark Shapiro that he should meet that "goal." *See Nash v. Bowen, 869 F. 2d 675, 681 (2d Cir 1989)*; *Social Sec. Admin. v. Boham, 38 M.S.P.R. 540, 543 (1988)*; *Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 328 (1984)*.

5. The SSA's "goal" of 500 - 700 disability case dispositions, per ALJ, per year, was reasonable and attainable as evidenced by the capacity of the majority of ALJs in the New York City and New York State, New Jersey and Puerto Rico Region SSA's hearing offices to achieve that "goal." *See Nash v. Bowen, 869 F. 2d 675, 681 (2d Cir. 1989)*.

6. A "fixed quota" of disability case dispositions was never imposed upon Respondent Mark Shapiro by the Social Security Administration. (Tr. Vol. VI at 1217; Vol. VII at 1615 - 1616). *See Nash v. Bowen, 869 F. 2d 675, 680 (2d Cir 1989).* [*21]

7. During Fiscal Years 2008, 2009, and 2010, the disability cases assigned to Respondent Mark Shapiro for hearing and disposition, were the same or similar, in terms of file size, complexity, legal and evidentiary and/or factual issues, and time requirements, as those cases assigned to all other judges in the SSA's New York City and New York State, New Jersey and Puerto Rico Region hearing offices. *See Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 331 - 332 (1984)*.

8. From January, 2008, through June, 2008, the SSA undertook unprecedented and extraordinary efforts to both assist Respondent Mark Shapiro and to increase the numbers of scheduled hearings and case dispositions he produced each month/year.

9. Good cause exists to remove Respondent Mark Shapiro from service as a SSA ALJ, under Charge I, because his performance in that capacity was unacceptable during Fiscal Years 2008, 2009, and 2010. Unacceptable performance is, in this case, defined by a comparison of the low numbers of disability hearings Respondent scheduled, relative to the significantly higher numbers of disability hearings scheduled by the majority of other ALJs in the SSA's New [*22] York City and New York State, New Jersey and Puerto Rico Region hearing offices in the same Fiscal Years. Therefore, in light of the need for prompt and orderly dispatch of public business, Respondent's unacceptable performance undermines public confidence in the administrative adjudicatory process. *See Long v. Social Sec. Admin., 635 F.3d 526, 536 (Fed.*

Cir. 2011); *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

10. Good cause exists to remove Respondent Mark Shapiro from service as a SSA ALJ, under Charge I, because his performance in that capacity was unacceptable during Fiscal Years 2008, 2009, and 2010. Unacceptable performance is, in this case, defined by a comparison of the low numbers of disability case dispositions Respondent produced, relative to the significantly higher numbers of disability case dispositions produced by the majority of other ALJs in the SSA's New York City and New York State, New Jersey and Puerto Rico Region hearing offices in the same Fiscal Years. Therefore, in light of the need for prompt and orderly dispatch of public business, Respondent's unacceptable performance undermines public confidence in [*23] the administrative adjudicatory process. *See Long v. Social Sec. Admin., 635 F.3d 526, 536 (Fed. Cir. 2011)*; *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

11. Good cause exists to remove Respondent Mark Shapiro from service as a SSA ALJ, under Charge I, because he failed to perform his duties with due regard for the rights of all parties as well as the law and the need for prompt and orderly dispatch of public business. Hence, he failed to perform his duties in an acceptable manner, specifically, in that:

a. In Fiscal Year 2008, Respondent Mark Shapiro scheduled only 176 SSA disability hearings, compared to the SSA's New York City disability judges' average of 551 hearings and the New York State, New Jersey and Puerto Rico Region (Region II) SSA's judges' average of 659 hearings for the same Fiscal Year.

b. In Fiscal Year 2008, Respondent Mark Shapiro issued only 149 disability case dispositions. Of the nine other judges in the SSA's New York City hearing office, six judges produced at least 500 dispositions; one judge produced 481 dispositions; one judge produced 392 dispositions and one judge produced 282 dispositions [*24] for the same Fiscal Year.

c. In Fiscal Year 2008, Respondent Mark Shapiro issued only 149 disability case dispositions, compared to the SSA's New York City judges' average of 567 decisions and the Region II SSA judges' average of 613 decisions for the same Fiscal Year.

d. In Fiscal Year 2009, Respondent Mark Shapiro scheduled only 149 SSA disability hearings, compared to the SSA's New York City judges' average of 597 hearings and the SSA's Region II judges' average of 710 hearings for the same Fiscal Year.

e. In Fiscal Year 2009, Respondent Mark Shapiro issued only 122 disability case dispositions. Of the eleven other judges in the New York City SSA hearing office, ten judges produced at least 500 dispositions; and one judge produced 283 dispositions for the same Fiscal Year.

f. In Fiscal Year 2009, Respondent issued only 122 disability case dispositions, compared to the SSA's New York City judges' average of 611 decisions and the SSA's Region II judges' average of 608 decisions for the same Fiscal Year.

g. In Fiscal Year 2010, Respondent Mark Shapiro scheduled only 155 SSA disability hearings, compared to the SSA's New York City judges' average of 591 hearings [*25] and the SSA's Region II judges' average of 646 hearings for the same Fiscal Year.

h. In Fiscal Year 2010, Respondent Mark Shapiro issued only 111 disability case dispositions. Of the ten other judges in the SSA's New York City hearing office, eight judges produced at least 500 dispositions; one judge produced 428 dispositions and one judge produced 277 dispositions for the same Fiscal Year.

i. In Fiscal Year 2010, Respondent issued only 111 disability case dispositions, compared to the SSA's New York City judges' average of 630 decisions and the SSA's Region II judges' average of 622 decisions for the same Fiscal Year.

Thus, Respondent's failure to perform his duties in an acceptable manner undermines public confidence in the administrative adjudicatory process and constitutes a detriment to the SSA and the or-

derly dispatch of public business and is a burden which the Agency cannot endure. *See Long v. Social Sec. Admin., 635 F.3d 526, 536 (Fed. Cir. 2011)*; *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 468 (1984)*; *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

12. Good cause exists to remove Respondent [*26] Mark Shapiro from service as a SSA ALJ, under Specification 3, because he failed to acceptably manage his cases. During each of Fiscal Years 2008, 2009, and 2010, he failed to acceptably manage his cases by failing to schedule an acceptable number of disability hearings. An acceptable number of scheduled hearings is, in this case, defined by a comparison of the low numbers of hearings Respondent scheduled, relative to the significantly higher numbers of hearings scheduled by a majority of other ALJs in both the SSA's New York City and New York State, New Jersey and Puerto Rico Region (Region II) hearing offices. In this regard, Respondent demonstrated that he is unable to perform his assigned duties in a manner commensurate with a majority of other judges in either the SSA's New York City or Region II hearing offices. Thus, Respondent's failure to acceptably manage his cases undermines public confidence in the administrative adjudicatory process and constitutes a detriment to the SSA and the orderly dispatch of public business and is a burden which the Agency cannot endure. *See Long v. Social Sec. Admin., 635 F.3d 526, 536 (Fed. Cir. 2011)*; *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 468 (1984)*; [*27] *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

13. Good cause exists to remove Respondent Mark Shapiro from service as a SSA ALJ, under Specification 3, because he failed to acceptably manage his cases. During each of Fiscal Years 2008, 2009, and 2010, he failed to acceptably manage his cases by failing to render an acceptable number of disability case dispositions. An acceptable number of dispositions is, in this case, defined by a comparison of the low numbers of dispositions Respondent rendered, relative to the significantly higher numbers of dispositions rendered by a majority of other ALJs in both the SSA's New York City and New York State, New Jersey and Puerto Rico Region (Region II) hearing offices. In this regard, Respondent demonstrated that he is unable to perform his assigned duties in a manner commensurate with a majority of other judges in either the SSA's New York City or Region II hearing offices. Thus, Respondent's failure to acceptably manage his cases undermines public confidence in the administrative adjudicatory process and constitutes a detriment to the SSA and the orderly dispatch of public business and is a burden which the [*28] Agency cannot endure. *See Long v. Social Sec. Admin., 635 F.3d 526, 536 (Fed. Cir. 2011)*; *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 468 (1984)*; *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

14. The SSA's Complaint in the instant matter was neither arbitrary, politically-motivated, nor an at-

> tempt to influence the decisional independence of Respondent Mark Shapiro. The SSA's action herein is consistent with its right to ensure an ALJ performs his primary function of hearing and rendering a reasonable number of dispositions. *See Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 468 (1996)*; *Social Sec. Admin. v. Manion, 19 M.S.P.R. 298, 303*, *aff'd sub nom. Manion v. Dep't of Health & Human Servs., 737 F.2d 1020, 746 F.2d 1491 (Fed. Cir. 1984)* (unpublished).

III. PRINCIPLES OF LAW and JURISDICTION

A. Merit Systems Protection Board

The MSPB has original jurisdiction to adjudicate this case pursuant to *5 U.S.C. § 7521*. *Section 7521(a)* provides that an adverse action may be taken against an ALJ by his/her employing agency only for good cause established [*29] before the Board, on the record, and after an opportunity for a hearing before the Board. *Section 7521 (b)* describes a range of sanctions that can be imposed by the Board upon a finding of good cause. Those sanctions include the imposition of a removal; a suspension; a reduction in grade; a reduction in pay; and a furlough of 30 days or less. n8

> n8 The following adverse personnel actions are specifically excluded from MSPB review: "(A) a suspension or removal under *section 7532* of this title; (B) a reduction-in-force action under *section 3502* of this title; or (C) any action initiated under *section 1215* of this title." *5 U.S.C. § 7521(b)*. "Also omitted are reprimands and other less serious disciplinary acts. 'Reprimands . . . are not among the actions set forth in *section 7521*. As a result, agencies do not need to establish that good cause exists . . . because they do not need [Board] authorization to issue reprimands.'" *Sannier v. Merit Sys. Prot. Bd., 931 F.2d 856, 858 (Fed. Cir. 1991)* (quoting *In re Perry, 39 M.S.P.R. 446, 450 (1989))*.

[*30]

B. Administrative Law Judge

An ALJ is empowered to adjudicate this case per the provisions of *5 U.S.C. §§ 3105*, *7521* and *5 C.F.R. § 1201*. On August 2, 2011, the MSPB issued an "Acknowledgment Order" stating the case would be assigned to an ALJ. On September 14, 2011, this case was assigned to the undersigned ALJ for disposition. Therefore, this case is properly before the MSPB and the undersigned for adjudication.

C. "Good Cause Shown"

If this court finds the Charges are supported by the requisite preponderance of the evidence, then this court must determine whether the Respondent's conduct constitutes good cause to affect the discipline proposed by the employing agency. *Brennan v. Dep't of Health and Human Servs., 787 F.2d 1559, 1563 (Fed. Cir. 1986)*. "In short, under the statute, an employing agency may not remove an ALJ, suspend an ALJ, reduce an ALJ's grade, reduce an ALJ's pay, or put an ALJ on a furlough of 30 days or less, without first establishing before the Board good cause for the action." *Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1346 (Fed. Cir. 2005)* (dissenting opinion).

Congress provided general [*31] insight to the meaning of "good cause." The drafters of the Administrative Procedure Act said ALJs:

> [M]ust conduct themselves in accord with the requirements of this bill [APA] and with due regard for the rights of all parties as well as

the facts, the law and the need for prompt and orderly dispatch of public business. n9

n9 Administrative Procedure Act-Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 268 (1946).

Nevertheless, "good cause" is not actually defined by *5 U.S.C. § 7521* or by the APA, *5 U.S.C. § 500, et seq. Long v. Social Sec. Admin., 635 F.3d 526, 533 (Fed. Cir. 2011)*. "Rather, 'good cause' is to be given meaning through judicial interpretation . . . ." *Id.* quoting *Brennan, 787 F. 2d at 1561-62*. n10

n10 The legislative comments to the APA provide "[I]t will be the duty of reviewing courts . . . to determine the meaning of the words and phrases used, insofar as they have not been defined in the bill itself. For example, in several provisions of the bill, the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found, and the purpose of the entire section and bill. The cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record the cause will appear there; otherwise, it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill." Administrative Procedure Act-Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 326 (1946).

[*32]

The court in *Brennan* recognized "[d]etermining the existence of 'good cause' is not a simple task, but a task that is commenced by stating what 'good cause' is not." *Brennan, 787 F. 2d at 1563*. Such rationale is strikingly similar to that offered by Justice Potter Stewart, when he wrote the: "I know it when I see it" definition of obscenity. *Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964)* (concurring opinion). n11

n11 Notably, the SSA's Chief ALJ, Debra Bice, quoted Justice Potter Stewart's famous observation when she testified about ALJ performance levels *vis a vis* "good cause" in this case. (Tr. Vol. IV at 1133).

The Federal Circuit Court of Appeals has recognized that the "good cause" standard differs from the "good behavior" standard applicable to Article III judges. *Long, 635 F.3d at 534*. In fact, the "good cause" standard is much broader than the "good behavior" standard required for Article III judges, as, unlike ALJs, Article III judges cannot [*33] be removed for poor performance. *Brennan, 787 F.2d at 1562*. "Thus, while federal judges may only be removed, after impeachment and conviction, for 'Treason, Bribery, or other high Crimes and Misdemeanors,' *U.S. Const. Art. II, § 4*, ALJs can be, and have been, removed for other reasons." *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 469 (1996)*, *aff'd*, *124 F.3d 228 (Fed. Cir. 1997)* (citation in original). n12

n12 Similarly, the "good cause" standard differs from that of the "efficiency of the service" standard applicable in other Agency disciplinary actions. *Social Sec. Admin. v. Abrams, No. CB-7521-08-0001-T-1, CB-7521-08-0021-T-1, CB-7521-09-0002-T-1, 2010 MSPB LEXIS 2044 at*

**73-*74 (Mar. 29, 2010), appeal denied, 116 M.S.P.R. 355 (2011).*

Like the various federal courts, the MSPB has said that "good cause" is a purposefully ambiguous term of art. In fact, the Board has recognized: "the phrase 'good cause' is susceptible [*34] of more than one interpretation." *Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321 (1984).*

Accordingly, a review of MSPB cases concerning ALJs provides some guidance about the meaning of "good cause." The Board has found "good cause" to exist in cases of: physical incapacitation; n13 financial irresponsibility; n14 lewd and lascivious conduct; n15 insubordination; n16 forgery of a chief judge's signature; n17 and unprofessional conduct. n18 *See* Appendix 1.

n13 *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463 (1996).*
n14 *McEachern v. Macy, 233 F. Supp. 516, 517 (W.D. S.C. 1964), aff'd, 341 F.2d 895 (4th Cir. 1965).*
n15 *Social Sec. Admin. v. Davis, 19 M.S.P.R. 279, 281 (1984)*
n16 *Social Sec. Admin. v. Burris, 39 M.S.P.R. 51 (1988); Social Sec. Admin. v. Arterberry, 15 M.S.P.R. 320 (1983)* (refused to accept assignments in a particular geographical area); *Social Sec. Admin. v. Manion, 19 M.S.P.R. 298 (1984)* (refused to set or hear cases until certain administrative matters were resolved).
[*35]

n17 *Social Sec. Admin. v. Dantoni, 77 M.S.P.R. 516 (1998).*
n18 *Social Sec. Admin. v. Harty, 96 M.S.P.R. 65 (2004)* (engaging in unprofessional and injudicious conduct, including making unprofessional or injudicious statements to agency employees).

