To: MSPB Washington Regional Office
Fr: David W. Noble, Jr.
Re: Dkt. No. DC-0752-11-0880-I-1
Dt: October 27, 2011
By fax: 703-756-7112

Attached for filing are Appellant's Objections to October 20, 2011 *Order and Summary of Second Prehearing Conference,* and a certificate of service.

cc: Stephen W. Furgeson

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 27, 2011

Appellant's Objections to October 20, 2011 *Order and Summary of Second Prehearing Conference.*

Appellant objects as follows to the October 20, 2011 *Order and Summary of Second Prehearing Conference*:

1. In paragraph no. 1 the judge stated: "Both parties wrote and indicated that they believe this case will not settle." Appellant did not so write, and objects to the inaccuracy.

2. Appellant objects to his constructive suspension claim being docketed as a separate appeal. Appellant was removed for being AWOL for the period February 24 - April 28. The record shows that appellant notified the Postal Service in early February that he should be considered to be constructively suspended because of intolerable working conditions, and that is why he was absent in February, March, and April. The two events – absence and removal – are cause and effect, inextricably intertwined. It makes no sense to treat them as separate events, and it will be to appellant's disadvantage

to be forced to adjudicate them as separate events.

3. In the amended order on law of the case, etc., the judge misstates Judge Zamora's holding in MSPB Docket No. DC-3443-11-0235-I-1, making it sound as though Judge Zamora reached the merits of appellant's claim. She did not. Instead she merely ruled that the MSPB has no jurisdiction to adjudicate claims concerning holiday pay. Judge Turbitt also ordered appellant on October 20th to address MSPB Docket No. DC-3443-11-0235-I-1, a task appellant accomplished and filed on October 7th.

4. The judge's discussion of appellant's motions to postpone the hearing is misleading because it does not explain why appellant has made repeated postponement motions. By leaving the "why" out, the summary paints a picture of a litigant who has tried the patience of a tolerant judge. The truth is quite to the contrary – appellant has been forced by the judge to file repeated postponement motions because appellant is trying to take discovery, and the judge has four times scheduled hearings (on September 28, October 19, October 27, and November 4) that would have occurred before appellant received responses from the agency, and/or before appellant would have a chance to file a motion to compel discovery.

5. The judge's assertion that his prior statements about appellant's conduct were accurate are addressed in appellant's motions to disqualify and to certify an interlocutory appeal, and the exhibits attached thereto.

6. In the section denying appellant's motion to disqualify, the judge asserts that he does not have any deep-seated antagonism toward either of the parties. That assertion is belied by the judge's action in making false statements in the September 27th summary

about appellant's conduct during the first prehearing conference. Further evidencing deep-seated antagonism are: a) the judge's wholly arbitrary cutting of appellant's witness list, b) the judge's attempts to short-circuit appellant's discovery efforts through his power to schedule, c) the judge's refusal to compel the agency to give discovery, and d) the judge's baseless assumption that some of appellant's claims – but none of the agency's – might be precluded.

7. As to appellant's motion to compel:

a) Appellant objects to the judge's narrowing of Interrogatories 1 and 2 from five years to one. The information sought was relevant and material and was not overly broad and unduly burdensome in the case of an employee defending 36 years of unblemished service.

b) Appellant objects to the judge's narrowing of Interrogatory 2 to only those employees who have been charged with the same offenses as appellant. *Douglas* factor no. 6 requires the agency to consider consistency of the penalty with those imposed upon other employees for the same or *similar* offenses.

c) Appellant objects to the reference on page ten to William French as appellant's former supervisor. French was the supervisor who issued the notice of proposed removal and is, so far as appellant knows, still appellant's supervisor.

d) Appellant objects to the judge basing his refusal to compel the agency to answer Interrogatory No. 5 on a cryptic, vague, general, and completely unfounded concern about preclusion.

e) Appellant objects to the judge basing his refusal to compel the agency to

answer Interrogatory No. 5 based on appellant's availability to testify about the subject of the interrogatory. That is not a valid reason to prevent appellant from obtaining discovery.

