

To: MSPB Washington Regional Office
Fr: David W. Noble, Jr.
Re: Dkt. No. DC-0752-11-0880-I-1
Dt: October 7, 2011
By fax: 703-756-7112

Attached for filing are, *Appellant's Response to September 27, 2011 Order on Collateral Estoppel/Res Judicata* and *October 7, 2011 Declaration of David W. Noble, Jr.* 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 7, 2011

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Appellant's Response to September 27, 2011 Order on Collateral Estoppel/Res Judicata.

In his September 27, 2011 *Order and Summary of Prehearing Conference* the administrative judge ordered appellant to file argument and evidence proving that some or all of the issues and/or matters in the instant 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 appellant in this appeal. This, and the attached *October 7, 2011 Declaration of David W. Noble, Jr.* are appellant's response to the order.

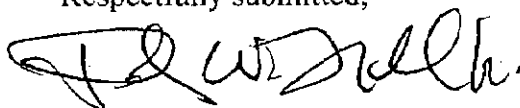
A. The law of the case doctrine does not bar the litigation of any issue and/or matter presented by the instant appeal.

The law of the case doctrine "limits relitigation of an issue once that issue has been decided . . . in a different stage of the same litigation." *Nease v. Department of the Army*, 103 M.S.P.R. 118, ¶ 10 (2006). The instant appeal has only been in the first stage. Therefore the law of the case doctrine does not apply here.

B. Neither the doctrine of collateral estoppel nor res judicata bars the litigation of any issue and/or matter presented by the instant appeal.

The doctrines of collateral estoppel and res judicata bar the re-litigation of issues and claims under certain circumstances. They are inapplicable here, because as shown by the attached declaration, appellant is not attempting to re-litigate any previously decided issue or claim.

Respectfully submitted,

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

David W. Noble, Jr.

October 7, 2011 Declaration of David W. Noble, Jr.

I, David W. Noble, Jr., make this declaration based on personal knowledge:

Noble v. U.S. Postal Service, MSPB Docket No. DC-0752-05-0606-I-1

1. I was the appellant in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1. My appeal in that case challenged a suspension of more than 14 days. After I filed the appeal the agency placed me on administrative leave. The agency was represented in the appeal by Stephen W. Furgeson. During the first telephone conference with the administrative judge, Furgeson said that the agency was in the process of completely cancelling the suspension and returning me to the status quo ante. At that time MSPB case law provided that MSPB was divested of jurisdiction when an agency represented that it planned to return an appellant to the status quo ante. Therefore, relying on Furgeson's representation, the administrative judge dismissed my appeal.

2. Furgeson's representation to the administrative judge was false – I was not returned to the status quo ante following the telephone call. MSPB case law at the time provided that under such circumstances the employee should re-file her or his appeal, so that is what I did. After I re-filed it took the Postal Service several months before it returned me to the status quo ante, after which the administrative judge again dismissed my appeal.

3. There was never a hearing in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1. The only claim presented by the appeal was that the suspension that prompted the appeal was improper. The agency conceded that claim by deciding to return me to the status quo ante. The only issue decided by the judge was whether and when I had been returned to the status quo ante.

4. The following issues or matters were not considered or decided in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-05-0606-I-1: a) intolerable working conditions, b) adjustment of routes, c) union's handling of appellant's grievances or the agency's blocking of appellant's access to the grievance procedure, d) threats to and harassment of appellant, e) the July 29, 2010 suspension, f) the April 28, 2011 removal action, g) the August 12, 2010 PDI, h) overtime, i) health benefits, j) annual and sick leave, k) holidays.

Noble v. U.S. Postal Service, MSPB Docket No. DC-0752-10-0113-I-1

5. I was the appellant in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1. My appeal in that case challenged a suspension of more

than 14 days. The agency was represented in the appeal by Stephen W. Furgeson. During the first telephone conference with the administrative judge, Furgeson said that the agency was in the process of completely cancelling the suspension and returning me to the status quo ante. The administrative judge asked Furgeson whether the agency would be able to restore me to the status quo ante within a month. Furgeson said that the agency would be able to do so. When Furgeson's representation about restoring me to the status quo ante proved to be false, a month after the conference call the administrative judge granted my appeal and reversed the suspension.