There are very few cases where an agency asserted a "lack of productivity" as the sole basis for seeking an ALJ's removal. However, in those few cases, both the Board and the appellate courts have refused to impose any disciplinary action because the prosecuting agency failed to establish "good cause." *See Social Sec. Admin. v. Balaban, 20 M.S.P.R. 675 (1984).*

One workable definition of "good cause" comes from the Federal Circuit Court of Appeals in *Long, 635 F. 3d 526 (Fed. Cir. 2011).* There, the court assigned "*Chevron* deference" to the Board's view, taken from the American Bar Association Model Code of Judicial Conduct, that "good cause" includes conduct that "undermines public confidence in the administrative adjudicatory process." *Id. at 535 - 536.* [*36]

To that, this court adds Respondent's interpretation of *Goodman, 19 M.S.P.R. at 330 - 331*, when he posits "whether good cause exists to remove an ALJ solely upon poor performance is whether respondent's performance was sufficiently below a reasonable level of productivity to warrant his removal." n19 In this case, that question is answered in the affirmative.

n19 Respondent's Closing Argument at 19.

IV. ANALYSIS

A. Allegations in the Complaint

The Agency's Complaint begins with a five-page recitation of the political environment that provided (at least, in part) the impetus for this removal action. Agency counsel admitted as much. (Tr. Vol. I at 47). Thereafter, the Com-

plaint contains two Charges: Charge I, "Unacceptable Performance" and Charge II, "Neglect of Duties." Each Charge is supported by three enumerated Specifications.

1. The Political Environment

In his Answer, Respondent denied responsibility for the political environment preceding his charging. At the [*37] hearing, the Agency did not attempt to prove those allegations. The Agency did offer a general description of the difficulties of its mission through the testimony of former SSA Chief ALJ Frank Cristaudo. n20 (Tr. Vol. I at 64 - 72). Judge Cristaudo testified that when he became the SSA Chief ALJ in 2006, the state of the SSA's Disability adjudication program was "[T]errible. . . . we weren't as efficient or as productive as we should be. We didn't have enough people doing the work. People were dying. It was horrendous. We were getting all kinds of complaints from applicants, Congress and from ourselves." (Tr. Vol. I at 76 - 77).

n20 Judge Cristaudo is currently assigned as the SSA's Acting Regional Chief Counsel in Boston, Massachusetts.

Absent any probative evidence that Respondent caused or was personally responsible for the facts and/or allegations contained in paragraphs 1 - 30 on pages 1 through 8 of the Complaint, the court finds those allegations **NOT PROVED.**

2. Charge I

The first Charge [*38] alleges Respondent's performance was unacceptable during Fiscal Years 2008, 2009, and 2010. Specifically, Charge I alleges that a SSA ALJ "[I]s required to provide timely and legally sufficient hearings and decisions for the public. The agency communicated these requirements to Respondent."

The Agency did not prove Respondent failed to provide legally sufficient hearings and/or decisions to the public. n21 No evidence was presented which impugned Respondent's legal acumen, knowledge, draftsmanship, or the professional manner in which he conducted his hearings. In fact, Mark Hecht, the SSA Hearing Office Chief ALJ for the New York City office, testified he never had any concerns about the legal sufficiency of Respondent's decisions. (Tr. Vol. III at 837).

n21 Judge Cristaudo defined a "legally sufficient" decision as one that "is a decision that complies with the law, Agency policy, that includes proper analysis for each of the findings. It's accurate factually, legally." (Tr. Vol. I at 80; Agency Ex. 3).

[*39]

Since the legal sufficiency of Respondent's decisions was not challenged by the evidence, the court's attention is next focused on whether Respondent failed to provide timely hearings and decisions for the public. In this regard, this court's analysis is guided by the Board's landmark decision in *Social Security Administration v. Goodman, 19 M.S.P.R. 321 (1984)* for a variety of important reasons discussed throughout this Initial Decision.

In *Goodman*, the Agency tried to remove an ALJ for low productivity alone and attempted to establish "good cause" by comparing the Respondent's case disposition rate to other SSA ALJs, nationwide, over a two and one-half year period. The MSPB rejected the Agency's proof, noting the Agency failed to prove Respondent's cases were more (or less) time-consuming or they were more (or less) factually or legally complex than cases assigned to other ALJs nationwide. *Id. at 331 - 332*.

Thus, the first important lesson from *Goodman* is that the Agency must lay an appropriate,

"apples to apples" foundation before comparative/statistical evidence can serve as the basis for a removal action against an ALJ.

a) Specification [*40] **1**

The first Specification alleges that in Fiscal Years 2008, 2009, and 2010, Respondent did not provide timely hearings. The first Specification pleads four specific case files by last names and redacted Social Security numbers, wherein Respondent is alleged to have failed to provide a timely hearing in Fiscal Years 2008, 2009, and 2010, specifically: "Beato, SSN xxx-xx-6023; Melecio, SSN xxx-xx-2092; Malave, SSN xxx-xx-1343 and Vicente, SSN xxx-xx-5473." The first Specification also incorporates Appendix 1 to the Complaint, a two-page spreadsheet which identifies fifty-three cases by last names and redacted Social Security numbers; cases wherein Respondent is alleged to have failed to provide a timely hearing in the referenced Fiscal Years. n22

n22 *See* note 4.

In regard to Specification 1, the Agency bore a burden to define "timely" and then prove whether Respondent failed to meet that standard in regard to the cases alleged in the Specification. However, the Agency did not define "timely" as [*41] that term was pled in the first Specification.

The Agency relied upon its Exhibit 1, an April 18, 2007, letter from former Chief ALJ Frank Cristaudo to all SSA Regional Chief ALJs. The letter describes fifteen sequential "benchmarks" for case processing; from receipt of a case file in a hearing office, through issuance of a final written decision. The "benchmarks" are described by three and four letter codes in a computer database, called "CPMS." n23 (Agency Ex. 1).

n23 "CPMS" (Case Processing and Management System) is a computer database management tool used by SSA management officials, in part, to track the status of any given disability case, from hearing office receipt to final written disposition. (Tr. Vol. I at 81 - 82; Vol. IV at 913 - 914).

Each "benchmark" is the ideal maximum number of calendar days where a case file should remain in a specific, task-oriented status; i.e., pre-hearing document compilation by support staff, pre-or-post hearing review by an ALJ, writing/editing, etc. (Tr. Vol. I. [*42] at 81, 135).

The consensus of testimony from Judge Cristaudo and several of the Agency's witnesses was that disability case processing is an interactive endeavor. Support staff and ALJs frequently work interdependently to move a case toward final disposition. The testimony revealed that, sometimes, support staff has sole responsibility for certain tasks on a file and, at other times, support staff must wait for and carry out directions given by a judge. ALJs are personally involved in roughly eight of the fifteen "benchmark" aspects of case processing, but not all of them. Importantly, the consensus of testimony from Judge Cristaudo, Respondent, and several of the Agency's witnesses revealed that it is the support staff--and not the ALJs--who bear responsibility for ensuring cases are correctly and properly assigned a proper "benchmark" code in the CPMS database at each stage of case processing. (Tr. Vol. I at 122 - 137; Tr. Vol. II at 432 - 439, 465 - 466; Tr. Vol. III at 752 - 755).

Although ALJs are personally involved in roughly eight of the fifteen "benchmark" aspects of case processing -- they are not personally involved in all of them. In fact, the "benchmarks" described [*43] in Agency Exhibit 1 reveal the first five sequential steps in case processing do not involve an ALJ at all,

even though a case might have been assigned to a particular ALJ. This distinction is important.

Respondent testified that new cases received in the New York City hearing office were assigned to judges on a random basis. He further testified that it was likely an individual judge would not know a given case had been assigned to him/her until that file was physically delivered to that judge's office for review. (Tr. Vol. VII at 1609 - 1610). Respondent explained his personal involvement with a given case file generally began when the case was physically presented to him and the case had been placed in "ARPR" status in CPMS, meaning the ALJ was given the file for pre-scheduling review. (Tr. Vol. VII at 1610 - 1611; Agency Ex. 1).

Another of the "benchmark" tasks described in Agency Exhibit 1 is "WKUP" meaning "case workup . . . assembly/development/analysis" of claimant files. This task is not described as an ALJ function in the "benchmarks." Notably, "WKUP" occurs after a case is assigned to a judge but before a hearing can occur. (Agency Ex. 1).

It is also crucial to [*44] note that a SSA ALJ has no supervisory authority over support staff. (Tr. Vol. VII at 1611). Hence, a SSA ALJ has almost no meaningful authority to direct that a given case status is correctly and timely reflected in the CPMS database. n24

n24 In its Written Closing Argument, the Agency contends that "Respondent had the ability to pull a list of cases assigned to him from CPMS." *Id.* at 7. Although correct, the Agency's argument does not establish that Respondent had the authority to direct, control or supervise support staff in the hearing office.

Although the "benchmarks" set an ideal time for each step of case processing, no Agency witness testified to the maximum time by which a judge must provide a hearing in order for that hearing to have been scheduled "timely."

Given the independent involvement of support staff (after a case is assigned to an ALJ), it is doubtful an enforceable timeliness standard, from case assignment to scheduled hearing, attributable solely to a judge, could ever be [*45] established. Thus, the Agency could not prove an enforceable "timeliness" standard exists. Nor could it prove Respondent was solely responsible for the processing times referenced in the cases cited in the Agency's Complaint.

The Agency offered no meaningful testimony regarding the four case files specifically pled in the first Specification, nor in its Appendix 1, nor in its Exhibit 34. n25 This omission is startling, particularly in light of the court's pointed inquiry to the Agency whether it would provide testimony and evidence concerning the specific instances of Respondent's alleged failures. (Tr. Vol. 1 at 14 - 20). The simple identification of cases with assigned time values in various pre-hearing statuses does not establish Respondent's culpability. Moreover, the Agency did not explain or account for the times attributable to support staff involvement in the pre-hearing processing of Respondent's cases.

n25 A thorough review of the first five volumes of transcribed testimony, which contain the Agency's case-in-chief, reveals that no substantive testimony was presented in regard to any of the four-named cases or whether Respondent failed to provide a timely hearing in those cases. The "Beato" file is referenced at Vol. I, p. 14; Vol. III, p. 817 - 818, 828. The "Melecio" file is referenced at Vol. III, p. 817 - 818. The "Malave" file is referenced at Vol. I, p. 15, 212; Vol. III, p. 817. The "Vicente" file is referenced at

> Vol. III, p. 817 - 818. All of those references were in regard to discovery and admissibility -- not their probative value relative to the Specifications. The Agency presented no meaningful testimony or documentary evidence concerning the cases referenced (by incorporation) in Appendix 1 to the Complaint or in its Exhibit 34. Agency Exhibit 34 was excerpted and referenced in the Petitioner's Written Closing Argument at 41.

[*46]

Thus, the Agency failed to elicit meaningful testimony or offer meaningful documentary evidence to support the allegations of delay in the first Specification of Charge I.

By contrast, Respondent affirmatively proved that the times attributed to him in the cases specifically cited in Specification 1 were mathematically incorrect.

Specification 1 alleges:

> 873 days after the claim was assigned to him, Respondent provided claimant Beato with a hearing
>
> 840 days after the claim was assigned to him, Respondent provided claimant Melecio with a hearing
>
> 818 days after the claim was assigned to him, Respondent provided claimant Malave with a hearing
>
> 818 days after the claim was assigned to him, Respondent provided claimant Vicente with a hearing

Although not specifically pled, the clear implication in each of these cases is that Respondent was solely responsible for the numbers of days alleged in each case.

(1) Beato

Respondent's Exhibit 89 is the SSA case file of claimant Beato. Respondent testified that although the Specification alleges it took 873 days from case assignment to hearing, much of that time was attributable to support staff involvement. [*47]

Respondent testified the Beato case was assigned to him on January 4, 2008. He also testified the case was identified in the CPMS system as being in "workup" status on the same date. He further testified the case remained in "workup" status until April 2, 2008 -- after the passage of ninety calendar days. (Tr. Vol. VI at 1376). A review of Agency Exhibit 1, the "benchmarks" and CPMS coding, reveals "workup" status is defined as "Case Workup (assembly/development/analysis)" and is not identified as an ALJ responsibility.

Respondent explained "workup" status means support personnel assemble "the file into a form that's useable to me, segregating the exhibits into those eight modular sections and putting them into the proper order within those sections. And they'll be carrying out any standing orders that I have for my cases." (Tr. Vol. VI at 1236 - 1237).

Respondent testified that he made routine use of "development questionnaires" as part of his pre-hearing case preparation, and had issued "standing orders" that his support staff was to send these questionnaires, together with medical authorization forms, to all claimants in all cases once a given file was entered into "workup" status. [*48] (Tr. Vol. VI at 1202, 1275).

Respondent further testified that his support staff sent claimant Beato a "development questionnaire" on June 18, 2008, "roughly five months" after the case had been assigned to Respondent. (Tr. Vol. VI at 1376 - 1377). Despite his "standing order" to support staff that

the "development questionnaires" and medical authorization forms be sent to claimants immediately, Respondent was unable to explain why it took his support staff five months to accomplish such a relatively minor administrative task. (Tr. Vol. VI at 1377).

Respondent explained that his meaningful involvement with a claimant's file essentially began after his receipt of the completed "development questionnaire" so he could "determine whether any kind of development is needed and if so, what kind." (Tr. Vol. VI at 1283). n26

n26 Respondent's Exhibit 6 is an excerpt from "HALLEX," an internal policy/procedure manual used in the SSA disability process. That excerpt contains "I-2-1-1" which provides, "If additional evidence is needed, the ALJ . . . should initiate development before the hearing is scheduled. The ALJ should make every effort to obtain all documentary evidence before the hearing . . ." (emphasis added). *See also* Resp. Ex. 7.

[*49]

Respondent further testified his staff received the claimant's "development questionnaire" on August 18, 2008, sixty-two days after it had been mailed. (Tr. Vol. VI at 1377 - 1378). To compound matters, the claimant had failed to sign an enclosed medical authorization form; a form SSA needed in order to obtain private medical information concerning the claimant. (Tr. Vol. VI at 1378). That failure required SSA support staff to contact claimant Beato and secure signatures on the required release forms.

Respondent testified he did not receive a signed medical authorization form from claimant Beato until November 3, 2008; another 78 calendar days after receipt of the "development questionnaire." (Tr. Vol. VI at 1379).

It was only after Respondent received a valid medical authorization form that he could lawfully seek claimant's medical records from physicians, hospitals and the like. (Tr. Vol. VI at 1379).

Simple math reveals 230 days of case-processing time, not solely attributable to Respondent, had elapsed since original case assignment.

Respondent testified it was not until December 19, 2008, that he was finally able to request the claimant's medical records from appropriate [*50] sources -- on a case that had originally been assigned to him on January 4, 2008. (Tr. Vol. VI at 1379 - 1380).

Respondent next testified that in December, 2008, he requested claimant Beato's medical records from a Dr. Deque, but the physician would not, apparently, cooperate with Respondent's requests, despite "several attempts" to persuade the doctor to provide the records. (Tr. Vol. VI at 1380). Thereafter, on January 14, 2008, Respondent attempted to obtain those records with an administrative subpoena, only to subsequently learn from the doctor's office staff that claimant Beato's medical records had not been provided because they had been filed under her maiden name and the office staff had never received the subpoena. (Tr. Vol. VI at 1381 - 1382).

Respondent then testified that his office finally received claimant Beato's medical records on May 18, 2010, after the passage of another 125 calendar days. (Tr. Vol. VI at 1383).

Hence, approximately 355 days, not solely attributable to Respondent, had elapsed since the case was first assigned to him.

Respondent then testified to additional delays occasioned by the efforts required to obtain other medical records from other sources, [*51] including the issuance of another subpoena to Columbia Presbyterian Hospital on June 13, 2009, which was not answered until

September 16, 2009. (Tr. Vol. VI at 1384 - 1386).

Respondent's Exhibit 89 reveals a hearing was finally held on May 26, 2010. (*See also* Tr. Vol. VI at 1387).

