

DAVID NOBLE v. UNITED STATES POSTAL SERVICE

Docket # DC-0752-11-0880-I-1

Agency's Reply to the Appellant's Declaration of 11-7-11 in Lieu of his Testimony
Summary Page

Case Title : DAVID NOBLE v. UNITED STATES POSTAL SERVICE

Docket Number : DC-0752-11-0880-I-1

Pleading Title : Agency's Reply to the Appellant's Declaration of 11-7-11 in Lieu of his Testimony

Filer's Name : Stephen W. Furgeson

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

Table of Contents

Pleading Interview	3
Uploaded Pleading Text Document	4
Certificate of Service	13

DAVID NOBLE v. UNITED STATES POSTAL SERVICE

Docket # DC-0752-11-0880-I-1

Agency's Reply to the Appellant's Declaration of 11-7-11 in Lieu of his Testimony
Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

No



Via e-Mail and Priority Mail – Delivery Confirmation

November 8, 2011

Daniel Madden Turbitt
Administrative Judge
Merit Systems Protection Board
Washington Regional Office
1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840

Re: David Noble, Jr. v. United States Postal Service
MSPB Dkt. No. DC-0752-11-0880-I-1

Dear Administrative Judge Turbitt:

:

Enclosed are the "Agency's Reply To The Appellant's Declaration Of November 7, 2011 In Lieu Of His Testimony" and a certificate of service in the above-captioned matter.

Sincerely,

A handwritten signature in cursive script that reads "Stephen W. Furgeson".

Stephen W. Furgeson
Attorney

cc: David Noble, Jr.
1 Fenceline Drive
Gaithersburg, MD 20878

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

DAVID W. NOBLE, JR., Appellant,)	
)	
v.)	DOCKET NO. DC-0752-11-0880-I-1
)	
UNITED STATES POSTAL SERVICE)	ADMINISTRATIVE JUDGE:
Agency.)	Daniel Madden Turbitt
<hr style="border: 0.5px solid black;"/>		
)	

**Agency's Reply To The Appellant's Declaration Of November 7, 2011 In
Lieu Of His Testimony.**

I. Introduction

Pursuant to the Administrative Judge's Order at the hearing the Appellant could not complete his testimony on the day of hearing, November 4, 2011, because he was overcome with the emotion of the day. In light of his represented inability to testify and the Administrative Judge's insistence that the hearing be completed expeditiously, the parties were afforded an opportunity to submit further argument and responses to complete the record. Although there is not sufficient time to provide further declaration and obviously no time to do cross examination; nevertheless, I will provide objections and rebuttal from the current record, objections based on prior rulings at the hearing and before and adverse inferences to actions and conduct of Brandon Toatley, who was called as the Appellant's witness and remained a full day at the hearing but only to be excused by the Appellant without testifying.

II. Adverse Inference To Be Drawn And Sanctions Imposed For Attributing Any Statements Or Conduct To Brandon Toatley As Provided By The Appellant In His Declaration Of November 7, 2011.

The Appellant called Brandon Toatley as his witness and did not designate him as a hostile witness. Therefore, the Agency's raises an objection to any statement or actions by Mr. Toatley insofar as they might reflect adversely on the Agency from the Appellant's declaration. The Appellant did not say why Mr. Toatley who had been called as his witness did not testify, but nonetheless, the Appellant references his testimony or actions very liberally in his declaration. Thus, the Appellant has failed to show good cause for not providing his testimony at the hearing and this omission detracts from the probative weight of Appellant's hearsay testimony about what Mr. Toatley did or said. See Taylor v. U. S. Postal Service, 75 M.S.P.R. 322 (1997); *cf.* Womack v. U.S. Postal Service, 70 M.S.P.R. 285, 292-93 (the agency's failure to explain why it did not call a witness, Ingram, at the hearing detracted from the probative weight to be given another employee's hearsay testimony about what Ingram supposedly said), *aff'd*, 99 F.3d 1160 (Fed.Cir.1996) (Table).

Therefore, the following paragraphs that contain references to Mr. Toatley should be given adverse inferences to the extent that those statements or action reflect unfavorably on the Agency: Paragraph Numbers 1-4, 8-9, 19, 22, 26, 28, 33, 35, 37, 39, 47, 63 and 85-90.

III. The Agency Objects To The Following Late Filed Exhibits.

The Agency objected at the hearing to the massive amount of exhibits that the Appellant filed with the Board and the Agency in the afternoon of November

3, 2011. The Agency objected because these documents were clearly within the possession of the Appellant and there appeared to be no reason that these documents could not have been submitted with his Prehearing Submission in September. Also, these documents appear to have not been provided within the time allowed by the Administrative Judge's "Order and Summary of Second Prehearing Conference", p. 20. Therefore, the Agency objects to the following documents and the paragraphs where they were referenced: Exhibit II (¶ 2); Exhibit RI (¶ 3); Exhibit S (¶ 4); Exhibit UU (¶ 7); Exhibit HH (¶ 8); Exhibit X (¶¶ 18 & 41); Exhibit QQ (¶¶ 25 & 78); Exhibit FFF (¶ 52); Exhibit AAA (¶ 60); and Exhibit TT (¶ 67).

III. The Agency Objects To The Alleged Transcript Provided In Paragraph 56, Which Allegedly Represents An Unauthorized Transcript Between The Appellant And Antonio Jones At The Pre-Disciplinary Interview On February 23, 2011.

These recordings were in clear violation of the Employee and Labor Relations Manual (ELM), 667.2 Interception of Oral or Wire Communications by Postal Employees:

667.21 Prohibition

During the course of activities related to postal employment, postal employees may not record, monitor, or otherwise intercept the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, nor listen in on a telephone conversation, nor direct another to do so, unless all parties involved in the communication are made aware of and consent to such interception.

