DAVID NOBLE v. UNITED STATES POSTAL SERVICE
Docket # DC-0752-12-0054-I-1
Agency's Response to Ack Order
Summary Page

Case Title : DAVID NOBLE v. UNITED STATES POSTAL SERVICE

Docket Number : DC-0752-12-0054-I-1

Pleading Title : Agency's Response to Ack Order

Filer's Name : Stephen W. Furgeson

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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DAVID NOBLE v. UNITED STATES POSTAL SERVICE
Docket # DC-0752-12-0054-I-1
Agency's Response to Ack Order
Online Interview

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

See attached pleading text document

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

No

CAPITAL METRO LAW OFFICE

Via e-Mail and Priority Mail – Delivery Confirmation

November 21, 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 Docket. No. DC-0752-12-0054-I-1

Dear Administrative Judge Turbitt:
:
Enclosed are the "Agency's Response to the Acknowledgement Order and Motion to Dismiss" and a certificate of service in the above-captioned matter.

Sincerely,

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,	**DOCKET NO. DC-0752-12-0054-I-1**
v.	
UNITED STATES POSTAL SERVICE Agency.	**ADMINISTRATIVE JUDGE:** Daniel Madden Turbitt

AGENCY RESPONSE TO ACKNOWLEDGMENT ORDER

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1	00/07/11	Agency's Response to Acknowledgment Order	USPS
2		NA	
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4a	02/08/11	Appellant's response to return to duty letter	USPS/ Appellant
4b	01/12/11	Dr. Nelson L. Lui's medical certificate returning the Appellant to work	USPS

UNITED STATES OF AMERICA
MERIT SYSEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DAVID W. NOBLE, JR., Appellant,	)	**DOCKET NO. DC-0752-12-0054-I-1**
v.	)	
UNITED STATES POSTAL SERVICE Agency.	)	**ADMINISTRATIVE JUDGE:** Daniel Madden Turbitt

AGENCYS RESPONSE TO ACKNOWLEDGMENT ORDER AND MOTION TO DISMISS FOR LACK OF JURISDICTION

The United States Postal Service (hereinafter "Postal Service" or "Agency") hereby files its response to the Acknowledgment Order from the Merit Systems Protection Board (hereinafter "MSPB" or "Board"). The Appellant was terminated from the Postal Service for being in an Absent Without Official Leave (AWOL) status beginning on February 23, 2011. See "Agency's Response To The Acknowledgement Order" (hereafter referred to as "Agency File" or "AF") for David Noble, Jr. v. United States Postal Service MSPB Dkt. No. DC-0752-11-0880-I-1. The Appellant has alleged in his appeal in the above-captioned matter that his AWOL absences were caused by intolerable working conditions. See Appellant's Appeal Form 185-2, Appeal of Agency Personnel Action or Decision (hereinafter, "Appellant's Appeal Form"), Item No. 6.

I. STATEMENT OF FACTS

On April 28, 2011, Appellant was issued a Notice of Proposed Removal for Unsatisfactory/Absence Without Official Leave/Permission (AWOL). See AF, Tab 4b, for David Noble, Jr. v. United States Postal Service MSPB Dkt. No. DC-0752-11-0880-I-1. This removal was required when the Appellant failed to report after being sent a notice regarding his absences. This failure to report to work and failure to submit medical documentation pursuant to instructions was a clear violation of postal regulations. See id. A letter of decision was issued on or about July 5, 2011, which sustained the removal. See AF, Tab 4a, for David Noble, Jr. v. United States Postal Service MSPB Dkt. No. DC-0752-11-0880-I-1. The Appellant had requested leave on January 13, 2011 for January 3, 2011 until January 12, 2011, but did not request leave after that date. See id., Tab 4g.

The Appellant had approval from his doctor to return to work without restrictions on January 13, 2011. See AF, Tab 4b, for David Noble, Jr. v. U. S. Postal Service, MSPB Dkt. NO. DC-0752-12-0054-I-1. Subsequently, on February 8, 2011, the Appellant submitted a letter alleging, inter alia, that his working conditions were so intolerable as to result in his being constructively suspended from the Agency. See AF, Tab 4a, for David Noble, Jr. v. U. S. Postal Service, MSPB Dkt. NO. DC-0752-12-0054-I-1. This alleged constructive suspension is the subject of this current appeal.