The Agency did not refute Respondent's testimony in regard to the times attributed to support staff involved in the Beato case. Nor did it refute Respondent's testimony that support staff (over whom Respondent had no supervisory authority) had moved the Beato case in and out of various CPMS statuses (some of which would incorrectly reflect Respondent's sole responsibility) without his knowledge or permission. (Tr. Vol. VI at 1391).

To reiterate, Specification 1 alleges "Respondent did not provide timely hearings . . . for example . . . 873 days after the claim was assigned to him, Respondent provided claimant Beato with a hearing." The uncontroverted evidence plainly reveals at least 355 of those days were not attributable to Respondent. Hence, the Agency's allegation of 873 days attributable solely to Respondent in the Beato case is incorrect.

(2) Melecio

Respondent's Exhibit 87 is the [*52] SSA case file of claimant Melecio. Respondent testified while the Specification alleges it took 840 days from case assignment to hearing, much of that time was attributable to support staff involvement.

Respondent testified the Melecio case was assigned to him on February 26, 2008. He further testified the case was identified in the CPMS system as being in "workup" status on the same date. He also testified the case remained in "workup" status until March 17, 2009 -- the passage of 386 calendar days. (Tr. Vol. VI at 1349 - 1350). A review of Agency Exhibit 1, the "benchmarks" and CPMS coding, reveals "workup" status is defined as "Case Workup (assembly/development/analysis)" and is not identified as an ALJ responsibility.

Respondent testified after a delay in obtaining medical authorization forms from the claimant, he then requested claimant Melecio's medical records from Metropolitan Hospital on November 5, 2009 -- but the hospital did not reply until June 10, 2010, a. delay of another 218 calendar days. (Tr. Vol. VI at 1359 - 1360). Respondent testified to similar delays from other physicians. (Tr. Vol. VI at 1360 - 1361).

The Agency did not refute Respondent's testimony in regard [*53] to the times attributed to support staff or third parties involved in the Melecio case.

To reiterate, Specification 1 alleges "Respondent did not provide timely hearings . . . for example . . . 840 days after the claim was assigned to him, Respondent provided claimant Melecio with a hearing." The uncontroverted evidence plainly reveals at least 604 of those days were not solely attributable to Respondent. Hence, the Agency's allegation of 840 days attributable solely to Respondent in the Melecio case is incorrect.

(3) Malave

Respondent's Exhibit 82 is the SSA case file of claimant Malave. Respondent testified while the Specification alleges it took 818 days from case assignment to hearing, much of that time was attributable to support staff involvement.

Respondent testified the Malave case was assigned to him on April 30, 2008. He further testified the case was identified in the CPMS system as being in "workup" status on the same date. He also testified the case remained in "workup" status until March 19, 2009 -- the passage of 324 calendar days. (Tr. Vol. VI at 1236 - 1237). Once again, a review of Agency Exhibit 1, the "benchmarks" and CPMS coding, reveals "workup" [*54] status is defined as "Case Workup (assembly/development/analysis)" and is not identified as an ALJ responsibility.

Respondent testified although he had been assigned the Malave case on April 30, 2008, the

first meaningful interaction he had with the file was on June 2, 2009, at which time he began to issue instructions to his legal assistant to obtain medical records. (Tr. Vol. VI at 1237). Despite the fact the Malave case was in "workup" status after June 30, 2008, Respondent's support staff did not send a "development questionnaire" to the claimant until January 8, 2009, a delay of approximately 183 days. Respondent could not explain why his support staff (over whom he had no supervisory authority) took "six or seven months" to send the claimant a "development questionnaire." (Tr. Vol. VI at 1239 - 1240).

Nevertheless, claimant Malave returned medical authorization forms with the completed "development questionnaire" in April 2009, one year after the case had been assigned to Respondent. (Tr. Vol. VI at 1241).

As before, Respondent testified to numerous delays in obtaining claimant's medical records from a variety of sources. In some instances, medical records requested by Respondent [*55] in June, 2009, were not received until June, 2010; time that could not be attributed to Respondent. (Tr. Vol. VI at 1241 - 1253).

The Agency did not refute Respondent's testimony in regard to the times attributed to support staff involved in the Malave case.

To reiterate, Specification 1 alleges "Respondent did not provide timely hearings . . . for example . . . 818 days after the claim was assigned to him, Respondent provided claimant Malave with a hearing." The uncontroverted evidence plainly reveals at least 324 of those days were not solely attributable to Respondent; not including other delays attributed to unresponsive physicians and hospitals. Hence, the Agency's allegation of 818 days attributable solely to Respondent in the Malave case is incorrect.

(4) Vicente

Respondent's Exhibit 85 is the SSA case file of claimant Vicente. Respondent testified while the Specification alleges it took 818 days from case assignment to hearing, much of that time was attributable to support staff involvement.

Respondent testified the Vicente case was assigned to him on February 22, 2008. He further testified the case was identified in the CPMS system as being in "workup" status [*56] on the same date. He further testified the case remained in "workup" status until May 12, 2009 -- the passage of approximately 447 calendar days not solely attributable to Respondent. (Tr. Vol. VI at 1324 - 1325). Once again, a review of Agency Exhibit 1, the "benchmarks" and CPMS coding, reveals "workup" status is defined as "Case Workup (assembly/development/analysis)" and is not identified as an ALJ responsibility. As Respondent explained, when a case is in "workup" status, he was not actively involved in the preparation of the case. (Tr. Vol. VI at 1325).

Nevertheless, Respondent testified a "development questionnaire" was mailed to the claimant on January 12, 2009, who returned the document approximately three months later on April 21, 2009. (Tr. Vol. VI at 1326).

Respondent testified on May 28, 2009, his staff sent a request for medical records to Columbia Presbyterian Hospital and the hospital did not provide the requested records until August 25, 2009; after a delay of nearly three months. (Tr. Vol. VI at 1333 - 1334). Respondent noted the Vicente file also contains a letter from the claimant's attorney complaining the Columbia Presbyterian Hospital is "the worst hospital [*57] in the city with regard to releasing records to lawyers and on occasions, the attorney said he waited eight months for them." (Tr. Vol. VI at 1329; Resp. Ex. 85).

The Agency did not refute Respondent's testimony in regard to the times attributed to support staff involved in the Vicente case.

To reiterate, Specification 1 alleges "Respondent did not provide timely hearings . . . for example . . . 818 days after the claim was assigned to him, Respondent provided claimant

Vicente with a hearing." The uncontroverted evidence plainly reveals at least 447 of those days (not including other delays caused by unresponsive hospitals and physicians) were not attributable solely to Respondent. Hence, the Agency's allegation of 818 days in the Vicente case is incorrect.

Even a cursory review of the four cases listed in Specification 1 reveals the Agency's computations of times (from assignment to hearing), solely attributable to Respondent, are in error. In each of the charged four cases, the Agency's alleged times were wrong by a minimum of 300 days.

The evidence suggests the Agency pled the four charged cases (and those listed in Agency Ex. 34) on the basis of total time from assignment [*58] to hearing, without differentiating between times attributable to Respondent, support staff, and/or persons/agencies outside of SSA. The fact that a SSA ALJ has no supervisory authority over support staff looms large in this discussion: the Agency cannot reasonably hold an ALJ responsible for total processing time if he/she has no direct supervisory authority over the people who control much of the case processing or CPMS coding.

It is not for this court to reconstruct exactly how many days were solely attributable to Respondent's handling of each of the four pled cases; that was the Agency's burden, and in that regard, it failed.

Inasmuch as the Agency failed to refute Respondent's testimony concerning the four charged cases, the court finds Respondent fully credible and accepts his accounts and explanations of the processing times in each of the four charged cases. n27

n27 *Hillen v. Dep't of the Army, 35 M.S.P.R. 453, 458 (1987)*.

Hence, Specification 1 was **NOT PROVED**.

b) Specification [*59] **2**

The second Specification alleges in Fiscal Years 2008, 2009, and 2010, Respondent did not provide timely dispositions.

Just as in the first Specification, the second Specification pleads the same four case files by last names and redacted Social Security numbers wherein Respondent is alleged to have failed to provide timely dispositions, specifically: "Beato, SSN xxx-xx-6023; Melecio, SSN xxx-xx-2092; Malave, SSN xxx-xx-1343 and Vicente, SSN xxx-xx-5473." The second Specification incorporates Appendix 2 to the Complaint, a two-page spreadsheet which identifies seventy two cases by last names and redacted Social Security numbers, cases wherein Respondent is alleged to have failed to provide a timely hearing in the referenced Fiscal Years. n28

n28 *See* note 4.

As above, the court notes the absence of any proof of a meaningful "timeliness" standard. If Respondent's conduct is to be measured against a time standard, then it was incumbent upon the Agency to establish what that time standard was [*60] during the times alleged in the Specification. The Agency failed in this regard. A thorough review of the entire record reveals neither meaningful testimony nor substantive documentary evidence regarding the existence of an objective time standard; or even the basis by which a "rule of reason" might be discerned. Even tallying the days assigned to each event in the "benchmarks" for case processing, do not, alone, establish a maximum time period within which Respondent ought to have scheduled or conducted a hearing. (Agency Ex. 1).

Likewise, as in Specification 1, the Agency's proof failed to account for the involvement of support staff as they performed their independent case-processing tasks after cases had been assigned to Respondent.

In an apparent effort to prove Respondent's times from case-assignment to disposition were lengthier than other judges in his office or Region, the Agency offered its Exhibits 39 and 40. Agency Exhibit 39 is a one-page, computer-generated bar-graph that purports to compare "Respondent's Average Days from Assignment to Disposition in Fiscal Years 2008, 2009, and 2010," to other ALJs in the New York City and Region II hearing offices. Agency Exhibit [*61] 40 is a one-page, computer-generated bar-graph that purports to display a "Statistical Variance of Respondent's Average Days from Assignment to Disposition in Fiscal Years 2008, 2009, and 2010," compared to other ALJs in the Region II hearing offices.

Certainly, Agency Exhibits 39 and 40 both suggest a marked disparity between Respondent's processing times compared to the times reported for other judges in the New York City and Region II hearing offices. However, the court discounts these comparisons because the Agency did not prove whether the total processing times (from case assignment to disposition) attributed to Respondent included the times taken by support staff in the performance of their independent case-processing tasks. Nor did the Agency prove whether the times taken by other support staff in the performance of their independent duties was the "same or similar" to the times included in the reported times for other judges in either the New York City the Region II hearing offices. The failure to establish a "same or similar" relationship (here, between processing times attributable to support staff) was exactly the foundational failure addressed in *Goodman.*

To reiterate, [*62] in Specification 2, Respondent is charged with having failed to provide timely dispositions in Fiscal Years 2008, 2009, and 2010. Yet Judge Cristaudo testified SSA's current "goal" is to issue a decision within a 270-day standard. (Tr. Vol. I at 79). The Agency did not elicit any meaningful testimony from any witness that proved Respondent failed to issue decisions within a 270-day standard or whether the Agency's current 270-day standard even applied during Fiscal Years 2008, 2009, and 2010.

As was true in regard to Specification 1, the Agency offered neither meaningful testimony nor substantive documentary evidence regarding either the contents of Appendix 2 to the Complaint nor the four case files specifically listed in the second Specification. Again, this omission is startling, particularly in light of the court's pointed inquiry to the Agency whether it would provide testimony and evidence concerning the specific instances of Respondent's alleged failures. (Tr. Vol. I at 14 - 20). The simple listing of cases with assigned time values in various pre-decisional statuses does not establish Respondent's culpability. Moreover, Agency Exhibit 34, alone, does not explain [*63] or account for the times attributable to support staff involvement in the pre-decisional processing of Respondent's cases.

That the Agency referenced cases contained in other documentary materials (i.e., Appendix 2 to the Complaint or Agency Ex. 34) is again irrelevant, because at no time did an Agency witness testify about those cases, in context and with a proper explanatory foundation, or whether the Respondent failed to provide timely dispositions in those cases.

Not only did the Agency fail to prove the second Specification, Respondent affirmatively proved the processing times attributed to him in the cases specifically cited in Specification 2 were incorrect.

Specification 2 alleges:

> 900 days after the claim was assigned to him, Respondent pro-

vided claimant Beato with a decision

884 days after the claim was assigned to him, Respondent provided claimant Melecio with a decision

828 days after the claim was assigned to him, Respondent provided claimant Malave with a decision

826 days after the claim was assigned to him, Respondent provided claimant Vicente with a decision

(1) Beato

Specification 2 alleges "Respondent did not provide timely dispositions [*64] . . . for example . . . 900 days after the claim was assigned to him, Respondent provided claimant Beato with a decision." As discussed *supra*, the uncontroverted evidence plainly reveals at least 355 of those days were not attributable to Respondent. Hence, the Agency's allegation of 900 days attributable solely to Respondent in the Beato case is incorrect.

(2) Melecio

Specification 2 alleges "Respondent did not provide timely dispositions . . . for example . . . 884 days after the claim was assigned to him, Respondent provided claimant Melecio with a decision." As discussed *supra*, the uncontroverted evidence plainly reveals at least 604 of those days were not attributable to Respondent. Hence, the Agency's allegation of 884 days attributable solely to Respondent in the Melecio case is incorrect.

(3) Malave

Specification 2 alleges "Respondent did not provide timely dispositions . . . for example . . . 828 days after the claim was assigned to him, Respondent provided claimant Malave with a decision." As discussed *supra*, the uncontroverted evidence plainly reveals at least 324 of those days were not attributable to Respondent; not including other delays attributed [*65] to unresponsive physicians and hospitals. Hence, the Agency's allegation of 828 days attributable solely to Respondent in the Malave case is incorrect.

(4) Vicente

Specification 2 alleges "Respondent did not provide timely dispositions . . . for example . . . 826 days after the claim was assigned to him, Respondent provided claimant Vicente with a hearing." The uncontroverted evidence plainly reveals approximately 447 of those days were not attributable to Respondent; not including other delays attributed to unresponsive physicians and hospitals. Hence, the Agency's allegation of 826 days in the Vicente case is incorrect.

Even a cursory review of the four cases listed in Specification 2 reveals the Agency's computations of times, from assignment to disposition, solely attributable to Respondent, are in error. In each of the charged four cases, the Agency's alleged times solely attributable to Respondent were wrong by a minimum of at least 300 days.

As before, the evidence suggests the Agency pled the four charged cases on the basis of total time from assignment to disposition, without differentiating between times attributable to Respondent, support staff or persons/agencies [*66] outside of SSA.

Once more, the fact that a SSA ALJ has no supervisory authority over support staff looms large in this discussion. Specifically, the Agency cannot reasonably hold an ALJ responsible for total processing time if he/she has no direct supervisory authority over the people who control much of case processing.

Inasmuch as the Agency failed to refute Respondent's testimony concerning those four cases, the court finds Respondent fully credible and accepts his accounts and explanations of

the processing times in each of the four charged cases.

Once more, it is not for this court to reconstruct exactly how many days were solely attributable to Respondent's handling of each of the four charged cases; that was the Agency's burden. The Agency failed to meet its burden in regard to each of the four charged cases set forth in Specification 2.

Hence, Specification 2 was **NOT PROVED.**

c) Specification 3

Charge I alleges Respondent was required to "provide timely and legally sufficient decisions for the public." n29 The third Specification of the Charge, however, alleges in Fiscal Years 2008, 2009, and 2010, Respondent did not "acceptably manage his cases."

n29 There is no legal or factual causality between allegations of untimeliness in Specifications 1 and 2 and the low numbers of hearings or dispositions in Specification 3. Although it might be anecdotally true that an ALJ who is untimely in scheduling hearings or producing dispositions might also schedule fewer hearings or produce fewer dispositions, one does not necessarily follow the other. Hence, proof of Specifications 1 or 2, here, would not, *a fortiori,* result in proof of Specification 3. Conversely, the absence of proof of Specifications 1 or 2, here, would not, *a fortiori*, result in and absence of proof of Specification 3. *See* note 35.

