To: MSPB Washington Regional Office
Fr: David W. Noble, Jr.
Re: Dkt. No. DC-0752-12-0054-I-1
Dt: December 7, 2011
By fax: 703-756-7112

Attached for filing are *November 7, 2011 Declaration of David W. Noble, Jr.*, *December 7, 2011 Declaration of David W. Noble, Jr.*, 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-0752-12-0054-I-1 AJ: Turbitt Date: December 7, 2011

December 7, 2011 Declaration of David W. Noble, Jr.

I, David W. Noble, Jr., make this declaration based on personal knowledge. For evidence supporting the allegations below, please refer to the declarations and exhibits I submitted in Noble v. U.S. Postal Service, MSPB Docket No. DC-0752-11-0880-I-1.

A. Timeliness.

1. In February 2011 I knew that a preference eligible employee had appeal rights to the MSPB for, inter alia, suspensions of more than fourteen days in which the Postal Service notified an employee of the suspension. I had in 2005 and 2009 appealed suspensions to the MSPB. As to both the 2005 and 2009 actions the Postal Service notified me that I was suspended.

2. In February 2011 I was familiar with the concept of constructive suspensions as a result of my work in administering the collective bargaining agreement through its grievance procedure and as a result of work involving EEO complaints. However, I did not know in February 2011 that the MSPB recognized the concept of constructive suspensions caused by intolerable working conditions.

3. As described in the attached *November 7, 2011 Declaration of David W. Noble, Jr.* from January 2010 through January 2011 my working conditions deteriorated severely.

4. On January 13, 2011 I requested 64 hours of sick leave and annual leave for the period January 3 – January 12. I gave my request to my supervisor, Bill French, along with medical documentation supporting my request. French approved the leave on the spot. I told French that I needed to be paid for the leave as soon as possible so that I could get cardiac medications for myself and for my wife and asked that he make sure that the money would be paid on January

21st, which was the next pay day.

5. I didn't get paid for the leave on January 21st or on February 4th, the second pay day. I contacted my union representatives and asked that they find out why I hadn't been paid and that they initiate a grievance concerning the non-payment.

6. By letter dated January 31, 2011 agency representative Antonio Jones wrote to me and stated that I had been AWOL since December 14, 2010. Jones included a resignation form with the letter.

7. I spoke to one of my union representatives – Randy Williams – on February 7th by phone to find out whether he had gotten any information from Jones or French. Williams told me that both Jones and French refused to speak with him about it, and that French refused to meet with Williams to permit Williams to initiate a grievance concerning the failure to pay me for the leave.

8. By letter dated February 8, 2011 I replied to Jones' letter, telling him, *inter alia*, that I had been constructively suspended after January 13th as a result of intolerable working conditions, which I briefly described beginning with the then three-week delay in obtaining the cardiac medications that French had caused by stalling on processing my leave request.

9. I had no choice but to notify the Postal Service that I considered myself to have been constructively suspended. The cumulative effect of years of abuse by the Postal Service, which ill-treatment had intensified since the arrival of French and Colter in the second half of 2010, had made it impossible for me to continue to work.

10. Using MSPB's website's search on February 8th I looked for cases involving constructive suspensions and found more than 400. I read about 20 recent cases and they were all about situations in which limited duty had been denied. None of the cases I read involved contentions that working conditions were intolerable.

11. The collective bargaining agreement provides strong protections against management abuse of employees. Included among the exhibits I submitted in my removal case are examples of the successful invocation of those protections through arbitration. Because the MSPB did not seem to have addressed the concept of constructive suspensions caused by employer abuse, and because the union had enjoyed success (at least as to other employees) in addressing intolerable working conditions through the grievance procedure, I decided to request the union to pursue a grievance concerning the constructive suspension I identified in my February 8th letter to Jones. I made such a request, but to my knowledge the union did not pursue the grievance.

12. At no time after February 8th did the Postal Service notify me of a right to appeal to the MSPB the constructive suspension I identified in my letter to Jones.

13. The agency's duty to provide MSPB notice arises when the employee has made the

agency aware of facts or arguments that, "if the agency accepted an employee's characterization of the events, the agency would recognize that review could be had before the Board." *Yuni v. Merit Systems Protection Board*, 784 F.2d 381, 386 n.4 (Fed. Cir. 1986).