II. ARGUMENT

A. Appellant Was Not Constructively Suspended.

The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. An appellant bears the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. See Peoples v. Dept. of the Navy, 83 M.S.P.R. 216, 219 (1999); Herring v. Department of Veterans Affairs, 72 M.S.P.R. 96, 98 (1996). The test for determining whether an employee's absence constitutes a constructive suspension is whether the employee's absence from the agency was voluntary or involuntary. See Freeman v. U.S. Postal Service, 78 M.S.P.R. 665, 667-68 (1998); Holloway v. United States Postal Service, 993 F.2d 219, 220-21 (Fed.Cir.1993); Perez v. Merit Systems Protection Board, 931 F.2d 853, 855 (Fed.Cir.1991).

Appellant can allege that the agency coerced him or her by creating working conditions so intolerable for the employee that he or she is driven to involuntary absence from work. See Shoaf v. Dept. of Agriculture, 260 F.3d 1336, 1341 Fed Cir. 2001); Staats v. U.S. Postal Service, 99 F.3d 1120, 1123 (Fed. Cir. 1996); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). The Federal Circuit Court has adopted the so-called *Fruhauf* test for establishing involuntary coercion by an agency:

> [T]o establish involuntariness on the basis of coercion this court requires an employee to show: (1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic

alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency.

Shoaf, 260 F.3d at 1341; see also Fruhauf SW. Garment Co. v. United States, 111 F. Supp. 945, 951 (Ct. Cl. 1953); Staats, 99 F.3d at 1124; Christie, 518 F.2d at 587.

In evaluating involuntariness, the proper test is "an objective one," Christie, 518 F.2d at 587, and one that "consider[s] the totality of the circumstances," Shoaf, 260 F.3d at 1342. The appellant must "establish that a reasonable employee confronted with the same circumstances would feel coerced into resigning." Middleton v. Dep't of Defense, 185 F.3d 1374, 1379 (Fed. Cir. 1999); see also Shoaf, 260 F.3d at 1342. In other words, when adjudicating a claim of coercive involuntariness, the three elements of the *Fruhauf* test are evaluated from the perspective of a reasonable employee confronted with similar circumstances. Shoaf, 260 F.3d at 1341-42. Intolerable working conditions may render an employee's action involuntary when, under all the circumstances, the working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to leave the workplace. See Markon v. Department of State, 71 M.S.P.R. 574, 577 (1996); Heining v. General Services Administration, 68 M.S.P.R. 513, 520 (1995). Therefore, the touchstone of the "voluntariness" analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him or her of freedom of choice. Coufal v. Department of Justice, 98 M.S.P.R. 31, ¶ 22 (2004); Peoples, 83 M.S.P.R. at

219; Heining v. General Services Administration, 68 M.S.P.R. 513, 519-20 (1995).

As such, the totality of the circumstances is examined by an objective standard, not the employee's purely subjective evaluation. Heining, 68 M.S.P.R. at 520. The involuntariness standard, however, is a high one that requires the courts and the Board to focus on whether the agency "render[ed] the workplace so pervasively unpleasant and difficult" that the employee was "deprived .... of any other choice but to quit [or leave]." Gerges v. Dept. of the Navy, 89 M.S.P.R. 669, 674 (2001); Heining, 68 M.S.P.R. at 522.

A reasonable a requirement of the appellant alleging that his absence is caused by intolerable working conditions is that he must inform the agency of the existence of the objectionable conditions, and must request assistance or remediation from the agency. No employee is entitled to leave work and remain absent without explanation. *Cf.* Freedman v. Veterans Administration, 23 M.S.P.R. 361, 363-64 (1984) (appellant removed for abandonment of position had informed agency of alleged death threats causing him to leave work and not return; allegation was sufficient to warrant jurisdictional hearing to rebut presumption of voluntary abandonment of position and show that absence was the result of a constructive removal).

For the few months prior to Appellant's AWOL that began on February 23, 2011, there is nothing in the record to indicate that the Agency made the Appellant's working conditions intolerable other than his claim concerning unsubstantiated allegations that the Appellant was not properly paid for holiday

and accrued leave. See AF, Tab 4a. Appellant's remaining allegations occurred more than six months before when he alleged the following: denial of access to the grievance procedures in 2007; six years ago his city delivery route was not properly adjusted to his workload; and that he was threatened with removal in the past for AWOL. These allegations were also unsubstantiated.

