UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DAVID NOBLE, JR.,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DC-0752-11-0880-I-1

DATE: September 27, 2011

ORDER AND SUMMARY OF PREHEARING CONFERENCE

I conducted a telephonic status conference with the parties on September 26, 2011. The following matters were discussed:

1. **SETTLEMENT**: The parties indicated they have explored settlement, and there is a possibility that they may come to an agreement. They are advised that, if they reach a settlement, the Board retains jurisdiction to enforce compliance with the agreement if it is made part of the record, and if it appears that the agreement is legal on its face, was freely reached by the parties, and they understood its terms. The agency's representative was willing to waive the prohibition against *ex parte* communications concerning settlement matters, but the appellant declined to do so.

2. **ISSUES**: The following issues are in dispute in this appeal and all others are precluded:[1]

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[1] I rejected the appellant's request to include an additional issue that he was subjected to a constructive suspension during the same time he was charged as being AWOL. I informed the parties that the Board has jurisdiction over the appeal because the appellant was subjected to an adverse action (a removal). I explained that adding the issue of a constructive suspension would place the burden of proving jurisdiction on the

A. Whether the agency met its burden of proving its charge of "Unsatisfactory Attendance/Absence Without Official Leave/Permission (AWOL)."

B. Whether the agency met its burden of proving that the penalty of removal was reasonable and promoted the efficiency of the service under the circumstances of this case.

C. Whether the appellant met his burden of proving that the agency, in removing him, committed harmful procedural error by violating provisions of the collective bargaining agreement.

D. Whether the appellant met his burden of proving that the agency's decision to remove him was not in accordance with law because he was in an approved leave without pay status during the time the agency charged him as being AWOL.

E. Whether the appellant can prove that the agency, prior to removing him, subjected him to intolerable working conditions.[2]

3. **BURDENS OF PROOF**: I discussed the various burdens of proof and advised the parties that the agency must prove by a preponderance of the evidence the merits of the charge. Preponderance of the evidence is defined by regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The agency also must prove that the penalty imposed was reasonable.

In addition, the Board will not sustain the agency action if the appellant establishes one of the following: (1) harmful error in the application of the agency's procedures in arriving at such decision; (2) that the decision was based

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appellant as to that issue, which is unnecessary given that he was subjected to an adverse action appealable under Chapter 75 (a removal). I further advised the parties that, if the agency fails to prove the absence without leave charge, then the removal action will not be sustained and thus, there will be no need to decide if the appellant was subjected to a constructive suspension.

[2] This issue may be stricken, depending upon what the parties argue in their responses to my Order (see No. 5, below) concerning the prior adjudication of issues and/or matters being barred by the law of the case doctrine and the doctrines of collateral estoppel and/or res judicata.

on any prohibited personnel practice described in 5 U.S.C. § 2302(b); or (3) that the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2). The appellant bears the burden of proving these affirmative defenses by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii).

As to the appellant's allegations of harmful error, he is advised that harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed. Reversible harmful error is error by the agency in the application of its procedures which, in the absence or cure of the error, would have been likely to cause the agency to reach a conclusion different from the one reached. The burden is on the appellant to show the prejudice to his case. 5 C.F.R. § 1201.56(c)(3); *Stephen v. Dep't of the Air Force*, 47 M.S.P.R. 672 (1991).

I **ORDER** the appellant to identify: (1) the specific procedures, laws, rules, or regulations he believes the agency violated when it committed harmful error. I also **ORDER** the appellant to provide a copy of these specific procedures, laws, rules, or regulations. This evidence must be received by the Board and the agency within 10 days of the date of this Order. If the agency responds to the appellant's submission on this affirmative defense, it must be received by the Board and the appellant within 15 days of the date of this Order.

As to the appellant's other affirmative defense, he is advised that, to establish a violation of law, he has the burden to show that the action is not in accordance with law. *See* *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991). An agency's decision is subject to reversal under the doctrine of "not in accordance with law" only where the decision is unlawful in its entirety and with no legal justification. *See* *Handy v. U.S. Postal Service*, 754 F.2d 335, 338 (Fed. Cir. 1985).

I **ORDER** the appellant to identify precisely why he believes: (1) the agency's decision is unlawful in its entirety; and (2) why it has no legal justification. This evidence must be received by the Board and the agency within 10 days of the date of this Order. If the agency responds to the appellant's

submission on this affirmative defense, it must be received by the Board and the appellant within 15 days of the date of this Order.