[*67]

The Agency defines the phrase "acceptably manage" by the numbers of cases Respondent either scheduled for hearing or dispositions he issued compared to the numbers of cases scheduled or disposed of by other judges in both/either the SSA's New York City or Region II hearing offices.

The third Specification also incorporates the contents of Appendices 1 through 8 to the Complaint, which identifies those cases wherein Respondent is alleged to have failed to acceptably manage his cases. As before, absent an appropriate evidentiary foundation, the court does not regard those Appendices as admissible probative evidence.

The third Specification compares the numbers of cases scheduled or disposed of by Respondent, in Fiscal Years 2008, 2009, and 2010, to the numbers of cases scheduled or disposed of by other ALJs in both/either the New York City or Region II SSA hearing offices during the same time period. n30

n30 In this regard, the third Specification seems at odds with the gravamen of Charge I, which is timeliness. However, Respondent did not raise any objection to this Specification. Hence, any objection he may have had regarding adequacy of notice, etc., is waived. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited [or waived] in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)*.

[*68]

Finally, the third Specification alleges in Fiscal Years 2008, 2009, and 2010, Respondent's case processing times were "7.19 standards of deviation above the mean" of those processing times by other ALJs in Region II SSA disability adjudication offices. n31

n31 "Case processing times" seem only incidental to the gravamen of Specification 3, *i.e.*, the numbers of cases scheduled or dispositions issued. *See*, *p.* 68 *infra*.

(1) 500 - 700 Dispositions Per ALJ, Per Year

On October 31, 2007, then-Chief ALJ Frank Cristaudo sent a letter to all SSA ALJs. (Agency Ex. 2). The letter, which was issued six and one-half months after the "benchmarks" letter, *supra*, (Agency Ex. 1), outlined a clear "goal" of 500 to 700 case dispositions per ALJ, per year. (Tr. Vol. I. at 87; Agency Ex. 2). The letter was sent in response to the backlog of cases then pending before the SSA and the times it took SSA judges to adjudicate and render decisions. Judge Cristaudo pointedly described the 500 - 700 figure [*69] as a "goal," but wrote while he wanted disability decisions to be "legally sufficient," he did not "want to simply allow cases or deny cases to meet a goal." (Agency Ex. 2) (emphasis added).

It is important to note that the Complaint in this case does not allege Respondent failed to meet the Agency "goal" of 500 - 700 case dispositions per ALJ, per year; at least, not directly. Rather, Specification 3 of Charge I alleges Respondent was deficient because the numbers of cases he either scheduled for hearing or dispositions he issued were significantly lower than the numbers of cases scheduled or disposed of by a majority of judges in the SSA's New York City or Region II hearing offices. (It is not-too-coincidental that the majority of those judges met or exceeded the SSA "goal.") Hence, it might be argued, Respondent's productivity was being measured against the "goal," by proxy. But since the Complaint does not allege Respondent failed to meet a "goal," *per se*, and since Respondent's Answer does not thusly plead, this court needs not attend that question.

Because the SSA management was concerned Respondent would not achieve the yearly "goal," the Agency embarked on a lengthy [*70] effort to improve Respondent's productivity. n32

n32 A February 14, 2007, letter from the former Hearing Office Chief ALJ, Newton Greenberg to Respondent, clearly articulated management's longstanding concerns regarding Respondent's failures to process cases in a timely fashion. (Agency Ex. 11). The court considered Agency Exhibit 11 only as it pertained to the question whether Respondent was adequately notified of the Agency's general concerns about productivity.

(2) Agency / Respondent Improvement Efforts

The Agency undertook extraordinary efforts to assist and improve Respondent's productivity in light of Judge Cristaudo's "goal." Judge Mark Sochaczewsky, the SSA's Region II Chief ALJ, explained that in 2008 he directed Region II Assistant Chief ALJ Robert Wright to hold a series of meetings with Respondent, to work closely with the Respondent, and "to see what we could do to try to improve his performance." (Tr. Vol. I at 181; Agency Ex. 13). Judge Sochaczewsky also tasked then-Hearing Office Director [*71] (now ALJ) Marissa Pizzuto to attend those "improvement meetings" as a note-taker. (Tr. Vol. I at 187). The focus of the "improvement meetings" was twofold: to improve upon the actual number of case dispositions Respondent issued and to improve the timeliness with which Respondent issued his decisions. (Tr. Vol. I at 200 - 201). As Judge Pizzuto testified,

> The intention was never to chaperone Judge Shapiro's decision-making process. The intention was to point out places along the processing chain where he had been

> taking steps that perhaps could be delegated . . . to other people, and the . . . support staff was there to take over those roles so he would be freed up to hear and decide cases.

(Tr. Vol. II at 491 - 492).

On January 9, 2008, Judge Sochaczewsky formally notified Respondent of the first formal "improvement meeting" and directed Respondent to attend. (Agency Ex. 13). Thereafter, from January through June, 2008, Judge Wright conducted a series of performance "improvement meetings" with Respondent (Tr. Vol. II at 595).

The substance of the first "improvement meeting," held January 15, 2008, is reflected in handwritten notes taken by Judge Pizzuto. (Tr. Vol. [*72] II at 458, 460-461, 477; Agency Ex. 14). The court regards Judge Pizzuto's notes as exceptionally probative, inasmuch as Respondent testified he had reviewed the content of those handwritten notes and he agreed those notes correctly reflected the substance of the several meetings he had with Judge Wright. (Tr. Vol. VII at 1552).

Judge Wright's testimony and Judge Pizzuto's notes clearly reflect a meaningful interaction between Judge Wright and Respondent, including: a frank discussion of Respondent's low disposition productivity, recommended efficiencies, and a clear explanation of management's productivity expectations, with particular references to the "benchmarks," and the "goal" of 500 - 700 dispositions per judge, per year. (Tr. Vol. II at 580 - 586; Agency Ex. 14).

Interestingly, Judge Wright testified Respondent offered no reaction to the threat of discipline in the face of management's unmet productivity expectations. (Tr. Vol. II at 599). Similarly, Judge Pizzuto explained that throughout the series of meetings there was ". . . a dispassionate sense that while [Respondent] wasn't angry, or mad, or insulted, he also wasn't particularly embarrassed or sorry that this was [*73] going on." n33 (Tr. Vol. II at 496).

> n33 Judge Pizzuto further testified that claimants had called crying, requesting that their cases pending before Respondent be expedited because it had been so long since their hearing. When Judge Pizzuto or Respondent's Senior Case Technician shared this information with Respondent, he "took it in stride and would welcome the comment and would say leave the file, pick out the file, give it to me, whatever. But that would be it." (Tr. Vol. II at 456 - 457).

Respondent testified that during the "improvement meetings" he did raise his concerns with Judge Wright that "Second Circuit case law" required him to develop cases in a more thorough manner. (Tr. Vol. VII at 1621). By contrast, Judge Pizzuto's notes do not reflect any statement by Respondent in that regard or indicate that he felt he was being improperly counseled because he followed the dictates of controlling federal appellate law. n34 The court gives greater probative weight to Judge Pizzuto's contemporaneous, handwritten [*74] accounts of the meetings.

> n34 Although cases like *Rosa v. Callahan, 168 F.3d 72 (2d Cir. 1999)* and *Cruz v. Sullivan, 912 F. 2d 8 (2d Cir. 1990)* were extant at the times of the "improvement meetings," Respondent never memorialized his concerns in writing. (Tr. Vol. VII at 1621 - 1622). *But see* Tr. Vol. VI at 1183. The absence of any written protestation by Respondent factors heavily in this court's decision-making. *But see* Tr. Vol. VI at 1183 (Respondent testified he

was aware of *Callahan* at the time of the "improvement meetings").

Judge Wright conducted a second "improvement meeting" with Respondent on February 6, 2008. (Tr. Vol. II at 474, 600; Agency Ex. 15). Again, Judge Pizzuto, attended the meeting as a note-taker.

Judge Pizzuto's detailed notes of the February 6, 2008, meeting again reflect another frank and specific discourse between Judge Wright and the Respondent concerning Respondent's productivity, with particular reference to SSA's "goal" of 500 [*75] - 700 dispositions per judge per year. (Agency Ex. 15). Initially, Judge Wright pointed out in the preceding month, January, 2008, Respondent had only produced eight case dispositions.

The February 6, 2008, meeting then focused on Respondent's pending cases, his pre-hearing development practices, his difficulties obtaining pre-hearing evidence, and a discussion of Respondent's propensity for performing clerical, support work. In response to the latter, Judge Wright specifically directed Respondent to cease performing "his own development of any sort" as that practice was inefficient.

Judge Wright's testimony buttressed Judge Pizzuto's notes. He testified that he had suggested several ways Respondent could evaluate and decide cases more efficiently. (Tr. Vol. II at 601 - 604).

Judge Pizzuto's notes further reflect that she offered her own assistance to aid Respondent's pre-hearing development of case files. Once more, Judge Wright reiterated the Agency's need for increased productivity and also mentioned the potential for disciplinary action in an MSPB hearing if Respondent's productivity did not increase. (Agency Ex. 15).

Judge Wright testified he came to the "assessment that he [*76] [Respondent] was so concerned about making the right decision that he was paralyzing himself into not making a decision" at all. (Tr. Vol. II at 605). Judge Sochaczewsky offered a similar insight, testifying that while Respondent was a nice person, he was "ineffectual as an ALJ," explaining that "the problem was it wasn't just [one case]. It was case, after case, after case, frankly dithering." (Tr. Vol. I at 180, 258).

Again, Judge Pizzuto's notes from the February 6, 2008, meeting do not reflect any statement by Respondent he felt he was being scrutinized either for an improper purpose or because he was following the dictates of controlling federal appellate law.

A third "improvement meeting" was scheduled for February 21, 2008, with Respondent, Judge Wright and Judge Pizzuto in attendance. Judge Pizzuto produced typewritten notes of this meeting. (Tr. Vol. II at 486, 606; Agency Ex. 16).

Two days before the third formal "improvement meeting," however, Judge Wright sent a pointed and dramatic e-mail to the Respondent. (Agency Ex. 16). The e-mail boldly stated: "To be frank, the 'improvement' meeting of February 6, 2008, caused me concern about your fitness to hold the position [*77] of administrative law judge with the Social Security Administration." (Agency Ex. 16).

Judge Wright's February 19, 2008, e-mail is remarkable in another regard. That e-mail reflects prior assurances from the Respondent he would increase his productivity to an average of "40 cases schedule per month" to which Judge Wright responded, "you have not taken steps that would enable you to meet this objective." (Agency Ex. 16).

Nevertheless, the third "improvement meeting" occurred as scheduled and, again, Judge Wright reiterated management's expectations that SSA ALJ's produce between 500 and 700 dispositions per year. The notes reflect Judge Wright repeated his insistence Respondent cease performing clerical functions and reiterated his concerns that "too much substantial time is spent on those activities." (Agency

Ex. 16). Judge Wright reiterated his concerns Respondent "was also continuing to do clerical work after he had been directed not to do so." (Tr. Vol. II at 607).

As before, Judge Pizzuto's notes do not reflect Respondent protested he felt he was being scrutinized either for an improper purpose or because he was following the dictates of controlling federal appellate law which [*78] caused the delays Judge Wright sought to eliminate.

A fourth "improvement meeting" was conducted, telephonically, on March 18, 2008. As before, Judge Wright and Respondent conferred with Judge Pizzuto in attendance as a note-taker. (Tr. Vol. II at 487; Agency Ex. 17).

Judge Wright reiterated his expectation SSA ALJs should produce 500 to 700 dispositions per year but, given his current rate of productivity, the best Respondent could expect to produce was only 240 cases per year. Respondent indicated he had increased his efforts to find case files that might be decided "on the record" and without a full hearing. Judge Wright also noted while Respondent had curtailed his clerical functions, the anticipated increase in disposition production did not materialize. After a discussion of file development, Judge Wright reasserted his expectations concerning productivity and encouraged Respondent to continue to improve. (Agency Ex. 17).

As before, Judge Pizzuto's notes of the March 18, 2008, meeting contain no reference to any concern by Respondent he was being improperly targeted by management or that his low productivity was the result of his adherence to controlling federal appellate [*79] law regarding Social Security case-file development.

A fifth "improvement meeting" was conducted on April 8, 2008. Judge Wright conferred telephonically with Respondent and Judge Pizzuto attended as note-taker. (Tr. Vol. II at 489; Agency Ex. 18).

Once more, Judge Wright expressed the Agency's expectation that an ALJ produce between 500 and 700 dispositions annually. Judge Wright noted that in the preceding month, March, Respondent had produced only 13 dispositions. Judge Wright again emphasized poor performance could serve as the basis for a disciplinary action against Respondent, including termination.

Once more, Judge Pizzuto's notes do not reflect Respondent expressed any concern he was being singled out for inappropriate or illegal management action or his adherence to Second Circuit case law took precedence over SSA management directives.

The sixth, and final, "improvement meeting" was conducted on June 30, 2008. Judge Wright appeared telephonically with Respondent and Judge Pizzuto took notes of the meeting. (Agency Ex. 19).

The general context of the final meeting was, as before, Judge Wright's overriding concern Respondent did not schedule enough hearings to result in [*80] an adequate number of case dispositions. As a result, Judge Wright explained cases would be removed from Respondent's office and given to other judges in the New York hearing office for review and potential disposition. As was the case in the five prior meetings, Judge Pizzuto's notes do not reflect any expression by Respondent he was being unfairly targeted by management or his disposition rate was caused by his obligation to follow the dictates of federal appellate case law pertaining to Social Security case file development. (Agency Ex. 19).

The record reflects the intent and substance of each "improvement meeting" was essentially the same: Judge Wright and Respondent discussed Respondent's cases and why many were lingering in certain pre-or-post hearing statuses without resolution or action. (Tr. Vol. II at 471, 491 - 492, 616). Despite his repeated attempts to suggest other solutions, Judge Wright came to the conclusion Respondent continued to un-

necessarily move cases in and out of a variety of pre-and-post hearing statuses, ordering untimely or unnecessary medical evaluations, and would fail to take action when action was warranted. (Tr. Vol. II at 622).

The Agency offered [*81] evidence indicating that Respondent let cases languish in various cases statuses over which he had control. For example, in May, 2008, Judge Wright sent Respondent an e-mail asking about the status of nine cases that had been pending in "ARPR" status for a period of over 150 days. Within minutes of receiving Judge Wright's e-mail, Respondent asked his legal assistant to initiate case development on these nine cases. The court draws an inference that Respondent himself could have initiated this process much sooner. (Tr. Vol. II. at 616-618; Agency Ex. 20).

According to both Judge Wright and Judge Pizzuto's testimonies, Respondent sat passively and without reaction during the each of the "improvement meetings," without apparent reaction to either the gravity of situation or the potential for disciplinary action. (Tr. Vol. II at 496, 599).

The Agency effectively and appropriately communicated its needs for increased production and timeliness to Respondent through this painstaking "improvement" process. The court finds the Agency's efforts to improve Respondent's productivity were extraordinary and clearly contemplated to provide Respondent with notice of its expectations and offers [*82] of enhanced administrative support. n35

> n35 As the testimony concerning Specifications 1 and 2, *supra*, revealed, SSA support staff contributed to delays in case processing times. A prudent ALJ, aware that staff deficiencies contributed to slow case development and a low disposition rate, should ask for additional cases to compensate for those delays and, thus, ensure a larger case production total at year's end. The evidence established that every ALJ is assigned as many cases as he/she is willing to handle. (Tr. Vol. I at 274). In other words, while waiting on responses from claimants and medical sources in one case, work could begin/continue on other cases. *See* note 29.

While the Agency's guidance was not given with the precision of a military "order," it nevertheless made its expectations clearly and reasonably known to the Respondent. In this regard, *Goodman* is again instructive. There, the Board took issue with the Agency's self-restrictive view of its authority to order an ALJ to increase [*83] his case productivity. The Board pointedly observed:

> Based upon the agency's view that it could not order the respondent to take reasonable steps to improve his productivity, a view to which we do not subscribe, the respondent was not ordered to follow any specific instructions . . .