The Appellant's relationship with his supervisors clearly was difficult. The absence on which the Appellant's constructive suspension is based did not begin until several months after the alleged actions had occurred; and therefore, he can not be said to have been coerced by these official actions. See Gerges, 89 M.S.P.R. at 675. For the reasons stated above, the Appellant has not shown that the Agency compelled him to be absent on and after February 23, 2011, and that he therefore has not shown that his absence constituted a constructive suspension. See Gerges, 89 M.S.P.R. at 679. Moreover, it is undisputed that the Appellant was absent without leave during the period on which the Agency relied in removing the Appellant, i.e., from February 23, 2011, until April 28, 2011. Therefore, the AWOL during that period should be sustained and the Board has no jurisdiction over the Appellant's AWOL absence for that period through the effective date of his removal

B. The Board Does Not Have Jurisdiction If The Appellant Can Not Make A Non-Frivolous Allegation Of A Constructive Suspension.

If the action is found to be voluntary, the Board lacks jurisdiction and will dismiss the appeal. If the constructive suspension appeal is beyond the Board's jurisdiction, the Board also lacks authority to adjudicate discrimination claims associated with the appeal. See McMillian v. USPS, 98 MSPR 334, 335 (2005).

With a constructive adverse action appeal, the Board looks for non-frivolous allegations that would, if proven, support jurisdiction. If there is a *prima facie* showing of jurisdiction, the case then goes to a hearing (or is determined on the record if no hearing is requested), and at the conclusion of the fact-finding process, jurisdiction is determined along with the merits of the case. See Mojarro v. U. S. Postal Service, 113 MSPR 335, 341 (2010).

In constructive adverse action appeals, non-frivolous allegations do not establish jurisdiction; rather, the appellant must prove by preponderant evidence that the action was involuntary to establish Board jurisdiction. See Garcia v. Department of Homeland Security, 437 F.3d 1322, 1325 (Fed. Cir. 2006) (en banc); Heath v. U.S. Postal Service, 107 M.S.P.R. 366, 370 (2007). If an appellant raises a non-frivolous allegation that he was constructively suspended for more than fourteen days, then he is entitled to a hearing, if requested, at which time he must prove jurisdiction over his appeal by preponderant evidence. Sage v. Dept. of the Army, 108 M.S.P.R. 398, 403-04; Dones v. U.S. Postal Service, 107 M.S.P.R. 235, 238 (2007).

To avoid dismissal for lack of jurisdiction, the employee must first overcome the doctrine that employee-initiated actions, e.g., resignation or retirement or absence, are presumed voluntary unless the appellant either presents sufficient evidence to establish that the action was obtained through duress or coercion or shows that a reasonable person would have been misled by the agency. See Cruz v. Dept. of the Navy, 934 F.2d 1240, 1242 (Fed. Cir. 1991) (the Board's jurisdiction over a constructive action claim will not attach until

an employee carries his or her burden of establishing that a self-initiated personnel action was coerced or otherwise involuntary); Danelishen v. U. S. Postal Service, 43 M.S.P.R. 376 , 380 (1990). The appellant's burden to establish the right to a hearing is to allege facts that, if proven, could establish that an action was involuntary. Gibeault v. Dept. of Treasury, 114 M.S.P.R. 664, 667 n.3, (2010).

Although this requisite threshold determination often requires consideration and resolution of certain factual claims, the power to make these determinations is the result of the Board simply exercising its "jurisdiction to determine its jurisdiction." Cruz, 934 F.2d at 1244. Ultimately, the Board never acquires jurisdiction if the appellant fails to prove that his absence was involuntary. Id. at 1248. Furthermore, a non-frivolous allegation only entitles the appellant to a hearing where he or she will have the opportunity to prove the existence of an adverse action within the Board's jurisdiction by proving his or her claim of constructive suspension. Id. at 1253. The unmistakable holding of *Cruz* is that the Board 'never acquire[s] jurisdiction' over the appeal if the appellant fails to prove that he was constructively removed." Lloyd v. Small Business Admin., 96 M.S.P.R. 518 at 525 (2004).

