

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 Procedures, Laws, Rules, or Regulations* 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

**Appellant's Response to September 27, 2011 Order on Procedures, Laws,
Rules, or Regulations.**

In his September 27, 2011 *Order and Summary of Prehearing Conference* the administrative judge ordered appellant to identify the specific procedures, laws, rules, or regulations he believes the agency violated when it committed harmful error. This is appellant's response to the order. Appellant may add to the below list after discovery or during the hearing if evidence of other violations comes to light.

A. The agency violated M-39 Section 115.1 and committed harmful error by failing to make every effort to correct a situation before resorting to removal.

Section 115.1 of the USPS M-39 Handbook, *Management of Delivery Services*, provides that "[t]he delivery manager must make every effort to correct a situation before resorting to disciplinary measures." Appellant's Exh. B. The M-39 Handbook is incorporated into the collective bargaining agreement by reference in Article 19. Appellant will show that those who imposed the removal action made no effort at all to correct the situation before resorting to discipline and that their failure caused harmful error.

B. The agency violated the requirement stated in Article 16 of the collective bargaining agreement that discipline be corrective in nature rather than punitive, when it imposed removal on appellant without first observing the principles of progressive discipline. That violation caused harmful error.

Article 16 of the collective bargaining agreement requires that discipline be corrective in nature, rather than punitive. Appellant's Exh. A, p.5. The agency and the union interpret that requirement to mean that "for most offenses [the agency] must issue discipline in a 'progressive' fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge." Appellant's Exh. A, p.6. Appellant had more than 36 years of service and an unblemished disciplinary record at the time of the removal. The agency's failure to apply the principles of progressive discipline to appellant's alleged offense caused harmful error.

C. The agency violated the requirement stated in Article 16 of the collective bargaining agreement that discipline be for just cause when it initiated discipline before conducting a thorough investigation and before giving appellant a chance to defend himself. That violation caused harmful error.

Article 16 of the collective bargaining agreement requires that discipline of letter carriers be for "just cause." Appellant's Exh. A, p.5. The agency and the union interpret that requirement to mean, *inter alia*, that the agency must conduct a thorough and objective investigation before initiating discipline, including giving an employee the opportunity to defend her- or himself. Appellant's Exh. A, p.6. Failure of the agency to conduct a thorough investigation is fatal to a disciplinary action. Appellant's Exh. L. Appellant will show that the agency did not conduct a thorough investigation, and did not permit appellant to defend himself, before the agency initiated the removal action against him. That failure caused harmful error.

D. The agency violated MSPB case law by disciplining appellant for taking approved leave.

An employee may not be disciplined on the basis of approved leave. *Fleming*, 30 MSPR 302 (1986). Appellant will show that he was on LWOP during the period he was charged with being absent. Appellant's Exh. D. LWOP is an approved leave status. Appellant's Exh. C. The agency violated MSPB case law by removing appellant for taking a period of approved leave and committed harmful error.

Respectfully submitted,



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 Procedures, Laws, Rules, or Regulations* 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.