Social Sec. Admin. v. Goodman, 19 M.S.P.R. 321, 331 (1984) (emphasis added).

Hence, in the instant case, it is apparent the Agency's repeated "improvement meetings" constituted enforceable orders to Respondent to improve his productivity -- orders which the Board has recognized as enforceable.

In *Social Security Administration v. Boham, 38 M.S.P.R. 540, 545 (1988)*, the Board ruled that an ALJ can be disciplined for refusing to follow a reasonable order. Here, Respondent is not charged with either insubordination or a failure to comply with a reasonable Agency order. Nevertheless, the fact the Agency repeatedly made its lawful and reasonable requirements known to Respondent is a factor in this court's deliberations.

The court's attention is next focused upon Respondent's productivity -- the gravamen of Specification 3.

(3) "Quotas" and "Goals" [*84]

Comparisons of the numbers of cases ALJs either scheduled or disposed of, relative to a "quota" or to a "goal" or to the productivity of other ALJs, have historically raised important questions concerning due process and the relevance of comparative statistics. n36 As indicated above, the Complaint does not specifically allege Respondent failed to meet either a "quota" or a "goal," *per se.* However, Respondent's productivity is, in this case, measured against that of other SSA ALJs in both the New York City and Region II offices. Thus, the performance of those judges becomes the measuring standard in this case.

n36 Agency Exhibit 4 -- a SSA ALJ "position description" -- does not specify or even reference case productivity, quotas or goals. However, Section III of the "position description" does state a judge is subject "to such administrative supervision as may be required in the course of general office management." This court is of the belief that setting reasonable production expectations is fairly encompassed by the language in the position description.

[*85]

Thirty-three years ago, *Bono et al v. Social Security Administration et al*, No. 77-0819-CVW-4 (W.D. Mo. 1979), was filed by five ALJs who alleged SSA's case production quotas and related management policies violated the APA and the *Fifth Amendment*. Eventually, the parties signed a settlement agreement believed by many to mean the SSA would not, thereafter, impose case-production "quotas" or "goals" upon its disability judges. n37

n37 *But see Goodman v. Svahn, 614 F. Supp. 726 (D.C. 1985)* (discussing whether plaintiff ALJ could collaterally enforce provisions of the "*Bono* Settlement" in a separate action).

Seven years later, the district court in *Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986)*, cited the "*Bono* Settlement" for the proposition the SSA was barred from imposing "directives or memoranda setting any specific number of dispositions by ALJs as quotas or goals" in disability cases. *Id. at 1054*. Nevertheless, the court in *Bowen* pointedly [*86] recognized in the seven years between the time *Bono* was settled and *Bowen* was decided, "[T]he *Bono* settlement . . . did not end the quota system . . ." *Bowen, 641 F. Supp. at 1055*.

As a result of both *Bono* and *Salling*, it appeared, at least theoretically, that SSA was precluded from imposing either production "quotas" or "goals" upon its disability judges.

Three years after *Salling*, however, the Second Circuit Court of Appeals in *Nash v. Bowen, 869 F. 2d 675 (2d Cir 1989)*, expressed its concern about the impact of *Bono.* The court in *Nash* seemed to approve of "goals," while decrying "quotas," saying: "The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA." *Id. at 680*. The court in *Nash* further explained it is appropriate for the SSA to set a minimum number of dispositions an ALJ must decide in a given period, provided such a number is reasonable and is neither "etched in stone," nor is a prescription of how, or how quickly, an ALJ should decide a particular case. *Id. at 680 - 681*. A fair reading of *Nash* indicates that [*87] an ALJ's decisional independence is not in any way usurped by the SSA's setting of reasonable monthly production "goals."

As detailed *supra*, in his October 31, 2007 letter to all SSA's ALJs, then-SSA Chief ALJ

Frank Cristaudo, called for a productivity "goal" of 500 to 700 case dispositions per ALJ, per year. (Tr. Vol. I. at 87; Agency Ex. 2).

At the hearing, Agency counsel described Judge Cristaudo's "goal" as SSA's "formal performance standard, 500 to 700" dispositions per year for SSA ALJs. (Tr. Vol. I at 47). Likewise, Judge Cristaudo testified it is "accurate to evaluate an ALJ's performance against the 500 to 700 [disposition per year] expectation." (Tr. Vol. I at 89).

Judge Sochaczewsky, the SSA's Region II Chief ALJ also testified about the importance of the "500 to 700" dispositions per year standard, saying: "It's unconscionable if we're asking judges to issue between 500 to 700, and the most that an ALJ, for no good reason that I'm aware of, issues 149 or less in most years." (Tr. Vol. I at 246). n38

> n38 Judge Sochaczewsky was most certainly describing Respondent, inasmuch as Charge I, Specification 3 specifically alleges Respondent provided only 149 or fewer dispositions in Fiscal Years 2008, 2009, and 2010.

[*88]

Of Judge Cristaudo's "goal," however, Respondent testified "It's something you try to do, it's not required, but it's something that you try to do. It's an aspiration." (Tr. Vol. VI at 1217). More pointedly, Respondent specifically rejected the notion the Agency had imposed a production "quota" on him. The following colloquy with his counsel is crucial in that regard:

> Q. Has the Agency set any quotas or minimum production standards?
>
> A. No, they have not.

(Tr. Vol. VI at 1217).

Then, in response to questioning by the court, Respondent again denied the existence of a "quota:"

> Q. My question then to you, sir, is this, regarding the 500 to 700 cases when you were in active service as an administrative law judge at Social Security, did you believe that that 500 to 700 case number was a quota?
>
> A. Absolutely not. Judge Cristaudo specifically, very explicitly told us that it was not a quota.
>
> Q. All right. But regardless of what Judge Cristaudo said, my question to you, sir, is did you believe that it was a quota, a quota that if you did not meet it, you would be subject to discipline?
>
> A. Absolutely not.

(Tr. Vol. VII at 1615 - 1616). [*89]

Respondent's Answer pleads neither the "*Bono* Settlement" nor the Agency's setting of an impermissible "quota" or "goal" as an Affirmative Defense. Accordingly, Respondent did not offer the "*Bono* Settlement" into evidence. n39 Moreover, since Respondent pointedly rejected the existence of a "quota," so, too, must this court. The potential impact of the "*Bono* Settlement" thus laid aside, a thorough review of *Goodman* reveals that an agency may impose reasonable production requirements upon an administrative law judge.

n39 Despite the fact Respondent did not plead *Bono* as an affirmative defense, his Closing Argument suggests that *Bono* precludes the Agency's reliance upon a "minimum number of dispositions" as a basis for discipline. Respondent's Closing Argument at 41. That question, however, was not properly before the court.

(a) The Impact of *Goodman*

Goodman, which predates *Nash* by five years, stands as the Board's landmark position on the question of ALJ productivity. [*90] Expressing its disdain for the "*Bono* Settlement," the MSPB specifically said *Bono* "cannot reasonably be read to include a waiver by OHA [SSA Office of Hearings and Appeals] of its right to bring an action based upon low productivity." *Goodman, 19 M.S.P.R. at 328*.

Further, the Board in *Goodman* specifically disagreed with SSA's self-restrictive view that "it could not order the respondent to take reasonable steps to improve his productivity." *Id. at 331* (emphasis added). To the contrary, the MSPB said "instructions which do not improperly interfere with the performance of an ALJ's judicial functions can be issued by the employing agency." *Id. at 331, fn. 10*.

In sum, *Goodman* appears to stand for the proposition the Board would hold as enforceable an agency's orders to an ALJ to increase his/her productivity or face potential discipline. *Goodman* further suggests it would then be incumbent upon an ALJ to assert how such an agency order constituted interference with his/her statutorily-protected decisional independence.

Although the Respondent in *Goodman* was never given an order to increase his productivity, [*91] the same is not exactly true, here. In the instant case, Respondent was clearly given notice of the Agency's expectations regarding his productivity and timeliness through the series of "improvement meetings" conducted in 2008.

Since Respondent, here, has plainly disavowed any reliance upon the "*Bono* Settlement," this court abides by the Board's guidance in *Goodman* which holds that the Agency is within its right to bring an action against an ALJ based upon low productivity, with or without an order directing to the judge to increase his/her productivity.

The greater lesson from *Goodman*, however, is in its requirement the Agency establish the productivity and timeliness comparisons it makes between judges have a basis in relevance. Insisting that the Agency demonstrate "the validity of using its statistics to measure comparative productivity," the Board obliged the Agency to prove "approximately the same amount of time was required to render most final dispositions . . . [or] the complexities presented by the mix of cases assigned to the respondent mirrored the complexities of those in the national average" before comparative statistics would be relevant and admissible. [*92] *Goodman, 19 M.S.P.R. at 331 - 332*.

Hence, *Goodman* requires the Agency establish an "apples to apples" or "same or similar" relationship between the cases heard by Respondent *vis a vis* other ALJs before comparative statistics can be deemed admissible.

(b) "Same or Similar"

Doubtless because of *Goodman*, the Agency went to exceptional lengths to establish that during Fiscal Years 2008, 2009, and 2010, the cases assigned to Respondent were essentially the same or similar, in terms of file size, complexity, legal and evidentiary and/or factual issues, and time requirements as those cases assigned to all other judges in the New York City and Region II hearing offices.

Judge Sochaczewsky has served as the SSA Region II Chief ALJ since 2007. Region II consists of sixteen hearing offices in New York State, New Jersey and Puerto Rico. Approximately 128 ALJs serve in Region II. (Tr. Vol. I at 165). Judge Sochaczewsky testified that he personally reviewed (and directed subordinate

ALJs and staff counsel to review) Respondent's assigned cases during Fiscal Years 2008, 2009, and 2010. Judge Sochaczewsky testified he undertook this review to ensure Respondent's [*93] cases were the "same or similar" in length and factual or legal complexity to the cases assigned to other ALJs in the New York City and/or Region II hearing offices. (Tr. Vol. I at 190, 194 - 196, 255, 302).

Other SSA ALJs and staff counsel who reviewed Respondent's cases, in Fiscal Years 2008, 2009, and 2010, also testified that the numbers, varieties and complexities of the cases assigned to Respondent were the same or similar to the cases assigned to the other judges in the New York City and/or Region II hearing offices. (Tr. Vol. II at 375 - 385). n40

n40 The court cites the testimony of Judge Pizzuto, currently an ALJ in the SSA Newark, New Jersey hearing office. As described above, Judge Pizzuto formerly served in a variety of attorney/staff support positions, including service as the Hearing Office Director, in the New York City hearing office from 2000 - 2008. (Tr. Vol. II at 426 - 428). Judge Pizzuto testified that during her tenure in the New York City hearing office, Respondent was assigned the same types and numbers of cases as the other ALJs in the New York City hearing office, on a rotational basis. (Tr. Vol. II at 472, 557). The court also heard similar testimony from Judge Wright, who has served as the SSA Assistant Regional Chief ALJ for the SSA Region II since 2007, and who formerly served as the Acting Regional Chief Administrative Law Judge for the same Region from 2005 to 2007. Judge Wright testified that in or about 2007 and 2008, he was tasked to review Respondent's assigned case load to ensure Respondent's cases were the same or similar to the other ALJs in the Region in terms of complexity, length, legal/factual issues, etc. (Tr. Vol. II at 594, 609, 641 - 643, 646, 660). The court also heard similar testimony from Judge Brian Lemoine, who testified he personally screened cases assigned to Respondent to ensure they were the "same or similar" to those assigned to other ALJs.) (Tr. Vol. III at 703 - 715). Likewise, Agency Exhibit 22, at pages 40, 49, 58, 136 is illustrative of the thorough internal review undertaken to ensure Respondent's cases were the "same or similar" to cases assigned to other ALJs in the New York City and/or Region II hearing offices.

[*94]

After a lengthy review, Judge Sochaczewsky concluded that Respondent's cases were the same or similar "with respect to the issues, types of claims, and the medical and other evidence, as other cases I have adjudicated " in other Region II hearing offices. (Tr. Vol. I at 195 - 196; Agency Ex. 22).

Chief Judge Bice concurred, noting that the majority of SSA disability cases are not complex and that the same five-step factual/legal analysis is present in nearly every case. Moreover, the cases are generally the same in terms of issues and complexity. In essence, SSA ALJs see the same types of cases "over and over again." (Tr. Vol. IV at 1026, 1110 - 1114, 1120).

Respondent essentially agreed. In response to his counsel's inquiry, "Are judges given the same types of cases?" Respondent testified, "I don't know what cases other judges are given particularly, but I have no reason to think that any of us are given a different type." (Tr. Vol. VII at 1420, 1523).

In his Closing Argument, Respondent suggests that while the cases he was assigned may have been the "same or similar," his unique handling of those cases render any comparison between him and other judges meaningless for the purpose [*95] of *Goodman.* He creatively

argues that his reading of HALLEX n41 and his unique handling of cases "leads him to provide due process protections to claimants that may exceed those afforded by other judges, and that difference causes longer processing times." n42 Unfortunately, Respondent's argument in this regard is entirely speculative. He offered neither testimony nor evidence in support of his argument. He invites the court to guess at the unquantifiable precision or care with which other judges handle their cases. He invites the court to guess at the unquantifiable precision or care with which he handles his cases. He then invites the court to assign time values to those unquantifiable concepts. In short, Respondent's argument violates *Goodman* because he cannot establish a factual predicate for the distinctions he attempts to draw between himself and other judges.

n41 SSA's Hearings, Appeals and Litigation Law Manual.
n42 Respondent's Closing Argument at 6, 43.

The court is satisfied, and [*96] thus finds, per the dictates of *Goodman,* that the cases assigned to Respondent in Fiscal Years 2008, 2009, and 2010, were essentially the same or similar, in terms of file size, complexity, legal and/or factual issues, and time requirements as those cases assigned to all other judges in the New York City and/or Region II hearing offices. (Tr. Vol. II at 594 - 599). Hence, the Agency established a relevant standard by which to measure Respondent's productivity.

Having found the Agency established the cases assigned to the Respondent in Fiscal Years 2008, 2009, and 2010, were the "same or similar" to those assigned to other ALJs in either the SSA's New York or Region II disability hearing offices, the court now examines the numbers of hearings Respondent scheduled and the numbers of case dispositions he produced.

(4) Respondent's Productivity

The Agency elicited testimony from Dr. Natalie Lu, Associate Commissioner of the SSA for the Office of Electronic Services and Strategic Information (Tr. Vol. IV at 912) and Daniel Zabronsky, Director, Division of Modeling with the SSA's Office of Quality Performance. (Tr. Vol. IV at 946; Agency Ex. 41).

Dr. Lu oversees the Agency's [*97] use of CPMS; a "tool" she described that SSA uses to "manage and process [disability] cases at the hearing level." (Tr. Vol. IV at 914).

Mr. Zabronsky testified that he conducted a number of performance measures to compare Respondent's productivity to other ALJs in New York City and in Region II. (TR. Vol. VI at 958).

Dr. Lu explained Agency Exhibit 36, n43 a three-page color document in a "pie chart" format, was created from CPMS data concerning cases handled by Respondent from September 29, 2007, through April 29, 2011. (Tr. Vol. IV at 925).

n43 Agency Exhibit 36 was admitted over Respondent's three-fold objection: first, that Respondent had not seen the document before June 15, 2012; second, that Respondent had not been afforded sufficient discovery; and, third relevance. The court specifically notes that Respondent had at least one month to prepare for trial (from the day he received the document on June 15, 2012 until July 16, 2012, the day the document was offered into evidence). Moreover, Respondent was granted generous and extraordinary discovery. Finally, Agency Exhibit 36 is exceptionally relevant in light of Specification 3.