4. **STIPULATIONS**: The parties did not stipulate to any matters.

5. **ORDER ON COLLATERAL ESTOPPEL/ RES JUDICATA**: During the prehearing conference, the agency contended that it appears, based on arguments raised in the appellant's submissions, that he is trying to relitigate issues and/or matters previously adjudicated by the Board.[3] *See Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1 (Initial Decision, Oct. 21, 2005) (Administrative Judge Barbara S. Mintz dismissed the appellant's appeal of the agency's action placing him on enforced leave, finding that he lacked a legally cognizable interest in the outcome of the appeal after the suspension was rescinded and he was returned to the status quo ante); *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-2 (Initial Decision, May 1, 2006) (Administrative Judge Barbara S. Mintz dismissed as moot the appellant's refiled appeal of the agency's action placing him on enforced leave); *Noble* v. *U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1 (Initial Decision, Jan. 12, 2010) (Administrative Judge Thomas P. Cook reversed the agency's imposition of a 21-day suspension, finding that the agency failed to provide the appellant with minimum due process before suspending him); *Noble* v. *U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-C-1 (Initial Decision, Jan. 11, 2011) (Administrative Judge Michelle M. Hudson denied the appellant's petition for enforcement, finding that the agency submitted

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[3] In particular, these issues and/or matters could be described as one or more of the following: (1) intolerable working conditions; (2) adjustment of routes; (3) union's handling of the appellant's grievances and blocking his access to grievance procedures; (4) threats to and harassment of the appellant; (5) the July 29, 2010 suspension; (6) the April 28, 2011 removal action; (7) the August 12, 2010 PDI; (8) overtime; (9) health benefits; (10) annual and sick leave; and (11) holidays. The parties are expected to address each and every one of these issues and/or matters so that I can ascertain which of these issues are properly before the Board in the instant appeal.

documentation showing that his health benefits covering the period of his suspension at issue in the appeal were restored).

Under the circumstances, it appears that the Board would be barred from relitigating some or all of these issues and/or matters under the law of the case doctrine, the doctrine of collateral estoppel, or the doctrine of res judicata. The law of the case doctrine refers to the practice of courts in refusing to reopen what has been decided and of following a prior decision in an appeal of the same case. The doctrine applies not only to matters which were explicitly decided in a prior decision, but also to matters decided by necessary implication. *See Smith International Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1577 (Fed. Cir.), *cert. denied*, 474 U.S. 827 (1985); *see also State Industries, Inc. v. Mor-Flo Industries, Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991). Consistency derived from application of the law of the case doctrine avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). The law of the case doctrine is a widely-accepted rule that "furthers the important value of procedural efficiency … and prevents the 'bizarre result' that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who argued and lost.'" *Id.* (citing *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984)). The law of the case doctrine has been applied to administrative agency proceedings, such as those found here.

There are three recognized exceptions to application of the law of the case doctrine: the availability of new and substantially different evidence, a contrary decision of law by controlling authority which is applicable to the question at issue, or a showing that the prior decision was clearly erroneous and would work a manifest injustice. *See Smith International, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1576 (Fed. Cir.), *cert. denied*, 474 U.S. 827 (1985). *See also Piambino v.*

Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied sub nom., Hoffman v. Sylva*, 476 U.S. 1169 (1986). Courts have consistently held that disregarding the law of the case under the manifest injustice standard requires "exceptional circumstances." *See, e.g., Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1083-84 (D.C. Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1181 (1985). The standard for invoking the manifest injustice exception is a stringent one which "'requires a strong showing of clear error' that 'convinces' the court that the 'prior decision was incorrect.'" *Smith International*, 759 F.2d at 1579 (quoting *Northern Helex Co. v. United States*, 225 Ct. Cl. 194, 634 F.2d 557, 562 (1980)).

Next, the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) both concern the preclusive effects of a prior adjudication and are based on similar policy concerns—to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 336-37 (1995) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. In determining if a prior judgment was rendered by a forum with competent jurisdiction under the doctrine of res judicata, the subsequent forum's scope of review is generally limited to ascertaining whether the issue of jurisdiction has been fully and fairly litigated and finally decided in the first forum. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995).

In addition, the doctrine of collateral estoppel states that a claim or issue may be precluded from litigation in a proceeding if: (1) the issue is identical to that involved in a prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *See Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, 124 (2008); *Fisher v. U.S. Postal Service*, 100 M.S.P.R. 94, 100 (2005), *aff'd*, 184 F. App'x. 969 (Fed. Cir. 2006).

