

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

DAVID NOBLE, JR.,
Appellant,

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

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: November 1, 2011

RULINGS ON APPELLANT'S ADDITIONAL OBJECTIONS

A. October 22, 2011 Appellant's Objections

On October 27, 2011, the appellant filed objections to the October 20, 2011 Order and Summary of Second Prehearing Conference.

1. The appellant objected to my statement in Paragraph 1 that said:

‘Both parties wrote and indicated that they believed this case will not settle.’ Appellant did not so write, and objects to the inaccuracy.

On September 30, 2011, the agency wrote that “there is really no possibility of settlement.” Appeal File, Tab 14 at p. 1. The appellant, on October 6, 2011, wrote and stated that my statement in the September 27, 2011 First Prehearing Conference Summary, that “The parties indicated they have explored settlement, and there is a possibility that they may come to an agreement,” was inaccurate because the parties never said this. Appeal File, Tab 14 at p. 1. According to the appellant’s unofficial transcript of that prehearing conference, I began the conference by declaring to the parties (in which I am referencing a previous telephone call when the parties and I talked about possible settlement), “I’m assuming we shouldn’t even bother to discuss settlement because of what the appellant said in our last discussion. Is that correct?” The agency’s representative answered “Yes.” The appellant, in reply,

said that “I’m not willing to jeopardize my lawsuit (in District Court) by way of settling this case.” Appeal File, Tab 25. Without going into the particulars of what we discussed in our informal talks about settlement, I believe that the parties did make clear to me, both verbally and in writing, that they believed this case would not settle. Therefore, my statement was not inaccurate, as the appellant claimed. To the extent that the appellant would like me to revisit that issue and change my wording, his request is denied.

2. The appellant objected to my docketing his constructive suspension claim as a separate appeal. To the extent that the appellant would like me to revisit that issue and change my decision, his request is denied.

3. The appellant objected to my characterization, in the Second Prehearing Conference Summary, under the section titled “Amended Order on Law of the Case Doctrine, Collateral Estoppel and Res Judicata,” of Administrative Judge Sherry A. Zamora’s holding in the case of *Noble v. U.S. Postal Service*, MSPB Docket No. DC-3443-11-0235-I-1 (Initial Decision, Apr. 1, 2011). I stated therein that Judge Zamora “dismissed the appellant’s appeal of the agency’s action denying his request for holiday pay.” The appellant argued that this characterization “[made] it sound as though Judge Zamora reached the merits of appellant’s claim.” The appellant is mistaken. I correctly stated that Judge Zamora did not reach the merits because, by noting that Judge Zamora dismissed the case for lack of Board jurisdiction, I was implicitly stating that she did not reach the merits. To the extent that the appellant would like me to revisit this issue and change my characterization of Judge Zamora’s initial decision, his request is denied.

4. The appellant objected to my discussion, in the Second Prehearing Conference Summary, under the section titled “Motion to Postpone the Hearing,” on why he repeatedly asked that the hearing be delayed three or four times. He stated that, by this omission, I left unclear why he needed the additional time for the requested delays. Actually, I extensively detailed the appellant’s reasons for

his and the agency's requested delays – in a total of five paragraphs – in both my First Prehearing Conference Summary (September 27, 2011) and my Second Prehearing Conference Summary (October 20, 2011). To the extent that the appellant would like me to revisit this issue and change my wording in either the first or second Summary, his request is denied.

5 / 6. The appellant reiterated his claims about my purported inaccurate observations about his conduct during the first prehearing conference and about my statement (addressing his motion to disqualify and to certify an interlocutory appeal in the First Prehearing Conference Summary) that I did not have deep-seated antagonism for either party. To the extent that the appellant would like me to revisit this issue, to change the wording of the Summary, and/or to change my decision on these motions, his requests are denied.

7. The appellant objected too many of my rulings on his motion to compel. To the extent that he would like me to revisit this issue, and to change my ruling on any of these motions, his request is denied.

8. The appellant objected to my order requiring additional exhibits to be submitted no later than 12:00 p.m. on November 3, 2011. He argued that he will not have completed discovery by then. To the extent that the appellant would like me to revisit this issue, and to change the date when additional exhibits are due, his request is denied.

9. The appellant objected that I did not include in the Second Prehearing Conference Summary my order requiring the agency to respond to his October 14, 2011 discovery request no later than 12:00 p.m. on November 3, 2011. The appellant's objection is duly noted and the agency is required to respond to his October 14, 2011 discovery request no later than 12:00 p.m. on November 3, 2011.