Events complained of leading to a constructive adverse action must be reasonably proximate to the action under appeal. The Board may preclude consideration of incidents that occurred too remote in time from a claimed constructive suspension. See Miller v. Dept. of Defense, 85 M.S.P.R. 310, 313-14 (2000) (without agreeing with the judge that in all involuntary resignation

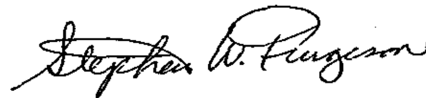
cases, the examination of circumstances should include a period no more than six months prior to the resignation, the Board found that the judge did not abuse discretion by limiting the examination of events to those six months; the circumstances extant immediately prior to the date of the resignation are most relevant in determining the voluntariness of the action); Gregory v. FCC, 79 M.S.P.R. 563, 569 (1998) ("The Board has approved excluding from consideration incidents that occurred too remote in time from an appellant's resignation."); Wood v. Dept. of Navy, 43 MSPR 24, 28-29 (1989) (under the particular circumstances of the case, the judge did not err by limiting the testimony of witnesses to a period of approximately six months before the appellant's resignation); see also Shoaf v. Dept. of Agric., 260 F.3d 1336, 1343 (Fed. Cir. 2001) ("The level of evidentiary weight the MSPB must grant to events temporally further from Shoaf's resignation than the agency's post-transfer conduct is within its discretion; yet, such events must, at a minimum, be considered to place activity and inactivity more immediately preceding Shoaf's retirement into the proper context.")

Here, the Appellant's allegations are all unsubstantiated. Moreover, the Appellant's claim that he carried an overburdened route, was denied access to the grievance procedures and an alleged threat of discipline for AWOL all have occurred more than six months prior to his AWOL absence that began on February 23, 2011. See AF, Tab 4b. Nor has the Appellant established that his working conditions when weighed under the reasonable objective standard were so intolerable as to cause him to be absent from work.

In light of the foregoing, he has failed to make a non-frivolous claim for a constructive suspension. Therefore, since the Appellant has not established that his appeal is within the Board's jurisdiction it should be dismissed.

III. CONCLUSION

Based on the foregoing facts and argument, the Postal Service submits that the Appellant's AWOL absences are not supported as a non-frivolous allegation for a constructive suspension and his appeal should be dismissed.



November 21, 2011
DATE

Stephen W. Furgeson, Esq.
Capital Metro Law Office
U.S. Postal Service
8200 Corporate Drive
Landover, MD 20785-2200
(301) 955-0703 (Phone)
(651) 306-6526 (Personal FAX)
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TAB 2

STATEMENT REGARDING APPLICABILITY
OF
COLLECTIVE BARGAINING AGREEMENT

This is not applicable to the U.S. Postal Service

TAB 3

STATEMENT AS TO FORMAL DISCRIMINATION COMPLAINTS

The Agency is not aware of the filing of any formal complaints of discrimination involving this matter.

TAB 4A

1 Fenceline Drive
Gaithersburg, Maryland 20878
February 8, 2011

Antonio L. Jones
Manager, Customer Service
Friendship Station
4005 Wisconsin Avenue, NW
Washington, DC 20016

Dear Mr. Jones:

This is in reply to the letter dated January 31, 2011 in which you sent me a resignation form.

You state in your letter that I have been absent without leave since December 14, 2010 and that since then I have not provided notification of my absence nor provided medical documentation. That statement is false. I worked on December 26, 2010 and on January 13, 2011 submitted a leave request to and medical documentation for the period 1/3/11 – 1/12/11. The leave request was approved by Bill French on January 13th. Since January 13, 2011 I have been constructively suspended from employment because the Zone 16 management team and other management representatives have made my working conditions completely intolerable. Actions taken by management to prevent me from coming to work include:

A. Refusal to pay me for accrued leave.

As stated above, Bill French approved my request for 64 hours of combined sick leave and annual leave on January 13, 2011. That approval put me in pay status for the first hour of the first day after the January 1 holiday, making the total owed me 72 hours. I have attached a copy of the approved leave form and the medical documentation. I should have been paid for that approved leave and the holiday on January 21, 2011, but I wasn't. Instead, with a large smirk, you gave me a check for $2.29. I needed that payment to buy medications, food, and gasoline to commute to and from work. I didn't get paid for the leave on February 4, 2011 either, so I still don't have money for medications or gasoline, we're living on peanut butter sandwiches and oatmeal, and I have no way to get to work.

B. Refusal to pay me for holidays.

The Postal Service hasn't paid me for the Columbus Day, Veterans' Day, Thanksgiving Day, Christmas, or New Year's holidays although I was eligible to be paid for all of them. Bill French refused to meet with Leon Tucker about grievances concerning the holidays, and refused to provide documents requested by Tucker necessary to process the grievances.