Further, "unlike res judicata, collateral estoppel may bar a party from relitigating an issue in a second action even when the prior appeal was dismissed for lack of subject matter jurisdiction." *Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, 697 (2003). An issue is considered "actually litigated" when it was "properly raised by the pleadings, was submitted for determination, and was determined." *Id.*, at 698, citing *Banner v. United States*, 238 F.3d 1348, 1354-55 (Fed. Cir. 2001) (mere disagreement with a legal ruling does not mean that a party was denied a 'full and fair' hearing, such an argument would lead to the absurd result of precluding the use of collateral estoppel whenever the prior litigation originated from dismissal of a cause of action based on a legal ruling). The last element, that the party be fully represented, is satisfied even if an appellant represents himself. *See Fisher v. Department of Defense*, 64 M.S.P.R. 509, 515 (1994) (this requirement does not refer to whether a party was represented by an attorney, but rather, whether the party's interests were fully represented in the action). A dismissal for lack of jurisdiction does not preclude a second action on the same claim under the doctrine of res judicata; a second action in the same forum would generally be precluded by the doctrine of collateral estoppel, which would preclude relitigation of the same jurisdictional issue. *Peartree*, 66 M.S.P.R. at 338.

The appellant has the burden of proving that some or all of the issues and/or matters in this appeal are not barred by the law of the case doctrine, the doctrine of collateral estoppel, or res judicata – and that these doctrines do not preclude the Board from re-litigating certain issues raised by him in this appeal. 5 C.F.R. § 1201.56(a)(2). Therefore, I **ORDER** the appellant to file argument and evidence on the issues and/or matters identified above, to be received within 10 days of the date of this Order. The agency is directed to respond to this Order, so that its reply is received within 15 days of the date of this Order.

5. **WITNESSES**: During the prehearing conference, the appellant continually questioned my authority to narrow the list of his 19 proposed witnesses to only those I deemed appropriate. The appellant is mistaken in his belief that I lack the authority to do this. *See Heelen v. Department of Commerce*, 75 M.S.P.R. 366, 368-69 (1997); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (an administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious). The appellant also alleged that I did not have sufficient information to make a determination on which to base whether his proposed witnesses would provide relevant, material, and nonduplicative testimony. I agree with the appellant, but note that my biggest hindrance in this endeavor was the general, vague, and cryptic written proffers he supplied in his prehearing submissions. Nothing in the appellant's written proffers for his numerous witnesses showed that any of them (other than the appellant himself) would be able to provide relevant and material testimony at the hearing. For instance, he wrote that his witnesses would testify about "the 7/5/11 removal action," "adjustment of routes," "health benefits," "annual and sick leave," and "holidays." Other than the general comment about "the 7/5/11 removal action," most of these matters do not seem pertinent to the delineated issues before me in this case.

In his pleading dated September 26, 2011, the appellant complained that I "cut [him] off" as he was beginning to explain the relevancy or materiality of his witnesses. Actually, much of the prehearing conference was spent on the appellant's extensive discussion of his witnesses and why I should approve them. At times, I did interrupt him when he repeatedly claimed that I lacked the authority to deny any of his witnesses and that "there was no sound legal basis for excluding any of them," as he stated in his September 26th pleading. As noted above, the appellant is incorrect in maintaining that I cannot deny witnesses that I deem unsuitable for these proceedings. The appellant also asserted at the prehearing conference and in his September 26th pleading that if I struck any of his witnesses, he would make an offer of proof as to them. I encourage the appellant to use whatever avenues of redress he believes are available to him, including making offers of proof. *See, e.g., Lemelson v. United States*, 752 F.2d 1538, ¶ 20 (Fed. Cir. 1985).

In spite of the difficulties mentioned above, I was able to make the following rulings on witnesses (the underlined names are those witnesses called by both parties who were approved):