f) Appellant objects to the judge's statement that he instructed both parties to submit a joint stipulation as to the subject of the Interrogatory No. 5. The judge instructed the agency alone to prepare a stipulation.

g) Appellant objects to the judge's refusal to compel an answer to Interrogatory No. 5 on the completely unsupported basis that the interrogatory was overly broad, cumbersome, and irrelevant. The information sought was relevant and material and was not overly broad and unduly burdensome in the case of an employee defending 36 years of unblemished service.

h) Appellant objects to the judge's refusal to compel answers to Interrogatories Nos. 6 and 7 on the completely unsupported basis that the interrogatories were overly broad, cumbersome, and irrelevant. The information sought was relevant and material and was not overly broad and unduly burdensome in the case of an employee defending 36 years of unblemished service.

i) Appellant objects to the judge basing his refusal to compel the agency to answer Interrogatories No. 6 and 7 on a cryptic, vague, general, and completely unfounded concern about preclusion. In what previous Board case does the judge believe there was any issue or claim relating to annual leave or sick leave?

j) Appellant objects to the judge basing his refusal to compel the agency to answer Interrogatories No. 6 and 7 based on appellant's availability to testify about the

subject of the interrogatory. That is not a valid reason to prevent appellant from obtaining discovery.

k) Appellant makes the same objections to the judge's refusal to compel answers to Interrogatories 8 and 12 as appellant made to the judge's refusal to compel answers to Interrogatories 5, 6, and 7.

l) Appellant objects to the judge's refusal to order the agency to permit the appellant to review the material described in Document Production Requests 1 and 2 on the completely unsupported basis that the requests were overly broad, cumbersome, and irrelevant. The information sought was relevant and material and was not overly broad and unduly burdensome in the case of an employee defending 36 years of unblemished service. By denying these requests the judge will prevent appellant from obtaining material information about the past records and seniority of the employees identified in Interrogatories 1 and 2.

m) Appellant objects to the judge's refusal to order the agency to permit the appellant to review the material described in Document Production Request 5 on the basis that they are irrelevant and an effort to relitigate grievances through the MSPB. The documents are plainly relevant to appellant's contention that the agency made appellant's working conditions intolerable, in part, by blocking his access to the grievance procedure. The idea that evidence of that blocking might be precluded is ridiculous – appellant was the prevailing party in the NLRB proceedings. What could he possibly have to try to relitigate? That appellant can testify about the blocking is not a valid reason to deny discovery. The judge did not direct the parties to prepare a joint stipulation.

n) Appellant objects to the judge's refusal to order the agency to permit the appellant to review the material described in Document Production Request 6 on the basis that they are irrelevant and an effort to relitigate grievances through the MSPB. Appellant also objects for the reasons he objected to the judge's refusal to order answers to the interrogatories concerning holidays. That appellant can testify about the holiday is not a valid reason to deny discovery. The judge did not direct the parties to prepare a joint stipulation.

o) Appellant notes that the judge's grant of Document Production Request No. 7 provides almost nothing of value to appellant, given the judge's denial of appellant's request to compel an answer to Interrogatory No. 8.

8. Appellant objects to the order requiring additional exhibits to be submitted no later than 12:00 p.m. on November 3, 2011. Appellant will not have completed discovery by that time.

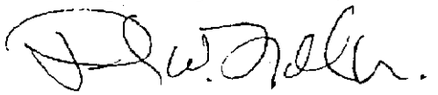
9. During the prehearing conference the judge ordered the agency to respond to appellant's October 14th discovery requests no later than 12:00 p.m. on November 3, 2011. Appellant objects to the omission of that requirement from the *Order and Summary of Second Prehearing Conference.*

10. Appellant objects if the statement that closing arguments will not be allowed at the hearing means that no closing arguments will be permitted at all. If written arguments will be permitted after the hearing appellant does not object.

11. Appellant objects to the scheduling of the hearing for November 4, 2011.

Appellant will not have completed discovery by that date, and will not have had enough time after discovery to adequately prepare his case.

Respectfully submitted,



David W. Noble, Jr.

Certificate of Service

I certify that on October 27, 2011 I sent Appellant's Objections to October 20, 2011 *Order and Summary of Second 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.