[*98]

Agency Exhibit 36 reveals the numbers of Respondent's case dispositions in comparison to the other ALJs in the New York City hearing office. Page one of that Exhibit shows that in Fiscal Year 2008, Respondent issued 149 dispositions. Of the nine other judges in the New York City office, six judges produced at least 500 dispositions; one judge produced 481 dispositions; one judge produced 392 dispositions and one judge produced 282 dispositions in the same Fiscal Year.

Page two of Agency Exhibit 36 reveals in Fiscal Year 2009, Respondent issued 122 dispositions. Of the eleven other judges in the New York City office, ten judges produced at least 500 dispositions; and one judge produced 283 dispositions in the same Fiscal Year.

Page three of Agency Exhibit 36 reveals in Fiscal Year 2010, Respondent issued 111 dispositions. Of the ten other judges in the New York City office, eight judges produced at least 500 dispositions; one judge produced 428 dispositions and one judge produced 277 dispositions in the same Fiscal Year.

Agency Exhibit 36 establishes two salient facts: 1) Respondent produced significantly fewer dispositions than his colleagues in the New York City hearing office [*99] in Fiscal Years 2008, 2009, and 2010 and, 2) Respondent's productivity declined after the series of performance improvement meetings he attended with Judge Wright from January through June, 2008.

Respondent did not significantly challenge either the accuracy of these reported numbers nor their relevance during either his cross-examination or during his case-in-chief. Nor did he offer any independent testimony or evidence to refute the contents or meaning of Agency Exhibit 36.

Inasmuch as the Agency established that Respondent's cases were the same or similar to those handled by other judges in the New York City office, Agency Exhibit 36 thus proves that Respondent's performance was markedly below a comparable level of productivity.

Mr. Zabronsky testified he analyzes CPMS-generated data regarding the performance of all aspects of the SSA's functions. n44 Mr. Zabronsky was recognized by the court as an expert in the field of statistical and data analysis as it pertains to information generated by, and pertaining to, the SSA. (Tr. Vol. IV at 956).

n44 Respondent did not object to the court's recognition of Mr. Zabronsky as an expert witness.

[*100]

In this case, Mr. Zabronsky was asked to use data from CPMS to analyze Respondent's case processing and productivity and to compare Respondent's productivity to other ALJs in Region II and in the New York City hearing office. (Tr. Vol. IV at 958 - 959).

Mr. Zabronsky then explained, in depth, the significance of Agency Exhibits 37 and 38. n45 He explained that Agency Exhibit 37 is a one-page, computer-generated, color "line graph" showing the average numbers of Respondent's case dispositions in comparison to the other fully-available ALJs in both the New York City and Region II hearing offices in Fiscal Years 2008, 2009, and 2010. (Tr. Vol. IV at 964, 967 - 973).

n45 Respondent did not object to these Agency Exhibits, or to Agency Exhibits 39 and 40, *infra,* or to Mr. Zabronsky's testimony in relation thereto.

Agency Exhibit 37 reveals that in Fiscal Year 2008, Respondent produced 149 dispositions, compared to the New York City judges'

average of 567 decisions and the Region II judges' average of 613 [*101] decisions for the same Fiscal Year. Exhibit 37 also reveals that in Fiscal Year 2009, Respondent produced 122 dispositions, compared to the New York City judges' average of 611 decisions and the Region II judges' average of 608 decisions for the same Fiscal Year. Finally, Exhibit 37 reveals in Fiscal Year 2010, Respondent produced 111 dispositions, compared to the New York City judges' average of 630 decisions and the Region II judges' average of 622 decisions for the same Fiscal Year.

Agency Exhibit 37 establishes that Respondent's disposition productivity was significantly less than his peers' production averages in Fiscal Years 2008, 2009, and 2010. Agency Exhibit 37 also establishes that Respondent's productivity actually declined after the series of performance-improvement meetings he attended with Judge Wright from January, 2008, through June, 2008.

Respondent did not meaningfully challenge either the accuracy of these reported numbers nor their relevance during either his cross-examination or during his case-in-chief. Nor did he offer any independent testimony or evidence to refute the contents or meaning of Agency Exhibit 37.

Inasmuch as the Agency established that Respondent's [*102] cases were the same or similar to those handled by other judges in the New York City office, Agency Exhibit 37 thus proves that Respondent's performance was significantly below a comparable level of productivity.

Mr. Zabronsky explained that Agency Exhibit 38 is a computer-generated color "line graph" showing a comparison of the average numbers of hearings scheduled by Respondent to the other ALJs in both the New York City and Region II hearing offices in Fiscal Years 2008, 2009, and 2010. (Tr. Vol. IV at 974 - 977).

Agency Exhibit 38 reveals in Fiscal Year 2008, Respondent scheduled 176 hearings, compared to the New York City judges' average of 551 hearings and the Region II judges' average of 659 hearings for the same Fiscal Year. Exhibit 38 further reveals in Fiscal Year 2009, Respondent scheduled 146 hearings, compared to the New York City judges' average of 597 hearings and the Region II judges' average of 710 hearings for the same Fiscal Year. Finally, Exhibit 38 reveals in Fiscal Year 2010, Respondent scheduled 155 hearings, compared to the New York City judges' average of 591 hearings and the Region II judges' average of 646 hearings for the same Fiscal Year.

As before, [*103] Agency Exhibit 38 again establishes two salient facts: 1) Respondent scheduled significantly fewer hearings than his colleagues in the New York City hearing office in Fiscal Years 2008, 2009, and 2010 and, 2) the numbers of Respondent's scheduled hearings declined after the series of performance-improvement meetings he attended with Judge Wright from January, 2008, through June, 2008.

Respondent did not meaningfully challenge either the accuracy of these reported numbers nor their relevance during either his cross-examination or during his case-in-chief. Nor did he offer any independent testimony or evidence to refute the contents or meaning of Agency Exhibit 38.

As before, inasmuch as the Agency established that Respondent's cases were the same or similar to those handled by other judges in both the New York City and Region II hearing offices, Agency Exhibit 38 thus proves that Respondent's performance was sufficiently below a reasonable level of productivity.

During his case-in-chief, Respondent testified that he had not been given a full complement of cases in Fiscal Years 2008, 2009, and 2010, suggesting he could not achieve the desired 500 - 700 disposition "goal" because he [*104] had not been assigned enough cases to do so: "Basically what I remember is that be-

tween Fiscal Year 2008 and 2010, I think there was one year when I was assigned 15 or 16 cases. And other years, one year I was assigned I think roughly 250 cases."(Tr. Vol. VII at 1426 - 1427, 1619). Respondent testified he asked to be given more cases. (Tr. Vol. VII at 1430 - 1436; Resp. Ex. 53).

But even if Respondent had been given a full complement of cases, he could not (or would not) have been able to meet the desired quantity. In response to the Agency's counsel's questions, Respondent testified:

> A. I have tried to change my case processing so that I could produce more cases, but I didn't think that it would bring it up to 500, no.
>
> Q. But you didn't think it would be bring it up to 400 either, correct? [sic]
>
> A. That's correct.
>
> Q. And in fact, you're not sure you could even do 200 cases a year, correct?
>
> A. I think I could.
> . . .
>
> Q. But you've never tried, correct?
>
> A. No, I've tried. I think there are other, having reviewed the cases now, I think there are ways that I could probably improve my processing now and I think I might be able to get it up to at [*105] least 200.

(Tr. Vol. VII at 1514).

Then, in response to similar questions from the court, Respondent reiterated:

> Q. What if you had been given 50 cases a month in Fiscal Years 2008, 2009, and 2010, which would have resulted in an assignment of over 500 cases for a given year, could you, Judge Shapiro, have issued 500 legally sufficient decisions per year?
>
> A. I don't think I could have.
>
> Q. All right. And using the same techniques and the same professional approach that you took to these cases could you have issued 400 decisions per year?
>
> A. I don't think so.
>
> Q. The same question then, could you have issued 300 decisions a year?
>
> A. Possibly 300, I'm pretty sure I could do 200.
>
> Q. But you're confident you could have done 200 cases a year?
>
> A. Yes.

(Tr. Vol. VII at 1620).

Respondent was remarkably candid in his admission, "I'm slower than other judges, I produce fewer decisions. I know that. [But] I was managing my cases more diligently and that that led to longer processing times and fewer dispositions, but acceptably." (Tr. Vol. VII at 1442 - 1443). Inasmuch as it would be impossible to quantify whether a given ALJ was "more [*106] diligent" in his/her case handling than another judge, the court must rely upon the testimonies of Judges Socaczewsky and Wright

and the objective evidence contained in Agency Exhibits 36, 37, and 38.

The court also makes particular reference to Agency Exhibits 36, 37 and 38 for the proposition that the majority of other ALJs in either the SSA's New York or Region II disability hearing offices were able to meet the "goal" of 500 - 700 dispositions per ALJ, per year. Given that the cases assigned to Respondent and other judges in the New York City and Region II were the same or similar, the productivity of those other ALJs is a legitimate comparative tool by which to measure Respondent's productivity.

There is an anomaly in the way Specification 3 is pled that must be addressed. As discussed above, the Agency also alleged in Fiscal Years 2008, 2009, and 2010, Respondent's case processing times were "7.19 standards of deviation above the mean" of those processing times by other ALJs in Region II SSA disability adjudication offices. (That allegation seems tangential to Specification 3 and ought, perhaps, to have been pled as part of Specification 1 or 2.) However, in an effort to prove [*107] the allegation of "7.19 standards of deviation above the mean," the Agency's relied upon its Exhibits 39 and 40, discussed, *supra.* Agency Exhibit 39 is a one-page, computer-generated bar-graph that purports to compare "Respondent's Average Days from Assignment to Disposition in Fiscal Years 2008, 2009, and 2010," to other ALJs in the New York City and Region II hearing offices. Agency Exhibit 40 is a one-page, computer generated bar-graph that purports to display a "Statistical Variance of Respondent's Average Days from Assignment to Disposition in Fiscal Years 2008, 2009, and 2010," compared to other ALJs in the Region II hearing offices.

As was true in the analysis of the Agency's proof of Specification 2, Agency Exhibits 39 and 40 both show a disparity between Respondent's processing times compared to the times reported for other judges in the New York City and Region II hearing offices. Again, however, the court discounts these comparisons because the Agency did not prove whether the processing times attributed to Respondent included the times taken by support staff in the performance of their independent case-processing duties. n46 To reiterate, the Agency did not prove whether [*108] the times taken by other support staff in the performance of their independent duties was the "same or similar" to the times included in the reported times for other judges in either the New York City the Region II hearing offices. The failure to establish a "same or similar" relationship between case types and complexities was squarely addressed in *Goodman, supra.* Hence, the Agency's allegation Respondent's alleged case processing times were "7.19 standards of deviations above the mean" in Specification 3 was **NOT PROVED.**

> n46 A "standard deviation" is a measure of how spread-out numbers are in relation to other numbers. Agency Exhibit 40, for instance, graphs "two standard deviations" (not the 7.19 alleged in the Complaint) in its comparison of Respondent's average number of days from assignment to disposition to those judges in Region II. Even though the Agency elicited testimony from a data analysis expert, that testimony did not account for the significant impact support staff processing had on the number of days attributed to either Respondent or other judges. (Tr. Vol. IV at 982 - 984).

[*109]

That anomaly aside, the uncontroverted evidence proves the following: The Agency notified Respondent of its legitimate production expectations; the cases assigned to Respondent were the same or similar, in terms of file size, complexity, legal and/or factual issues, and time requirements as those cases assigned to all other judges in the New York City and Region II hearing offices; and Respondent failed to ac-

ceptably manage the cases he was assigned in Fiscal Years 2008, 2009, and 2010, as established by the significantly lower number of hearings he scheduled and dispositions issued, in comparison to the majority of other judges in the New York City and Region II hearing offices.

The court in *Nash* recognized "in view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at a minimally acceptable level of efficiency." *869 F.2d at 681*. In this case, the court relies upon the performance of the majority of other ALJs in the New York City and Region II offices to define a "minimally acceptable" level of performance.

To this day, it is unlikely Respondent could produce more than 200 dispositions per year. That figure is significantly [*110] lower than his Agency reasonably requires, given the Agency's mission and the "need for prompt and orderly dispatch of public business," *supra.*

The Agency **PROVED** the allegations in Specification 3; hence, Charge I is **PROVED**.

3. Charge II -- A Duty of Due Care

Charge II of the Agency's Complaint, "Neglect of Duties," recites, *verbatim*, the preamble allegations contained in Charge I: That a SSA ALJ "is required to provide timely and legally sufficient hearings and decisions for the public. The agency communicated these requirements to Respondent."

Thereafter, the three Specifications under Charge II allege, respectively, that Respondent "did not exercise due care" to: 1) ensure he held timely hearings; 2) ensure he provided timely decisions; and 3) adequately manage his cases. The Specifications do not allege either the basis for the "due care" standard nor specific cases wherein Respondent failed to exercise the referenced "due care" -- apart from oblique references to cases contained in various Appendices which were attached to the Complaint.

The allegations contained in Charge II are resolved by virtue of Respondent's Affirmative Defense, *infra.* [*111]

B. Affirmative Defenses

As discussed *supra*, Respondent's Answer affirmatively pled three defenses which he was obliged to prove by a preponderance of the evidence, as per *5 C.F.R. § 1201.56(a)(2)(iii)*.

Respondent's Answer did not plead, nor did Respondent prove, any affirmative defense which might have arisen out of the "*Bono* Settlement." Neither did Respondent plead or prove the Agency unlawfully attempted to impose an unlawful productivity "quota" or "goal" upon him.

Respondent's three discernible affirmative defenses are:

1. Multiplicity of Charges

Paragraphs 24 - 26 of that portion of Respondent's Answer which pled "Defenses" affirmatively allege the Charges in the Complaint are multiplicious. That is, Respondent contends the Charges are unreasonably multiplied. n47

n47 Respondent's Closing Argument, by contrast, asserts that Specifications 1 and 2 of Charge I are multipilcious with one another. He did not plead that as a defense in his Answer. However, the court need not address this latter-day assertion, inasmuch as both Specifications were found **NOT PROVED** on the basis of the evidence.

[*112]

Charges are unreasonably multiplied when they "[arise] out of the same instance of misconduct." *Wusstig v. Dep't of Navy, 49 M.S.P.R. 335, 336 (1991)*. Moreover, charges are deemed to be multiplicious when they are "based on the same misconduct [and] proof of the act of misconduct automatically constitutes proof of both

charges." *Mann v. Dep't of Health and Human Servs., 78 M.S.P.R. 1, 7 (1998)*; *see generally Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)*.

There are two Charges in the Agency's Complaint. The gravamen of Charge I is that during Fiscal Years 2008, 2009 and 2010, Respondent failed to provide timely hearings and/or decisions in sufficient quantities to the public. The gravamen of Charge II is that, during the same time period, Respondent breached a duty of "due care" in the performance of his duties. "Due care" is a tort concept, the breach of which is generally described as negligence. However, the term is not defined in any relevant MSPB case. Congress, by contrast, provided the standard by which both Charges ought to be evaluated:

> [Judges] must conduct themselves in accord with the requirements of [*113] this bill [APA] and with due regard for the rights of all parties as well as the facts, the law and the need for prompt and orderly dispatch of public business. n48

> n48 Administrative Procedure Act-Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 268 (1946).

Charge I and Charge II are based on exactly the same instances of Respondent's behavior during exactly the same time periods. The Congressionally-crafted standard of conduct, *supra*, is the same standard against which both Charges, and Respondent's conduct, might be measured. Proof of the actions/inactions in Charge I is, therefore, automatically, proof of the actions/inactions in Charge II. There are no separate "elements" which distinguish the two Charges, save for a creative linguistic interpretation that Charge I might allege "intentional" conduct and Charge II might allege "negligent" conduct.