C. Sterling Colter's big lie.

On July 29, 2010 Sterling Colter (then acting manager of Zone 16) gave me an emergency suspension without even bothering to introduce himself. Several days later Brandon Toatley sent me an email telling me that I hadn't been suspended and that I should return to work. When I returned to work Toatley held a pre-disciplinary discussion with me, alleging that I had been AWOL during the period I was off because of the suspension. Toatley said in that meeting that Colter contended that he had not suspended me. Colter came into that meeting and bellowed that he guaranteed that I would be disciplined for being AWOL (I wasn't, however). Other Zone 16 employees witnessed the July 29, 2010 suspension, but neither was contacted either by management or by the union to give statements.

I don't tell lies, I don't like to be told lies, and I don't like to be lied about. Coming to work with Colter is very difficult, and that's another nine days of pay management improperly denied me.

D. Holding Route 16011 out of adjustment.

I have been required to work overburdened routes continuously for the past six years. My current bid assignment, Route 16011, is so far out of adjustment that I have never been able to carry more than half of it. On most days I can only carry a quarter of it. Adjusting a route is not a big deal – almost every route in America has been adjusted multiple times in the past two years. There's no good reason for you to continue to refuse to adjust Route 16011.

E. Blocking my access to the grievance procedure.

In December 2007 David Pryor called me into his office and while leaning over me and shaking his forefinger in my face told me than I would no longer be permitted to initiate grievances by discussion with my supervisor. In March 2008 Pritesh Benjamin told me that I would be permitted to initiate grievances by discussion with my supervisor, but that I would not be permitted to be accompanied and represented by a steward during such discussions. I filed an unfair labor practice charge and in response to that charge the Postal Service posted notices in eight locations in Zone 16 for 60 days stating that the Postal Service would refrain from telling employees that they could not initiate grievances by discussion with their supervisors, and would refrain from telling employees that they may not be represented during such discussions by a steward. The notices were posted in September, October, and November 2008. In March 2009 Brandon Toatley did exactly what the notices said management would not do – he refused to permit me to have a grievance-initiation discussion with him, saying that only the union could initiate grievances. Pryor's and Benjamin's statements violated the contract and the National Labor Relations Act ("NLRA"), as did Toatley's. In early February 2010 USPS admitted that Toatley's conduct violated the NLRA and a second round of notices was posted in Zone 16.

Now in its fourth year, the focus of the Postal Service's blockade of my access to the grievance procedure has moved from the first step to the second step. After a grievance has been

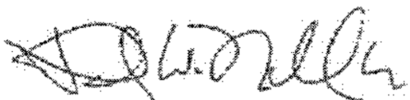
appealed to Formal Step A, management and the union are supposed to meet within seven days. In the case of my allegations, however, grievances have languished for more than seven *months* without the union and management getting together to meet. This big stall has kept me from getting any review of or relief for my numerous complaints about Bill French's incessant bullying, the unpaid holiday leave, the unpaid annual and sick leave, Colter's big lie, Colter's many shouted threats, and has now taken me back again to the National Labor Relations Board.

F. Conclusion.

I have had to face an unending onslaught of insult and disrespect from management in word and in action, and now, to top it all off, you send me a resignation form.

I am about to start my 37th year of postal employment, and I have just started the 17th year of the litigation of *Noble v. Sombrotto*, a federal suit in which I claim that NALC's highest ranking officers have engaged in a phony in-town expense scheme. I think that such a suit should be brought by an actively employed letter carrier, so I decline your suggestion that I resign. I expect to retire when the suit is finished. I don't expect that to be for another couple of years, however. That leaves you plenty of time to constructively unsuspend me by paying me what I am due, adjusting my route, addressing Colter's big lie, and removing the blockade of the grievance procedure.

Very truly yours,



David W. Noble, Jr.

TAB 4B

Nelson L. Lui, MD
11908 Darnestown Rd Suite D
N. Potomac, MD 20878
301-990-1620

Disability Certificate

Date 1/12/11

This is to certify that Mr. David Herbst

has been under my professional care and was totally incapacitated

from 1/3/11 to 1/12/11

As of this date he/she is

___ Still unable to return to work\school.

✓ Sufficiently recovered to resume a normal workload.

___ Sufficiently recovered to return to work/school with the following limitations.

[illegible handwriting]

[signature]

CERTIFICATE OF SERVICE

I hereby certify that the "Agency's Response to the Acknowledgement Order and Motion to Dismiss" was served on this 21st 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 Response to Ack Order	e-Appeal / e-Mail
David Noble Appellant	Agency's Response to Ack Order	e-Appeal / e-Mail