14. An appellant who should have been advised of his appeal rights, but was not, is not required to show that he exercised due diligence in attempting to discover his appeal rights. Rather, the question is whether the appellant was diligent in filing an appeal . . . after he learned he could do so. *Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995).

15. After my removal became effective on July 22, 2011 I spent several days using the MSPB's website's search to look for issues I expected to arise once I filed an appeal. A few days before I filed the August 15, 2011 appeal I found a constructive suspension case based on intolerable working conditions. Such cases, it turns out, comprise fewer than 1% of the total constructive suspension cases decided by MSPB. As a result of finding that case I "learned" that I could appeal my January 2011 constructive suspension to the MSPB, and promptly did so in conjunction with the appeal of my removal.

B. Jurisdiction.

1. Intolerable working conditions.

a. A constructive adverse action arises when an agency's conduct leaves an employee no alternative but for the employee, involuntarily, to impose the adverse action on himself or herself. For example, although a resignation is ostensibly a voluntary separation from employment, it is possible that an employee can be coerced into resigning by actions of the employing agency. In other words, the facially voluntary action by the employee may actually be involuntary. Such an involuntary adverse action is known as a constructive adverse action, and a long line of cases has established that the Board's jurisdiction extends to an involuntarily imposed adverse action. *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006).

b. A constructive adverse action may be found on the basis of evidence that an employer deliberately sought to place an employee in a position that jeopardized his or her health. *See*, e.g., *Spence v. Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993); *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369, 371-72 (5th Cir. 1981). Here, the agency has taken health-jeopardizing actions against me on several occasions: First, by sabotaging my attempts to get paid for annual and sick leave, thereby preventing me from obtaining needed cardiac medications. Second, by holding my route far out of adjustment for more than six years and by ordering me to work overtime every day while knowing that my physician had recommended that I not work overtime. Third, by keeping me without health insurance for several months, while refusing to communicate with me about the insurance, and otherwise sabotaging and delaying my efforts to reacquire insurance.

c. A constructive adverse action may be found in part on the basis of evidence that an employer suggested or encouraged an employee to resign. Clowes v. Allegheny Valley Hospital, 991 F.2d 1159, 1161 (3d Cir.), cert. denied, 510 U.S. 964 (1993). In his letter to me dated January 31, 2011 Antonio Jones included a resignation form.

d. A constructive adverse action may be found on the basis of evidence that an employer reduced an employee's rate of pay with a discriminatory intent J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Here the agency reduced my pay by about 4% by failing and refusing to pay me for five holidays after September 2010 although required by the collective bargaining agreement to make the payments, and although it made the payments to 200,000 other letter carriers.

e. A constructive adverse action may be found on the basis of evidence that an employer attempted to set an employee up on a false charge. Suders v. Easton, 325 F.3d 432 (3d Cir. 2003). Here Sterling Colter and Brandon Toatley attempted to set me up on a false charge of AWOL by: First, telling me on July 29, 2010 that I was suspended, second, by telling me on August 4, 2010 that I had not been suspended, and, third, telling me when I returned to work that I had been AWOL since July 29, 2010.

f. A constructive adverse action may be found, in part, on the basis of evidence that an employer socially ostracized an employee. *Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999). Here the agency has engaged in a long-standing pattern of refusal to communicate with me. Notable examples of management silence include, but are not limited to: Antonio Jones' failure to answer my February 8, 2011 letter, Steve Furgeson's failure to comply with the administrative judge's order to notify me when the agency believed it had restored me to the status quo ante after the 2009 suspension, Steve Furgeson's and Brian Fletcher's failures to answer my April 2010 emails concerning my health benefits, Brandon Toatley's failure to answer my May 2009 and February 2010 letters, and Bill French's, Sterling Colter's and Paris Washington's failure to respond to my communications concerning the address to which I should send my response to the April 2011 notice of proposed removal. The exhibits I submitted in my removal case mention numerous other examples of management failure or refusal to respond to my oral and written communications.

g. A constructive adverse action may be found on the basis of evidence that an employer made a threat of disciplinary action that the agency knows is not sustainable. *Schultz v. United States Navy*, 810 F. 2d 1133, 1136 (Fed. Cir. 1987). Here on August 12, 2010 Sterling Colter publicly threatened to fire me if I brought back undelivered mail to the station. I brought back undelivered mail that day, as I had on every day since May 2010, and as I continued to do every day for the remainder of 2010. No disciplinary action was ever taken against me for bringing back undelivered mail. That is because bringing back undelivered mail, without more, does not provide cause for disciplinary action.