Hence, Charge I and Charge II are multiplicious. Accordingly, Respondent's Affirmative Defense is found **PROVED**; thus Charge II is [*114] hereby **DISMISSED.**

2. Agency Action Was Politically-Motivated

Paragraphs 17 - 20 of the portion of Respondent's Answer which pled "Defenses," and his Closing Argument, both affirmatively allege the Complaint against Respondent was politically motivated, in contravention of the holding in *Social Security Administration v. Mills, 73 M.S.P.R. 463 (1996)*, *aff'd 124 F. 3d 228 (Fed. Cir. 1997)*. There, the Board ruled if an Agency engages in either arbitrary, politically-motivated or an intentional interference with an ALJ's decisional independence, the Agency action cannot be supported by good cause. *Id. at 468*.

As Respondent's Closing Argument correctly suggests, the Agency's Complaint raises the specter of a politically-motivated interference with Respondent's decisional independence. n49 Indeed, nine paragraphs of the Agency's Complaint are devoted to the description of Congressional pressures levied upon the Agency by Congress. n50 Agency counsel admitted the Complaint was drawn "[T]o demonstrate the background and history which brings us to this case." (Tr. Vol. I at 74). Yet none of those allegations were proven to [*115] have been caused by Respondent's behavior.

> n49 Respondent's Closing Argument at 49.
>
> n50 The relationship between the Social Security disability program and Congress and the courts has been a long and uneasy one. As the Board chronicled in *Social Security Administration v. Goodman, 19 M.S.P.R. 321 (1984)*, "The Secretary of

> the Department is and has been the defendant in numerous lawsuits seeking to compel OHA to issue decisions in a more expeditious fashion." *Id. at 323. See also Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978)* (holding where delays in hearings exceed bounds of reasonableness, Secretary may be required to act with greater dispatch).

However, Respondent's argument falls short of the required legal standard. It is not enough for him to prove Congress put pressure on the Agency to produce more cases. n51 Nor is it enough for him to prove that the Agency, in turn, sought higher productivity from its ALJ corps. Rather, to prevail on this [*116] defense, Respondent must prove facts which establish an inappropriate political interference with his judicial independence; his decision-making. He did not, beyond conjecture, prove any facts to support the defense he alleged.

> n51 Attachment 3 to Respondent's Closing Argument is a September 13, 2012 Minority Report of the United States Senate's Permanent Subcommittee on Investigations, entitled *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions.* The court assumes Respondent provides this document in support of his argument that the Agency's actions herein were improperly driven by political purpose. Inasmuch as the document was not offered in open court and no evidentiary foundation was laid for its admission, the court assigns the document no probative value. Even if the document were otherwise admissible, it does not establish whether Respondent's judicial decision-making independence was impacted thereby.

Respondent might have called other witnesses or offered other [*117] documentary evidence to support his allegation of a political intrusion upon his independent decision-making, but he did not. In fact, Respondent did not point to one judicial decision he ever made that was adversely impacted by any political action.

Respondent's Closing Argument highlights and criticizes the contents of Agency Exhibit 24, the August 11, 2008, memorandum written by Judge Socaczewsky. n52 The memorandum is, as Respondent suggests, the blueprint for the Agency's actions which resulted in the instant litigation. However, this court sees nothing nefarious in the Agency's internal communication. Indeed, it was highly appropriate for Agency personnel to communicate among themselves concerning this case. The fact that the Agency carefully planned its position relative to the law and Respondent's behavior is not proof of impropriety. Moreover, it was always within Respondent's power to thwart the Agency's "calculations" -- he could have simply scheduled more hearings and produced more dispositions.

> n52 Respondent's Closing Argument at 9 - 12, 13.

[*118]

Respondent's defense case-in-chief focused almost exclusively upon his handling of certain case files and his general judicial methodology and philosophy. He did not establish any facts sufficient to meet his burden of proof in regard to the affirmative defense he pled.

Accordingly, Respondent's Affirmative Defense that the Agency's action was politically-motivated is found **NOT PROVED.**

3. Interference with Judicial Independence

Paragraphs 21 - 23 of Respondent's Answer affirmatively allege that the Charges in the

Complaint interfere with his judicial independence. Respondent reiterates this defense in his Closing Argument.

Social Security Administration v. Mills, 73 M.S.P.R. 463 (1996), precludes a finding of good cause if the Agency's action is found to be either an arbitrary or politically-motivated, or an "attempt to influence decisional independence." *Id. at 468*.

The court in *Nash v. Bowen, 869 F. 2d 675 (2d Cir. 1989)*, found SSA's reasonable efforts to increase judge's production levels were not an infringement upon an ALJ's decisional independence. The court noted with particularity the increasing backlog of [*119] cases requiring disposition necessitated the Agency's efforts to increase productivity. *Id. at 681*.

In *Matter of Chocallo, 1 M.S.P.R. 612, 638 (1978)*, *aff'd*, *1 M.S.P.R. 605 (1980)*, the Board held the defense of judicial independence will not protect an ALJ from a review of a judge's performance of his/her official duties. *See Social Sec. Admin. v. Boham, 38 M.S.P.R. 540 (1988)*; *Social Sec. Admin. v. Manion, 19 M.S.P.R. 298 (1984)*. Thus, the defense of "interference with judicial or decisional independence" requires an ALJ to demonstrate actual, objectively-determinable agency interference with his/her decisional independence.

In his defense case-in-chief, Respondent did not prove any facts to support the defense he alleged. In fact, Respondent candidly admitted that he had never been "directed to issue any particular decision in any case." (Tr. Vol. VII at 1469). Furthermore, Respondent offered no affirmative proof that the Agency's actions to encourage his productivity were either arbitrary or resulted in any impact upon his independent ability to decide the outcome of a case. Nor was any proof [*120] adduced that the Agency ever attempted to inhibit his independent judicial reasoning or decision-making for an improper purpose. The evidence reveals that Respondent never complained that management's efforts to improve his performance were the result, or cause of, an impermissible intrusion into his thought process or his decisional independence.

Rather, as indicated above, Respondent's case-in-chief focused almost exclusively upon his unique handling of certain case files and his general judicial methodology and philosophy. He argues that his personal method of case development is the reason his processing times are affected or that his overall productivity is reduced. n53 This argument runs afoul of two undisputed facts: 1) Respondent's cases were the same or similar to those handled by other judges in the New York City and Region II hearing offices and, 2) the majority of judges in the New York City and Region II hearing offices were able to schedule and decide significantly more cases than Respondent. Clearly, Respondent's performance was sufficiently below a reasonable level of productivity as defined by the productivity of his peers. Neither can he establish that he was more [*121] diligent or painstaking in the handling of his cases than his peers were in theirs.

n53 Respondent's Closing Argument at 46 - 47.

Accordingly, Respondent's Affirmative Defense the Agency's action constituted an interference with judicial independence is found **NOT PROVED.**

The Agency **PROVED** the allegations in Specification 3 and hence, Charge I. Thus, it is incumbent upon the court to examine whether good cause exists to remove Respondent from his position as an Administrative Law Judge with the Social Security Administration, *infra.*

V. SANCTION

Although the Agency seeks Respondent's removal, the Agency's insistence upon removal

"is not due a high degree of deference." *Social Sec. Admin. v. Glover, 23 M.S.P.R. 57, 79 (1984)*.

A. The "Douglas Factors"

A thorough and reflective analysis of Respondent's conduct must be undertaken before any sanction can be imposed. Toward that end, *Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981)*, provides [*122] a variety of considerations, or "factors," appropriate to determining a sanction. n54

n54 *See also Soc. Sec. Admin. v. Steverson, 111 M.S.P.R. 649, 658 (2009)* (holding that the Board will consider the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated).

The federal courts have instructed that the "*Douglas* Factors" are not intended to be an exhaustive list and they are not to be applied mechanically. *Nagel v. Dep't of Health and Human Servs., 707 F. 2d 1384, 1386 (Fed. Cir. 1983)*. Nor has the Board required that every "*Douglas* Factor" be considered. *Social Sec. Admin. v. Davis, 19 M.S.P.R. 279 (1984)*.

Many of the "*Douglas* Factors" include the term "offense," which might be read to mean either misconduct, criminality, or inappropriate or offensive [*123] personal conduct. The evidence in this case does not suggest any "offense" in the sense that term implies misconduct or criminality or inappropriate or offensive personal conduct. n55 However, in this case, this court interprets "offense" broadly to include the conduct described in the Complaint.

n55 The instant case is factually distinguishable from prior, successful removal actions against SSA ALJs that were predicated, in part, upon a finding of personal misconduct. *See* Appendix 1.

The *"Douglas Factors"* include consideration of the following:

1. Nature and Seriousness of the "Offense"

The Agency is obliged to produce a reasonable number of timely and legally sufficient disability dispositions per year. This is particularly true in light of the increasing demands placed upon the Agency by the public and Congress. Thus, the fact that Respondent failed, repeatedly, in his obligation to produce a reasonable quantity of hearings and case dispositions (despite his Agency's needs) is a crucial [*124] consideration in fixing an appropriate sanction. The court agrees with Chief Judge Bice who opined that if all SSA ALJs issued the same numbers of dispositions per year as did Respondent, SSA disability operations would essentially "grind to a halt." (Tr. Vol. IV at 1047).

2. Respondent's Position and its Prominence

The position of ALJ is an important one in the federal government, vested with significant judicial and professional esteem and responsibility. *Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)*; *Ramspeck v. Federal Trial Exam'rs. Conf., 345 U.S. 128, 73 S. Ct. 570, 97 L. Ed. 872 (1953)*; *Social Sec. Admin. v. Carter, 35 M.S.P.R. 466, 482 (1985)*. This is a keystone consideration in determining an appropriate sanction and must not be disregarded. Respondent, here, is a professional engaged in a highly-respected position of authority. He has a duty to perform at a level commensurate with his agency's reasonable production expectations.

3. Past Disciplinary Record and Past Work Record

Judge Sochaczewsky testified he adhered to a policy of progressive discipline. n56 (Tr. Vol. I at 269 - 270). It is noteworthy the Agency had never imposed lesser forms [*125] of formal discipline upon Respondent throughout the entirety of his nearly fifteen-year career with the Agency. (Tr. Vol. I at 90, 142; Vol. II at 387; Vol. III at 838).

n56 At least one SSA ALJ, Judge Brian Lemoine of the White Plains, New York hearing office, believes that "progressive discipline" is employed as a "general managerial philosophy" by the Agency. (Tr. Vol. III at 736 - 737).

Certainly, there is no requirement "progressive discipline" be employed for ALJs as there might be for other federal employees -- but the concept is apt, particularly in light of the "*Douglas* Factors" and Judge Sochaczewsky's testimony in that regard. Thus, the absence of prior formal discipline in Respondent's case is noteworthy and weighs in his favor. n57

n57 Although Agency Exhibit 11, a February 14, 2007, "Memorandum" to Respondent, contained an expression of the Agency's concerns regarding Respondent's prior performance, the document does not constitute a formal disciplinary measure.

[*126]

However, the series of performance "improvement meetings," which might be regarded as informal discipline, resulted in no improvement of performance and cannot be ignored.

4. Effect of the Offense on Respondent's Performance

The Board has ruled that good cause to remove an ALJ may be established even absent a showing the ALJ engaged in personal misconduct. *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 467 (1996)*. Thus a judge's inability or unwillingness to do his/her job can form the basis for a removal action. Yet, this court can find no prior MSPB case in which a removal action was been sustained by the Board solely for an ALJ's slow performance or low productivity. *See* Appendix 1.

Although not fully analogous to the instant case, *Mills* recognizes an ALJ's long-term absence from his duties, with no realistic chance of return, coupled with the agency's compelling need for productivity, can form the basis for a removal action. Applying *Mills* to this case, Respondent's simple inability or incapacity to produce a meaningful volume of work, with no realistic chance for rehabilitation, coupled with the Agency's compelling need for productivity, [*127] can also form the basis for a removal action. Thus, regardless of cause, be it physical incapacity or simple inability or unwillingness, the result is the same. *See Ward v. General Servs. Admin., 28 M.S.P.R. 207, 208 (1985)*.

5. Notoriety of the Offense

Although the instant Complaint arose amidst an ongoing and public clamor between Congress and the Social Security Administration, there is no evidence whatsoever that Respondent is personally responsible for the scrutiny. Moreover, it is unlikely that Respondent's disposition productivity is widely known outside of the Agency or the New York disability bar.

6. Potential for Rehabilitation

In his Answer, Respondent pled "his assurances that he will work to bring his production numbers to an acceptable level." The court reads this as an admission that the Agency's claims about Respondent's deficient productivity are correct. Moreover, the testimony presented at trial reveals Respondent gave the same repeated assurances to his superiors, *i.e.*,

he would improve his productivity, but to no apparent avail. (Tr. Vol. I at 268; Vol. II at 388; Agency Ex. 16).

At the same time, this court cannot ignore the [*128] unprecedented and extraordinary "improvement meetings" Judge Wright conducted with Respondent. Despite the Agency's efforts in 2008, Respondent's productivity did not improve -- it got worse. (Agency Ex. 36, 37, 38). Hence, Respondent has demonstrated he lacks potential for rehabilitation.

7. Mitigating Circumstances

Respondent's witness, Judge Kenneth G. Levin, described his colleague as "diligent, very intelligent, well-informed, a kind man and very bright." (Tr. Vol. VII at 1634). The Agency's witness, Judge Mark Hecht, Hearing Office Chief ALJ for the New York City office described Respondent as a "hard worker." (Tr. Vol. III at 838). To that, this court adds that Respondent presents himself as dignified, articulate and meticulous.

The gravamen of Respondent's Closing Argument is that he was so painstaking in his prehearing case development and was so attentive to the due process interests of the claimants before him, that he was unable to schedule enough hearings or produce enough dispositions to satisfy his Agency. However, in the vernacular of Social Security disability hearings, Respondent is simply not able to work at a competitive pace, relative to his peers. In [*129] this regard, *Mills* supports removal of an ALJ on the grounds of incapacity to perform the work required by the employing agency.

8. Was Respondent on Notice of Any Rules or Conduct?

The court notes with particularity the February 14, 2007, letter from former New York City Hearing Office Chief ALJ Newton Greenberg to Respondent demanding higher productivity. Thereafter, the Agency repeatedly communicated its needs for increased production and timeliness to Respondent through its nearly six-month long "improvement" process from January through June, 2008.

The Agency's efforts to improve Respondent's productivity were extraordinary and clearly contemplated to provide Respondent with notice of its expectations. The Agency made its lawful expectations clearly and reasonably known to the Respondent. It is, therefore, remarkable that Respondent did not respond in a meaningful way to his employer's expectations. In fact, Respondent admitted that even if he were given a full complement of cases, he could not (or would not) meet his Agency's lawful productivity expectations.

9. Will Other Sanctions Deter Future Conduct?

Respondent was repeatedly given notice of his Agency's [*130] production expectations. In spite of this, Respondent's productivity declined after the series of "performance improvement" meetings he attended with Judge Wright from January through June, 2008. Respondent was clearly given both adequate advanced notice of his Agency's expectations and three years to improve his performance.

Most damaging to his cause is Respondent's own forthright admission that even if he were presently given a full monthly/yearly complement of cases, he would still be unlikely to produce an adequate number of dispositions. (*See* Tr. Vol. VII at 1619 - 1620). Hence, it appears lesser remedial efforts, such as a reprimand or a suspension, would be of no avail.

B. Removal

The Social Security Administration demonstrated extraordinary patience and expended extraordinary effort to assist Respondent Mark Shapiro in the performance of his duties.

Good cause exists to remove Respondent Mark Shapiro from service as a SSA ALJ because, despite the Agency's rehabilitative efforts, he failed to acceptably manage his cases. During each of Fiscal Years 2008, 2009, and 2010, he failed to acceptably manage his cases

by failing to schedule (or conduct) an acceptable [*131] number of hearings and by failing to render an acceptable number of disability case dispositions.