10. The appellant objected to my decision to deny closing arguments. To the extent that the appellant would like me to revisit this issue, and to change my

ruling on this matter, his request is denied. To be clear, neither verbal nor written closing arguments will be permitted.

11. The appellant, once again, objected to the hearing date, even though it has been delayed three or four times now. To the extent that the appellant would like me to revisit this issue, and to change the hearing date yet again, his request is denied. I will not rule on any more requests by the appellant or the agency to change or postpone the hearing date.

B. Appellant's Motion for Clarification

On October 30, 2011, the appellant asked that I clarify my statement that some of his discovery requests seem to pertain to issues or cases that he previously litigated, or that the Board has disposed of for lack of jurisdiction. To the extent that the appellant is unclear what I mean about issues that may be precluded by the doctrines of *res judicata*, collateral estoppel, or law of the case doctrine, I point him to the eight paragraphs in the section titled "Order on Collateral Estoppel/Res Judicata" in my Second Prehearing Conference Summary, and the one paragraph in the section titled "Amended Order on Law of the Case Doctrine, Collateral Estoppel and Res Judicata" in my Second Prehearing Conference Summary, which extensively notified the appellant about these issues.

In addition, the appellant asked if I have ruled that any of the above doctrines will preclude him from asking questions at the hearing. The parties are advised that I cannot make rulings on questions the appellant has not yet raised to witnesses. If, at the hearing, the agency decides it should object to any questions the appellant asks witnesses, then I will rule on those objections at that time.

C. October 31, 2011 Appellant's Second Motion to Compel

On October 31, 2011, the appellant filed a second motion to compel. In that motion, he asked that he be allowed to depose six witnesses, four of whom are named: Antonio Jones; William French; Sterling Colter; and Paris R. Washington. The appellant's request that these four named individuals be

deposed before the hearing is granted. The appellant is limited to one hour to depose each witness, except for the deciding official. The appellant will be allowed two hours to depose that witness. If he intends to request additional time for any deposition, that request will be denied. The appellant's request that two unnamed witnesses be deposed is denied. If the appellant later requests that one or more of these unnamed two witnesses be allowed to be deposed, that request will be denied. The appellant will be allowed to record the depositions by either audiotape and/or commercial transcription. He must choose one or more of these methods. I will not change my mind on this ruling.

In the interest of saving time, and because the appellant has indicated that he may file a third motion to compel, I am ordering that the agency respond to all questions included in the appellant's October 14, 2011 Request for Admissions (to the extent it has not already done so). The agency also must respond to the appellant's Interrogatories Nos. 13-17, as contained in his October 14, 2011 discovery request (to the extent it has not already done so). As to the appellant's Document Production Requests (contained in his October 14, 2011 discovery request), the agency must produce the following documents: Nos. 9-11 (to the extent it has not already done so). The agency does not have to produce any documents pertaining to the appellant's Document Production Request Nos. 8 and 12. Reviewing the appellant's request, as to these documents, I find that his request is overly broad and cumbersome, and these documents are irrelevant and immaterial to the issues before the Board in this appeal. As I've ruled in the past, the agency is required to respond to the appellant's October 14, 2011 discovery request, so that the response is due to be received no later than 12:00 p.m. on November 3, 2011.

D. October 31, 2011 Joint Motion to Suspend

On October 31, 2011, the parties filed a joint motion to suspend. After reviewing the parties' motion, I find that they have not established good cause for

granting their request. I have spent considerable time on ruling on the discovery aspects of this case and it appears all matters have been resolved, or will be resolved shortly. In addition, based on my discussions with the parties, I do not believe that they will need any additional time to engage in settlement talks. Therefore, the parties' request is denied and we are going forward with the hearing on Friday, November 4, 2011, which has already been delayed three or four times previously. I asked a paralegal from the Board's Washington Regional Office to telephone the parties on November 1, 2011, to advise them of my ruling on this motion to suspend. Finally, as I earlier advised the parties during the Second Prehearing Conference Summary, **No further delays will be granted, absent exigent circumstances** (bold and underline as in the original).

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

U.S./Electronic Mail David Noble, Jr.
1 Fenceline Drive
Gaithersburg, MD 20878

Agency Representative

U.S./Electronic Mail Stephen W. Furgeson
United States Postal Service
Capital Metro Law Office
8200 Corporate Drive
Landover, MD 20785-2200

November 1, 2011

(Date)

/S/

Kiecia Payne
Legal Assistant