

To: MSPB Washington Regional Office
Fr: David W. Noble, Jr.
Re: Dkt. No. DC-0752-11-0880-1-1
Dt: October 6, 2011
By fax: 703-756-7112

Attached for filing are *Appellant's Objections to September 27, 2011 Order and Summary of Prehearing Conference* and a certificate of service.

cc: Stephen W. Furgeson

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**MERIT SYSTEMS PROTECTION BOARD
Washington D.C. Field Office**

David W. Noble Jr.,
Appellant

v.

United States Postal Service,
Agency.

Docket No. DC-0752-11-0880-I-1

AJ: Turbitt

Date: October 6, 2011

**Appellant's Objections to September 27, 2011 Order and Summary
of Prehearing Conference**

Appellant objects to the September 27, 2011 *Order and Summary of Prehearing Conference* as follows:

Objection No. 1: In Section 1 it is stated: "The parties indicated that they have explored settlement, and there is a possibility that they may come to an agreement." No such indication was made by the parties. Appellant objects to the inaccuracy.

Objection No. 2: In Section 2 the administrative judge issued a list of issues that would be considered in the adjudication of the instant appeal and precluded all others. The issuance of the list is premature because no discovery has yet been taken. Therefore, appellant objects to the list of issues.

Objection No. 3: In Section 2 the administrative judge states: "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 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.”

The administrative judge’s analysis is faulty.

The file shows that appellant advised the agency that he should be considered to have been constructively suspended after January 13, 2011 because of intolerable working conditions. Appellant’s Exh. E, *February 8, 2011 letter from Noble to Jones*. In initiating the instant appeal appellant stated “Through harassment, bad faith, malice, and provocation the proposing and concurring officials (and others) acted to make it impossible for me to work because they made working conditions completely intolerable.” In appellant’s September 23, 2011 prehearing submission he stated that one of his defenses was “Appellant’s absence from work should be considered a constructive suspension rather than an unauthorized absence because the Agency had made Appellant’s working conditions intolerable.” Thus, both the Agency and the MSPB have been given notice of the constructive suspension claim.

MSPB recognizes constructive suspensions where intolerable working conditions prevent an employee from working. *Sage v. Dep’t of Army*, 2008 MSPB 68 (2008); *Wegener v. Dep’t of Interior*, 89 MSPR 644 (2001); *Stauner v. Dep’t of Interior*, 86 MSPR 179 (2000); *Peoples v. Dep’t of Navy*, 83 MSPR 216 (1999).

The administrative judge advances two reasons for rejecting appellant's attempt to have his constructive suspension claim adjudicated.¹ Neither of the reasons is valid.

First, the administrative judge asserts that the additional issue of constructive suspension would place an unnecessary burden of proving Board jurisdiction on appellant. That burden, however, is unnecessary only to having the April 28, 2011 removal adjudicated. It is a necessary burden to having appellant's constructive suspension adjudicated, and it is a burden appellant will be pleased to shoulder. Further, it should be noted that if appellant succeeds in his challenge to the removal he will be entitled to back pay dating only to July 23, 2011. If appellant succeeds as to his constructive suspension claim, however, he will be entitled to back pay dating to January 14, 2011 and perhaps to front pay as well.

Second, the administrative judge asserts that there will be no need to decide if appellant was subjected to a constructive suspension if the agency fails to prove the absence without leave charge. Thus, this reason rests on the assumption that the agency will fail to prove the absence without leave charge. There is, however, some very slight possibility that the agency will be found to have proven the absence without leave charge – being human, judges sometimes err. Assuming, *arguendo*, that the absence without leave charge is found to have been proven, the constructive suspension claim will operate as an additional barrier to the termination of appellant's employment. There is, therefore, a need to decide if appellant was subjected to a constructive suspension, and appellant objects to the rejection of the constructive suspension

¹These reasons are different than the reason given in the September 26th conference for rejecting appellant's constructive suspension claim. In the conference the administrative judge mistakenly asserted that intolerable working conditions are not enough to establish MSPB jurisdiction over a claim. The agency's representative shared the judge's mistaken belief.

issue.

Objection No. 4: In the second Section 5 the administrative judge made the following statements:

“During the prehearing conference, the appellant continually questioned my authority to narrow the list of his 19 proposed witnesses to only those I deem appropriate. The appellant is mistaken in his belief that I lack the authority to do this.”

“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 lack the authority to deny any of his witnesses and that ‘there was no sound legal basis to deny any of them,’ as he stated in his September 26th pleading.”

The above statements by the judge are false. Appellant did not even once question the judge’s authority to do anything. Further, appellant was not given the opportunity to extensively discuss his witnesses. *See generally* October 6, 2011 Declaration of David W. Noble, Jr.

Objection No. 5: In the second Section 5 the judge described appellant’s summaries of his witnesses’ expected testimony as “general, vague, and cryptic.” Appellant’s summaries were at least as informative as the agency’s, which summaries the judge found unremarkable. Appellant objects to being singled out.

Objection No. 6: Over appellant’s objection the judge rescheduled the hearing for October 19, 2011. If the hearing is held on that date appellant will be denied the opportunity contemplated by MSPB regulations for two rounds of discovery. Since the prehearing conference the agency responded to appellant’s September 12, 2011 discovery requests by refusing to answer any of appellant’s interrogatories and by denying all of appellant’s requests

for production of documents. Appellant intends to file a motion to compel discovery next week, but it is unlikely that both sides will even be able to completely brief the discovery issues by October 19th. Therefore, appellant renews his objection to the October 19, 2011 hearing date.

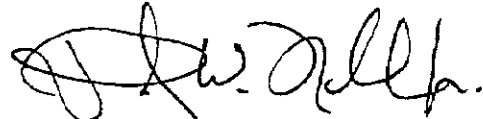
Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. W. Noble, Jr.", written in a cursive style.

David W. Noble, Jr.

Certificate of Service

I certify that I sent on October 6, 2011 I sent *Appellant's Objections to September 27, 2011 Order and Summary of Prehearing Conference* by facsimile transmission to Stephen W. Furgeson at 301.955-0701 and to the Honorable Daniel Madden Turbitt at the MSPB Washington Regional Office at 703.756-7112.


DAVID W. NOBLE, JR.