6. There was never a hearing in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1. The only claim presented by the appeal was that the suspension that prompted the appeal was improper, and that was the only issue decided by the judge.

7. The following issues or matters were not considered or decided in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-I-1: a) intolerable working conditions, b) adjustment of routes, c) union's handling of appellant's grievances or the agency's blocking of appellant's access to the grievance procedure, d) threats to and harassment of appellant, e) the July 29, 2010 suspension, f) the April 28, 2011 removal action, g) the August 12, 2010 PDI, h) overtime, i) health benefits, j) annual and sick leave, k) holidays.

***Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-10-0113-C-1**

8. My health benefits were cancelled in November 2009 as a result of the suspension I challenged in MSPB Docket No. DC-0752-10-0113-I-1. I was at that time 63 and had serious health issues, having had emergency open-heart surgery in 2008. In the Initial Decision of that case the administrative judge ordered the agency to inform me of its efforts to restore me to the status quo ante, and to notify me when it believed that it had completely restored me. The agency, still represented by Furgeson, did not do so. Indeed, when in April 2010 I contacted Furgeson and labor relations representative Brian Fletcher twice by email to find out what was happening with my health benefits, neither replied.

9. In May 2010 I filed a petition to enforce the Initial Decision in MSPB Docket No. DC-0752-10-0113-I-1, which enforcement action became known as MSPB Docket No. DC-0752-10-0113-C-1.

10. In June 2010 I had been without health benefits for 7 months. In response to my petition, Steve Furgeson represented to the MSPB that my health benefits had been restored and re-cancelled sometime in February or March of 2010. Upon learning that I should not be waiting for the agency to restore my

health benefits, I re-enrolled in FEHB just as would a new employee. Steve Furgeson tried to prevent me from re-enrolling in June 2010 by falsely informing me that I would not be eligible to re-enroll until September 2010, at the earliest.

11. Under OPM regulations, the gap created in my health benefits coverage between November and June will prevent me from carrying my health benefits into retirement unless I can work until I am 69.

12. If the agency restored my health benefits sometime in February or March it was required by the Initial Decision to so notify me, but it did not do so. If the agency re-cancelled my health benefits in February or March it was required by its own regulations to so notify me, but it did not do so.

13. In January 2011 an administrative judge denied my enforcement action, holding that the agency had restored me to the status quo ante as to my health benefits and that the February or March 2010 re-cancellation of my health benefits was a separate and distinct action that was not properly before the Board on an enforcement action. I filed a petition for review, which was denied on September 29, 2011. The full Board disturbed the administrative judge's holding only to the extent that it found that the agency had not proven that it informed me of the status of my health benefits. I intend to appeal to the Federal Circuit.

14. I am the appellant in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, which is presently pending before Administrative Judge Daniel Madden Turbitt. In that case I allege that the agency constructively suspended me by subjecting me to intolerable working conditions. As a very small part of my case concerning intolerable working conditions I intend to introduce evidence concerning the agency's without-notice cancellation of my health benefits in February or March 2010, Furgeson's and Fletcher's refusals to reply to my April 2010 communications concerning health benefits, and Furgeson's efforts to impede my June 2010 attempts to re-enroll in the FEHB program. Of those, only the without-notice cancellation was previously before the Board, and the Board at two levels found only that the without-notice cancellation was not properly before the Board on an enforcement action.

15. I have not introduced, and I do not intend to introduce any evidence in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, that would be inconsistent or in conflict with any of the Board's holdings in MSPB Docket No. DC-0752-10-0113-C-1.

16. I have not made, and I will not make any argument in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, that would be inconsistent or in conflict with any of the Board's holdings in MSPB Docket No.

DC-0752-10-0113-C-1. In particular, I do not argue in my pending case that agency failed to restore me to the status quo ante following the reversal of the 2009 suspension.