h. Evidence of a lack of recourse within an employer's organization can contribute to a case for constructive adverse action. Howard v. Burns Brothers, Inc., 149 F.3d 835, 842 (8th

Cir. 1998). Similarly, "[i]f an employee [absents herself] because she reasonably believes there is no chance for fair treatment, there has been a constructive [adverse action]." Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 574 (8th Cir. 1997). Here the agency has blocked my access to the collectively-bargained-for grievance procedure for almost four years, and for years before that refused to honor the settlements it entered into of grievances I had asked the union to pursue. For me, filing grievances has been an almost completely futile endeavor.

i. The effect of a number of adverse conditions in the workplace is cumulative. A constructive [adverse action] occurs if a reasonable person subjected to the same conditions as the plaintiff would have felt compelled to step down. Because a reasonable person encounters life's circumstances cumulatively and not individually, it is error to treat the various conditions as separate and distinct rather than additive. *Chertkova v. Connecticut General Life Insurance Co.* 92 F.3d 81 (2nd Cir. 1996).

2. Notice of objectionable working conditions and requests for remediation.

a. I wrote letters to the agency in 2009, 2010, and 2011 detailing objectionable working conditions and requesting remediation. Copies of the letters were included as exhibits in my removal appeal. The first two letters were addressed to Brandon Toatley, the third was addressed to Antonio Jones.

b. I have attempted to notify the agency of objectionable working conditions and to request remediation by using the collective bargaining agreement's grievance procedure. For the most part my efforts over the past four years have been blocked, as described in the *November 7, 2011 Declaration of David W. Noble, Jr.*

C. Miscellany.

1. Footnote 1 of the November 22, 2011 *Order to Show Cause* states: "Further, the record reflects that, in removing you, the agency charged you as being absent without leave (AWOL). Thus, based on what you are arguing, the agency placed you on constructive suspension from January 14, 2011, until the date you were charged as AWOL. In your response to this Order, you must clarify when you believe the AWOL period began and ended, and when you believe that the constructive suspension period began and ended, and state why you believe this."

I believe that the constructive suspension began on January 14th and has continued without break since that time. January 14th was the date that the cumulative effect of my bad working conditions became unbearable. The suspension has not ended because nothing about my intolerable working conditions has changed: My route hasn't been adjusted and Bill French has not indicated that he will stop ordering me to work overtime every day, I haven't been paid for the July 29, 2010 suspension and no action has been taken against Sterling Colter and Brandon Toatley for trying to set me up on false charges, I still haven't been paid for the five missed holidays or for the full amount of the annual leave and sick leave that was approved on January

13th, and the agency continues to block my access to the grievance procedure.

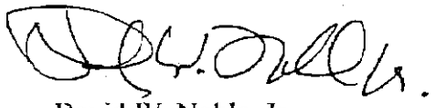
A person who succeeds in proving a constructive [adverse action] because of intolerable working circumstances provides the necessity for the agency to correct its wrong. A work environment so intolerable that no reasonable person can remain in it is an environment that must be changed, for the better. It is to the improved environment that the successful . . . litigant should be reinstated. Nebblett v. Office of Personnel Management, 237 F.3d 1353 (Fed. Cir. 01/30/2001).

I don't believe I was ever AWOL. Instead, I was constructively suspended during the entire period the agency charged me with being AWOL. Furthermore, the Postal Service sent me a letter dated June 21, 2011, notifying me that I had been on long term LWOP since January 14, 2011. Exh. TT. (In my February 8th letter to Jones, I had said that I had been constructively suspended since January 14, 2011.) Exh. E. A Form 50 accompanied the letter, and also indicated that I had been placed on long-term LWOP effective January 14, 2011. Exh. D. "LWOP" is an approved leave status, and is not a synonym for "AWOL." Exh. C. I have been involved in the administration of the collective bargaining agreement for more than 36 years, and I have never even heard a management representative assert that LWOP and AWOL are the same thing, or that an AWOL charge may be lodged against an employee who is in an approved leave status. I am unaware of any authority supporting such propositions. Exh. C was published by the agency's headquarters level and cannot possibly be superceded by a first level supervisor's opinion that contradicts it.