Notwithstanding the improper recording of postal employee communications these recordings or transcripts were not made available prior to the hearing and were not provided at the hearing. The Agency's objections to this withheld and delayed evidence was sustained at the hearing and the Agency renews its

objections to now include these alleged transcripts of the conversation at this late date.

Moreover, if these recordings were as favorable to the Appellant as he claims it is a mystery as to why he would withhold them until the very last minute.

IV. The Agency Objects To Any References In The Appellant's Declaration To Holiday Pay And Health Since This Evidence Has Been Precluded Under The Doctrines Of Res Judicata And Collateral Estoppel.

In the "Order and Summary of the Prehearing Conference, dated September 27, 2011, the Administrative Judge ruled that any reference to the Appellant's health benefits had already been adjudicated and was barred as a matter that had already been litigated. See Noble v. U.S. Postal Service, MSPB Docket No. DC-0752-10-0113-C-1 (Initial Decision, Jan. 11, 2011) (Administrative Judge Michelle M. Hudson denied the appellant's petition for enforcement, finding that the agency submitted documentation showing that his health benefits covering the period of his suspension at issue in the appeal were restored). In the "Order and Summary of the Second Prehearing Conference, dated October 20, 2011, the Administrative Judge ruled that any reference to the Appellant's holiday pay had already been adjudicated and was barred as a matter that had already been litigated. See Noble v. U.S. Postal Service, MSPB Docket No. DC-3443-11-0235-I-1 (Initial Decision, Apr. 1, 2011) (Administrative Judge Sherry A. Zamora dismissed the appellant's appeal of the agency's action denying his request for holiday pay).

Therefore, the following paragraphs should be excluded from consideration: Paragraph Numbers 10-11, 14-17, 19-21, 43-46¹, & 53.

V. The Remaining Items for Rebuttal in the Appellants' Declaration.

1. In Paragraph 1, there is no indication that he provided any medical document to Brandon Toatley to apprise him of his medical condition. Again Mr. Toatley was available on the hearing day but was released by the Appellant without testifying.
2. In Paragraph 22, the Appellant makes reference to a settlement discussion from the Appellant's union and the Agency with regard to his closing the coverage in his health benefits gap in exchange for the Appellant not appealing other matters. The Agency objects to this statement in that he includes matters that are subject to settlement discussions and are, therefore, improper for consideration by the Board.
3. The statements in Paragraph 36 were contradicted and denied by the Mr. Coldter. Moreover, even if true, statements made about bringing back delayed mail can be the subject of discipline. As such, the Appellant does not explain how these statements contributed to his being AWOL for several days in February through April of 2011.
4. With regard to Paragraph 40, Supervisor Bill French testified at the hearing that only one of the medical certificates proffered by the

¹ The Appellant at paragraph 46 candidly admits that he does not contend that his alleged denial of holiday pay constitutes an issue over which the Board has jurisdiction.

Appellant at the hearing was dated after Mr. French came to the Friendship Station, where the Appellant works. Moreover, Mr. French testified that he received no medical certificates at the time referenced in Paragraph 40.

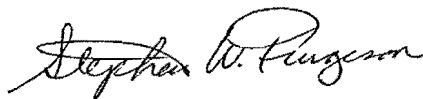
5. Paragraph 48, references a Pre-disciplinary Interview in November of 2011. This is apparently an error but such errors tend to discredit the accuracy of the Appellant's Declaration.
6. Paragraph 57 is directly contradicted by Antonio Jones who indicated that he told the Appellant as he was leaving from the Pre-Disciplinary Interview that he would be in an AWOL status. The Appellant tried to get different testimony from Mr. Jones by suggesting that he had recorded the entire discussion that day but Mr. Jones was unmoved and held firm to his statement that he had warned the Appellant he was being placed on AWOL.
7. Paragraph 84 in the Appellant's Declaration show that Amado Ingram was removed for AWOL, which is consistent with the Appellant's removal for AWOL. The mere fact that it was resolved does not mean that any of Agency's witnesses were involved in reducing the removal for Mr. Ingram. Therefore, this shows that as a comparator the Appellant had been treated no less favorably in that Mr. Ingram was also removed for AWOL.

The Appellant raises numerous other grievances and exceptions to the current process of his appeal that are too numerous to mention and do nothing to show that he was improperly removed for AWOL.

V. Conclusion

In light of the foregoing and the testimony presented at the hearing on November 4, 2011, the clear record of evidence supports the Agency's decision to remove the Appellant from Postal employment. The Agency respectfully requests the Appellant's removal be sustained by the Board.

Respectfully submitted,



Date: November 8, 2011

Stephen W. Furgeson
Attorney
Capital Metro Law Office
U.S. Postal Service
8200 Corporate Drive
Landover, Maryland 20785-2244
Phone: (301) 955-0703
Fax: (301) 955-0701

CERTIFICATE OF SERVICE

I hereby certify that the "Agency's Reply To The Appellant's Declaration Of November 7, 2011 In Lieu Of His Testimony" was served on this 8th day of November 2011, as indicated below, as follows:

Administrative Judge—via Priority Mail, Delivery Confirmation and efile

Daniel Madden Turbitt
Administrative Judge
Merit Systems Protection Board
Washington Regional Office
1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840

Appellant -- via Priority Mail, Delivery Confirmation

David Noble, Jr.
1 Fenceline Drive
Gaithersburg, MD 20878



Stephen W. Furgeson

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Washington Regional Office	Agency's Reply to the Appellant's Declaration of 11-7-11 in Lieu of his Testimony	e-Appeal / e-Mail
David Noble, Jr. Appellant	Agency's Reply to the Appellant's Declaration of 11-7-11 in Lieu of his Testimony	e-Appeal / e-Mail