An acceptable number of hearings is, in this case, defined by a comparison of the low numbers of hearings Respondent scheduled/conducted, relative to the significantly higher numbers of hearings scheduled/conducted by a majority of other ALJs in both the SSA's New York City and New York State, New Jersey and Puerto Rico Region hearing offices in the same Fiscal Years.

Likewise, an acceptable number of dispositions is, in this case, defined by a comparison of the low numbers of dispositions Respondent rendered, relative to the significantly higher numbers of dispositions rendered by a majority of other ALJs in both the SSA's New York City and New York State, New Jersey and Puerto Rico Region hearing offices in the same Fiscal Years.

In this regard, Respondent demonstrated that he is unable to perform his assigned duties in a manner commensurate with a majority of other judges in either the SSA's New York City or New York State, New Jersey and Puerto Rico Region. Thus, Respondent's inability to perform his duties constitutes a detriment to the SSA and the public, and is a burden [*132] which the Agency cannot endure. *Social Sec. Admin. v. Mills, 73 M.S.P.R. 463, 468 (1984)*; *Social Sec. Admin. v. Anyel, 58 M.S.P.R. 261, 267 (1984)*.

VI. DECISION

Given the totality of the circumstances, Respondent's own testimony, the administrative record as a whole and with due regard to the *"Douglas Factors,"* this court finds good cause exists to sustain the Respondent's **REMOVAL** from service as an Administrative Law Judge with the Social Security Administration.

Done and dated this the 18th day of October, 2012
At New Orleans, Louisiana

Hon. Bruce Tucker Smith

United States Administrative Law Judge

ATTACHMENT A -- EXHIBIT LIST

(Exhibits not sequentially numbered)

Agency's Exhibits

1. 2-page letter 04/18/07
2. 3-page letter 10/31/07
3. 3-page letter 12/19/07
4. 10-page ALJ Position Description
10. 2-page letter 07/21/06 NOT ADMITTED
11. 3-page "Memorandum" dated 02/14/07
13. 2 pages: 1 page e-mail 01/9/08; 1 page "Memorandum" dated 01/09/08
14. 30-pages: e-mail, handwritten notes, computer-generated documents
15. 30-pages: e-mail, handwritten notes, computer-generated [*133] documents
16. 29-pages: e-mail, typewritten notes, computer-generated documents
17. 7 pages: e-mail, handwritten notes, computer-generated documents
18. 6 pages: e-mail, handwritten notes, computer-generated documents
19. 5 pages: e-mail, handwritten notes, computer-generated documents
20. 19 pages: Pages 2 & 3, e-mail, ADMITTED. Pages 1, 4 - 19 NOT ADMITTED

21. 2 pages: e-mail 07/01/02
22. 215 pages: e-mail 01/15/08 and various documents regarding Respondent's cases
24. 256 pages: Memo 08/11/08 to Frank Cristaudo with numerous attachments
25. 292 pages: ALJ Shapiro Cases, summaries, e-mail
28. 3 pages: CPMS codes
32. 1 page: bar graph NOT ADMITTED
34. 436 pages: Respondent's docket information
36. 3 pages: pie charts
37. 1 page: graph
38. 1 page: graph
39. 1 page: bar graph
40. 1 page: graph
41. 7 pages: Zabronsky curriculum vitae
42. 1 page: e-mail 02/23/10
43. 10 pages: e-mail 12/17/09

Respondent's Exhibits

6. 1 page: Hallex I-2-1-1
7. 2 pages: Hallex I-2-5-1
8. 1 page: Hallex I-2-5-34
9. 1 page: Hallex I-2-5-50
39. 1 page: e-mail 05/18/10
42. 1 page: e-mail 08/25/10
43. 1 page: e-mail 08/02/10
46. 1 page ODAR Memo 09/28/07 NOT ADMITTED
53. [*134] 2 pages: e-mail 04/23/07
57. 4 pages: ODAR tables of cases NOT ADMITTED
71. 2 pages: e-mail 06/21/07
72. 3 pages: e-mail 05/20/10
73. 1 page: e-mail 05/25/10
74. 1 page: e-mail 07/22/10
75. 1 page: e-mail 09/17/10
76. 1 page: e-mail 09/23/10
77. 10 pages: 12/07/11 computer data, e-mail
78. 3 pages: Bice memo 06/03/11
79. 1 page: Respondent's CV
80. 1 page: Hallex I-2-8-1
82. 741 pages: Malave case file
83. 57 pages: Ighoumuaye case file
84. 154 pages: Thomas case file
85. 55 pages: Vicente case file
86. 86 pages: Rivera case file
87. 65 pages: Melecio case file
88. 48 pages: Stover case file
89. 58 pages: Beato case file
90. 34 pages: Tatis case file
91. 1 page: handwritten notes 05/01/08

ATTACHMENT B: NOTICE TO RESPONDENT

This initial decision will become final on November 22, 2012, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 [*135] days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your

petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW.

Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. [*136] A petition for review submitted by electronic filing must comply with the requirements of *5 C.F.R. § 1201.14*, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5C.F.R. Part 1201, Appendix 4) to support your claim. [*137] The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See 5 C.F.R. § 1201.4(j)*. If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See 5 C.F.R. § 1201.14(j)(1)*.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals

for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, [*138] you should refer to the federal law that gives you this right. It is found in Title *5 of the United States Code, section 7703* (*5 U.S.C. § 7703*). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.USCourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO PETITIONER

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX:

APPENDIX 1 -- TABLE OF MSPB CASES

Case Name and Cite	Underlying Conduct/Offense	Sanction sought by SSA	MSPB Ruling or Presiding ALJ's Decision	Underlying Conduct/Offense	MSPB / Appellate Court Action	Sanction sought by SSA
McEachern v. Macy, *233 F. Supp. 516* (W.D.S.C. 1964) Brought by the Civil Service Commission before they became the MSPB.	Financial irresponsibility (indebtedness in many personal accounts) which brought discredit on the Hearing Office, Department and the United States.	Removal.	SSA, DHHS v. Asherberry, *15 M.S.P.R. 320* (1983).	Refusing to accept assignment to a particular geographical area.	General public knew the SSA employee and retained a certain responsible position who was neglectful of his personal financial obligations.	30 Day Suspension.
Matter of Spielman, *1 M.S.P.R. 54, 1 M.S.P.B. 50* (1979).	Falsifying statements regarding his experience to obtain appointments at a higher grade level.	60 Day Suspension.	SSA, DHHS v. Manion, *19 M.S.P.R. 208* (1984).	Insubordinately refusing to hear cases until certain administrative matters were resolved.	Removal.	30 Day Suspension.
Matter of Chocallo, *2 M.S.P.B. 20, 1 M.S.P.R. 605* (1980).	(1) Disobedience in conducting a hearing in a case which had been removed from her jurisdiction. (2) Refusal to obey an order directing her to make available the files in said case (3) Lack of judicial temperament as well as bias and partiality displayed in the course of three hearings before her. Insubordinate in	Removal.	SSA, DHHS v. Davis, *19 M.S.P.R. 279* (1984).	Lewd and lascivious behavior toward female employees disrupted the workplace.	60 Day Suspension.	Removal.
			DHHS v. Haley, *20 M.S.P.R. 365* (1984).	Used government-owned passenger vehicle for other than official purposes. No other details provided.		30 Day Suspension
			SSA, DHHS v. Glover, *23 M.S.P.R. 57* (1984).	(1) Inappropriate and disruptive behavior by failing to show proper courtesy and consideration in dealing with coworkers. (2) Abuse of authority by resentfully including a hearing assistant's name in the body of an opinion he had written.	Removal.	Removal.
				Low productivity in		

Case Name and Cite	Underlying Conduct/Offense	Sanction sought by SSA	Case Name and Cite	Presiding ALJ's Decision	MSPB or Highest Appellate Court Decision	Sanction sought by SSA
SSA, DHHS v. Goodman, *19 M.S.P.R. 321* (1984).	producing cases due to methodical manner in handling cases. Alleged failure to meet minimally acceptable level of productivity.	Removal.	SSA, DHHS v. Brennan, *27 M.S.P.R. 242* (1985).	Removal.	Underlying Conduct/Offense because of inefficiency and neglect of duty. (2) Pattern of disruptive, insubordinate, obstructionist, and dilatory conduct in performance of official duties.	Removal.
SSA, DHHS v. Balaban, *20 M.S.P.R. 675* (1984).	Low productivity in producing cases. Similar to Goodman and no other details provided.	Removal.	SSA, DHHS v. Carter, *35 M.S.P.R. 485* (1987).	No disciplinary action taken. SSA failed to establish good cause relying on Goodman and comparative evidence.	ALJ behaved offensively, indecently, in an intimidating, sexually harassing manner toward female coworkers, due to relying on Goodman and comparative evidence.	No disciplinary action taken. SSA failed to establish good cause due to relying on Goodman and comparative evidence.	120 Day Suspension.
SSA, DHHS v. Givens, *27 M.S.P.R. 360* (1985).	Used government owned vehicle for other than official purposes and allowed vehicle to be driven by an unauthorized person who drove carelessly in a manner to reflect adversely on the government.	30 Day Suspension.	SSA v. Boham, *38 M.S.P.R. 540* (1988)	Settlement resulting in 14 Day Suspension.	(1) Refusal to schedule assigned cases (2) Refusal to travel in order to hear docket of assigned cases, twice refusing to schedule and hear a docket of assigned cases.	Settlement resulting in 14 Day Suspension.	Suspension for 30 days on the first refusal then subsequent suspension for 45 days on the second refusal.
SSA, DHHS v. Pucci, *27 M.S.P.R. 358* (1985).	Used government office for commercial display and sale of jewelry and clothing. (1) Failure to meet a minimally acceptable level of productivity	14 Day Suspension.		Settlement resulting in 7 Day Suspension.	(1) Insubordination, disruptive, and unprofessional actions and refusing to open correspondence in defiance of administrative authority. (2) Malicious use of the	Settlement resulting in 7 Day Suspension.	

Case Name and Cite	Underlying Conduct/Offense	Sanction sought by SSA	Case Name and Cite	Presiding ALJ's Decision	Underlying Conduct/Offense	MSPB or Highest Appellate Court Decision	Sanction sought by SSA
SSA v. Burris, *39 M.S.P.R. 51* (1988).	HHS grievance procedures to attack supervisors and other management officials. (3) Refusal to following written instruction issued by CALJ directing him not to use intemperate language towards administrative supervisors. (4) Misuse of official mail envelopes.	Removal.	SSA v. Liebling, *71 M.S.P.R. 465* (1996).	Removal.	Failure to adequately extend to pro se claimant the right to representation during hearing. Noncompliance with official agency time and attendance requirements because of excessive tardiness.	Reversed by a weighing the Douglas factors	30 Day Suspension.
SSA v. Whittlesey, *59 M.S.P.R. 684* (1993).	Unapproved outside practice of law, failure to comply with time and attendance requirements, misuse of OHA and employees in furtherance of private legal matters, and violation of settlement agreement for previous disciplinary action of unauthorized practice of law.	Removal.	SSA v. Biesman, *73 M.S.P.R. 82* (1997)	Removal.	Inactive service (due to injury) with an increasing department workload and likelihood that ALJs would never return to work due to their disabilities. Alleged off-duty misconduct. No further details provided.	Removal.	Removal. Not mentioned but given agreement, at least 15 Day
SSA v. Anyel, *66 M.S.P.R. 328* (1995).	Failed to demonstrate acceptable level of professional competence by having high rate of significant adjudicatory error.	Removal.	SSA v. Dantoni, *77 M.S.P.R. 516* (1998).	90 Day Suspension	Forging DCALJ's name, title, and duty station on a variety of documents for product information resulting in over fifteen hundred pieces of mail sent to DCARM that Characterized as childish and diverted staff attention. Demanded and resulting Settlement Agreement criticized as	Removal.	Removal.

Case Name and Cite	Underlying Conduct/Offense	Sanction sought by SSA	Case Name and Cite	Presiding ALJ's Decision	MSPB or Highest Appellate Court Decision	Underlying Conduct/Offense	Sanction sought by SSA
	harassing					agency letterhead, and agency equipment). (4) Failure to follow agency policy (use of business address to send and receive personal correspondence).	
SSA v. Carr, *78 M.S.P.R. 313* (1998).	Persistent use of vulgar and profane language, demeaning comments, sexual harassment, and ridicule. Injured a co-worker by closing a door on her.	Removal.		Removal. And considered prior reprimand, though explicitly not characterized as discipline, in determining penalty.			
	Interference with efficient and effective agency operations.		SSA v. Hoppenfeld, *2009 M.S.P.B. LEXIS 462* (Jan. 30, 2009).			Refusal to attend a meeting after being directed to by her supervisor. Failure to follow a supervisor's direct order.	5 Day Suspension.
SSA v. Harty, *96 M.S.P.R. 65* (2004)	Engaging in unprofessional and injudicious conduct. Making unprofessional or injudicious statements to agency employees.	Removal.		Removal.		Removal. Domestic violence. Physical altercation with domestic partner and child involving neighbors and police.	
			SSA v. Long, *113 M.S.P.R. 190, 2010 M.S.P.B. 19* (2010).				Removal.
SSA v. Steverson, *111 M.S.P.R. 649, 2009 M.S.P.B. 143* (2009).	(1) Conduct unbecoming of an ALJ (use of agency letterhead for personal correspondence). (2) Misuse of government property (viewed and stored sexually explicit material on his work computer). (3) Lack of Candor (provided misleading and incomplete responses when questioned regarding his misuse of official title,	Removal.		35 Day Suspension.		(1) Non-productive in that his cases were not being heard or decided and his hearing dockets were not being scheduled (wasn't processing cases in a timely fashion). (2) Taking an extremely long time to render cases before the Board.	Removal on Nov. 14, 2008 for failure to again follow subsequent directives after reprimand. Complaint for 14 day suspension
			SSA V. Abrams, *2010 M.S.P.B. LEXIS 2044* (Mar. 29, 2010).			Reversing the Douglas factors. hearing them as well as an extremely long	

Case Name and Cite	Underlying Conduct/Offense	Sanction sought by SSA	Presiding ALJ's Decision	MSPB or Highest Appellate Court Decision	Sanction sought by SSA
	time deciding cases. (3) Abrams was issued directives to move cases by a certain date or explain why they weren't moved and subsequently disobeyed directives multiple times. (4) Placed a cigar in his mouth and kicked feet up on desk during hearing.	for first failure to follow directive.	*LEXIS 755* (Feb. 7, 2012) Complaint seeking 30 day suspension for second failure to follow directive.	with representatives in the office of a US Senator. (3) Refusing to cooperate in an investigation. (4) Failure to follow SSA's flexiplace [*139] Court of Appeals denoted the Abruzzo disposition as nonprecedential. The Federal Circuit designates orders or opinions as nonprecedential when the issuing panel determines it not adding significantly to the body of law. *Fed. Cir. R. 32*. Pursuant to the *Federal Circuit Rules Rule 32.1(c)*, "[p]arties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007.	Suspension.
SSA v. Abruzzo, *2010 M.S.P.B. LEXIS 5624* (Sept. 29, 2010).	(1) Failure to follow a direct order to stop certain communications and repeatedly failed to follow an order to treat his coworkers and the public with courtesy and to conduct himself with propriety. Specifically, he called co-workers neo-Nazis. (2) Conduct unbecoming of an ALJ. He painted religious symbols above doors of co-workers and spoke in tongues.	Removal.	Removal.	Removal. (Fed. Cir.)<1>	
SSA v. White, *2012 M.S.P.B.*	(1) Improperly reviewed personally identifiable information in the file of a US Senator. (2) Yelled and was argumentative	45 Day	45 Day	No record; ALJ decision	