> ***For the agency***, I approved: (1) Antonio Jones; (2) William French; (3) Sterling Colter; and (4) Paris R. Washington.
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> ***For the appellant***, I approved: (1) the appellant; (2) Antonio Jones; (3) William French; (4) Sterling Colter; (5) Paris R. Washington; (6) Leon Tucker; and (7) Louis Minor.
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> I instructed the appellant to pick three out of the following seven witnesses, all of whom – in addition to the appellant and another witness – were all going to testify to the same or similar matters: (1) Alton Branson; (2) Chuck Clark; (3) Singh Nirlep Sidhu; (4) Justin Batista; (5) Brandon Toatley; (6) Randy Williams; and (7) Terence Seawright. I notified the appellant that his list of three witnesses must be received by the Board and the agency no later than 5:00 p.m. Eastern on September 26, 2011. I also told the appellant that, if he did not submit his list of three witnesses by the deadline, then I would choose the three witnesses for him. I also informed the appellant that the deadline for furnishing this list would not be extended, absent exigent circumstances. At 3:17 p.m., I received a copy of

> the appellant's submission. He claimed that he was entitled to all of his requested witnesses and he rejected my offer to allow him to select three witnesses. Because the appellant refused to pick the three witnesses, I will select them for him. The three witnesses from this group I am approving are: (1) Alton Branson; (2) Singh Nirlep Sidhu; and (3) Brandon Toatley. The other four witnesses, (1) Chuck Clark; (2) Justin Batista; (3) Randy Williams; and (4) Terence Seawright are denied because their proffered testimony would be either irrelevant, immaterial, or unduly repetitious of other witnesses' testimony.
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> In addition, I denied Tim Dowdy and Chester Maddox as witnesses because their proffered testimony would be either irrelevant, immaterial, or unduly repetitious of other witnesses' testimony.
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> Finally, I denied Brian Fletcher, Bright Ofuso, and Barbara D. Myers because they would be testifying concerning issues and/or matters that are prohibited from being relitigated by the Board under the law of the case doctrine, or the doctrines of collateral estoppel and/or *res judicata*.[4]

6. **MOTION TO POSTPONE THE HEARING**: On September 19, 2011, the appellant filed a motion to postpone the hearing scheduled for September 28, 2011. At the prehearing conference, the agency's representative said the agency did not object to the appellant's request. The appellant's motion is GRANTED. The hearing is rescheduled for October 19, 2011, beginning at 9:30 a.m. Eastern.

After I told the parties at the prehearing conference that I would grant the appellant's motion, the appellant objected to my scheduling the hearing on a date during the month of October. He explained that he may need additional time to complete discovery and so he wanted the hearing date scheduled even later (in his motion, he asked that the hearing be rescheduled for some time in December 2011). I advised the appellant that, at this juncture, I expect the parties to cooperate with each other during the discovery process. I also expect

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[4] The agency asserted that many of the other witnesses I approved will be testifying to matters already adjudicated by the Board. I will wait to receive the parties' submissions on the law of the case doctrine, collateral estoppel, and res judicata before I revisit my rulings on any witnesses. The agency may renew its objection of my approval of certain witnesses on this basis, and I will decide later whether any other witnesses will be denied based on these grounds.

them to initiate and complete needed discovery with a minimum of intervention by the administrative judge. In addition, I anticipate that discovery will be completed by the imposed deadlines. I also note that this appeal does not seem to involve any complex or novel issues of law, and so I cannot imagine the parties needing extensive discovery. The appellant then asserted that he may file a motion in U.S. District Court to obstruct this case from proceeding to hearing. I advised the appellant that he should exercise any rights he deems appropriate under the circumstances.

7. **EXHIBITS**: I advised the parties that if they objected to any of the opposing side's exhibits, they must submit their objections in writing. The written objection must specifically identify the exhibit and state explicitly with the exhibit should not be admitted into the record. The parties' written objections must be received no later than 5:00 p.m. on October 11, 2011. If the parties introduce any additional exhibits at the hearing, I will specifically rule on their admissibility at a later time.

8. **STATUS CONFERENCE**: I will conduct a status conference on October 17, 2011, at 11:00 a.m. Eastern. The agency's representative must make arrangements for this telephone call.

9. **HEARING**: The rescheduled hearing will take place at the Board's Washington Regional Office at 1800 Diagonal Road, Suite 205, Alexandria, Virginia 22314.

If either party disagrees with this summary, they must submit a written objection or motion to supplement this memorandum, to be received no later than 5:00 p.m. Eastern on October 6, 2011.

FOR THE BOARD: _____/S/_____
Daniel Madden Turbitt
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail — David Noble, Jr.
1 Fenceline Drive
Gaithersburg, MD 20878

Agency Representative

Electronic Mail — Stephen W. Furgeson
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Capital Metro Law Office
8200 Corporate Drive
Landover, MD 20785-2200

September 27, 2011
(Date)

/S/
Kiecia Payne
Legal Assistant