2. In the November 22, 2011 *Order to Show Cause* the judge stated: "[T]he record clearly reflects that you were removed from the federal service on July 24, 2011, and so you could not possibly have been subjected to a constructive suspension after you were no longer employed by the government." This statement is incorrect in at least two ways: First, a constructive suspension may under some circumstances survive a subsequent removal. *Smith v. Dep't of the Army*, 458 F.3d 1359 (Fed. Cir. 2006). Second, I have not yet been removed from federal service and, under the terms of the collective bargaining agreement, will not be at least until the Board rules on any petitions for review of the initial decisions in my removal and constructive suspension cases.

3. I object to being forced to respond to an order to show cause before I have had a chance to conduct discovery.

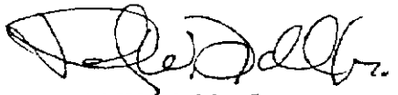
I declare under penalty of perjury that the foregoing is true and correct. Executed on December 7, 2011.



David W. Noble, Jr.

Certificate of Service

I certify that I sent on December 7, 2011 *November 7, 2011 Declaration of David W. Noble, Jr.* and *December 7, 2011 Declaration of David W. Noble, Jr.* 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.

November 7, 2011 Declaration of David W. Noble, Jr.

I, David W. Noble, Jr., make this declaration based on personal knowledge:

1. One day in early August 2008 I felt ill while at work and was unable to complete my route. I called my wife (a registered nurse) who called 911 and I was taken from my route to a hospital by ambulance. Shortly after that I had open heart surgery. I engaged in physical rehabilitation for several months before attempting to return to work. I first tried to resume carrying mail in March 2009. On my first day back Brandon Toatley (then my immediate supervisor) forced me to work over eleven hours, a task that so exhausted me that I was unable to work for several days. I was then 63 years old, and had coronary artery disease, Stage 4 hypertension, emphysema, and cervical degenerative disc disease, all of which affected my ability to work long periods of overtime every day. I also have an abdominal aortic aneurysm that is not disabling *per se*, but is life threatening (as is its medical remedy). Given the aneurysm, I feel great emotional distress when I am forced to work overtime, a fact that I made known to all of my supervisors in 2009 and 2010, sometimes in writing, often in person. Although it does not affect my ability to work overtime, I also suffer from severe recurrent depression, a disease that has cut a deep swath through my family: Both my maternal grandfather and my youngest brother killed themselves at 28, and my surviving siblings and I have taken anti-depressant medications for decades.

2. The Toatley-forced eleven-hour day violated the collective bargaining agreement ("CBA") in two ways: First, the union had in 2007 negotiated settlements with management about several grievances I had filed concerning forced overtime. Those settlements required management to pay me several hundred dollars in penalties (which management long resisted paying), and included promises that management would "cease and desist" from forcing me to work overtime when others are available to perform the work (and, as a practical matter, others are essentially *always* available to perform the work). Second, the CBA contains an absolute bar to forcing carriers not on the overtime desired (such as me) to work over ten hours on a scheduled day (which my first day back was) except in December. Exh. II.

3. On my next day back at work I tried to initiate a grievance with Toatley about the forced eleven hour day, but Toatley refused to permit me to do so. The Postal Service had been blocking my access to the grievance procedure at that point for more than fourteen months, although it had been required by a settlement with the National Labor Relations Board ("NLRB") to post a notice for 60 days saying that it would not do so. I filed an unfair labor practice charge with the NLRB about Toatley's refusal to permit me to initiate a grievance. The NLRB in response to my charge issued a complaint against the Postal Service, which complaint, in turn, was later settled by an agreement that required another posting, this one including an admission that the agency had violated federal labor law, and included a promise not to do so again in any like or related way. (The notice, which was signed by Toatley, was posted June 29, 2010. Exh. R.)