***Noble v. U.S. Postal Service*, MSPB Docket No. DC-3443-11-0235-I-1**

17. I was the appellant in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-3443-11-0235-I-1. The following issues or matters were not considered or decided in that case: a) intolerable working conditions, b) adjustment of routes, c) union's handling of appellant's grievances or the agency's blocking of appellant's access to the grievance procedure, d) threats to and harassment of appellant, e) the July 29, 2010 suspension, f) the April 28, 2011 removal action, g) the August 12, 2010 PDI, h) overtime, i) health benefits, j) annual and sick leave.

18. In MSPB Docket No. DC-3443-11-0235-I-1 I alleged that the agency had reduced my pay by its failure to pay me holiday leave pay for the Columbus Day, Veterans' Day, and Thanksgiving holidays in 2010 although I was eligible for such pay under the collective bargaining agreement. The Initial Decision dismissed the appeal for lack of jurisdiction, finding that shorting an employee's pay by failing to pay holiday leave pay was not a "reduction in pay" within the meaning of the Board's jurisdictional regulations. I did not file a petition for review.

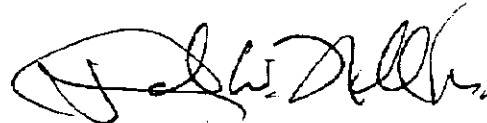
19. I am the appellant in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, which is presently pending before Administrative Judge Daniel Madden Turbitt. In that case I allege that the agency constructively suspended me by subjecting me to intolerable working conditions. As a very small part of my case concerning intolerable working conditions I intend to introduce evidence: a) showing that the agency failed to pay me holiday leave pay for the Columbus Day, Veterans' Day, Thanksgiving, and Christmas holidays in 2010 and the New Year's holiday in 2011, although I was eligible under the collective bargaining agreement for such pay, b) showing that the failure to pay me for the holidays was caused by the personal animus of Bill French, the supervisor who would in April 2011 propose my removal, c) showing that French repeatedly lied to me during October and November 2010 about looking into the holiday pay matter, d) showing that the agency blocked any meaningful access to the grievance procedure by refusing to timely provide the union with information concerning my clock rings on the day before and the day after each of the holidays, e) showing that the agency through French refused to meet with the union at the first step of the grievance procedure to discuss the holidays, f) showing that at the second step of the grievance procedure the agency's representative falsely told the union's representative that I had been paid for the Veterans' Day holiday, g) showing that at the second step of the grievance

procedure the agency and the union executed an agreement providing that the agency would pay me for the Columbus Day and Thanksgiving holidays, h) showing that notwithstanding the settlement the agency did not pay me for the two holidays, and i) showing that the union did not act to enforce the settlement. Of a-i, above, only the first three holidays were previously before the Board, and the Board found only that it was without jurisdiction to decide questions concerning denial of holiday pay.

20. I have not introduced, and I do not intend to introduce any evidence in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, that would be inconsistent or in conflict with any of the Board's holdings in MSPB Docket No. DC-3443-11-0235-I-1.

21. I have not made, and I will not make any argument in *Noble v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0880-I-1, that would be inconsistent or in conflict with any of the Board's holdings in MSPB Docket No. DC-3443-11-0235-I-1. In particular, I do not argue in my pending case that the Board has jurisdiction to decide whether the agency's denial of certain holiday pay violated federal law.

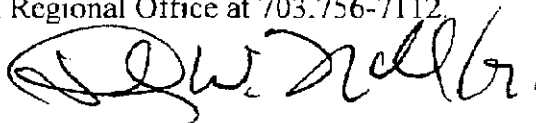
I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 7, 2011.



David W. Noble, Jr.

Certificate of Service

I certify that on October 7, 2011 I sent *Appellant's Response to September 27, 2011 Order on Collateral Estoppel/Res Judicata*, and *October 7, 2011 Declaration of David W. Noble, Jr.* 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.

A handwritten signature in black ink, appearing to read "D.W. Noble, Jr.", with a large, stylized initial "D" and "W".

David W. Noble, Jr.