4. When Toatley refused my attempt to initiate a grievance I requested that the union pursue a grievance at the next step of the grievance procedure to enforce the cease and desist agreements it had reached earlier with the agency. Nonetheless, from March 2009 through October 2009 Toatley forced me to work overtime essentially every day that I worked. I wrote to the union's national president in July 2009 and inquired about the status of the grievance I had asked the union to pursue and he wrote back saying that he understood that a grievance had been filed. When Toatley continued to force me to work overtime I filed an unfair labor practice charge against the union for its failure and refusal to enforce the previous grievance settlements and its failure and refusal to provide me with accurate information about the status of my grievance. After investigating my charge the NLRB issued complaint against the union. The union and the NLRB subsequently settled the complaint with an agreement that the union would make a posting in which it stated that it would not fail and refuse to pursue meritorious grievances to enforce the cease and desist settlements and would make appropriate responses to future requests for information about the status of grievances. The posting was made beginning on April 19, 2010. Exh. S.

5. None of the NLRB settlements and postings has had any effect on either the agency's or the union's behavior. The agency has continued to block and otherwise interfere with my access to the grievance procedure, and the union has continued to keep me misinformed or uninformed about the status of my grievances, and has continued to fail to pursue my meritorious grievances.

6. When I was a full-time union representative I took pride in obtaining grievance resolutions that were effective in solving employees' work-related problems. I pursued all grievances diligently, making no distinction between members and nonmembers, or between political supporters of the administration and political opponents, and I made certain that those I supervised took the same approach. Although the union has potent weapons to use against management abuse of employees, none of the resolutions it has reached as to my grievances since I returned to carrying mail in 1993 has had any beneficial effect whatsoever. On those rare occasions when a settlement has seemed on its face to promise some benefit the agency has refused to honor the settlement and the union has refused to enforce the settlement. This pattern of collusion has persisted for more than eighteen years and causes me great emotional distress. Because I cannot enforce them, none of the CBA's protections (some of which I personally negotiated between 1981 and 1993) apply to me. When I was a union representative I could use those protections to help other employees, but I cannot now get the union to use those same protections to help me.

7. One of the ways the agency has continued to interfere with my access to the grievance procedure is by blocking my access to union stewards, an issue that has been settled as to other employees for more than 30 years. In 2008 the union and management entered into a grievance settlement in which the agency promised to cease and desist from failing to tell me the reasons for delaying my access to a steward, and from failing to tell me when I would be permitted to meet with a steward. Exh. UU.

8. On October 22, 2009 I asked Brandon Toatley to permit me to meet with a steward. He and I argued briefly. After I talked to Toatley I approached the area manager and complained to him. The area manager shouted at me to return to my case. Exh. HH. I don't like to be shouted at. It causes me to feel emotional distress and causes my blood pressure to rise, and when it happens I usually clock out and leave. Over the past eighteen years leaving is the only tactic that has worked against shouting – filing grievances has had no effect. After the area manager shouted at me I went back and talked with Toatley, then clocked out and left.

9. A few days later the agency sent me a notice of emergency suspension citing my interactions with Toatley and Jeannie Merrifield, who was seated next to me when I was talking with Toatley. When the suspension had lasted for more than fourteen days I filed an appeal to the MSPB, asserting, *inter alia*, that I had been denied minimum due process as to the suspension.

10. At the time of the suspension I was covered by health benefits through FEHB. After I had been suspended for about a month the agency in late November sent me a notice that my health benefits had been cancelled, in part as a result of the time I had been off for the suspension.

11. In a conference call with the MSPB administrative judge in early December agency representative Steve Furgeson represented that he would restore me to the status quo ante by or about January 8, 2010. After the call I returned to work for two days, on both of which I was forced to work substantial amounts of overtime. Other employees were available to perform the work on both days. After the two days of overtime I decided to wait until my health benefits were restored before returning to work again. Given my medical problems, it seemed to be imprudent to work long hours of daily overtime without health benefits. I had NLRB hearings against both the agency and the union scheduled for late February, and I worked on preparing for those.

12. As had been the case in a 2005 appeal to the MSPB, Furgeson's representation about when I would be restored to the status quo ante proved to be false. I wasn't paid any of the pay I was due by or about January 8, 2010, and neither my life insurance nor my health benefits were restored by or about that date, either. Upon learning that I had not been restored to the status quo ante by the promised date the administrative judge promptly ordered the agency to cancel the suspension for denial of minimum due process. The judge's order included MSPB's boilerplate requirement that the agency notify me when it believed it had restored me to the status quo ante. I was, however, never given that required notice.

13. The concept of double jeopardy does not obtain in administrative proceedings. The administrative judge's order to cancel the suspension, therefore, did not have the effect of preventing the agency from curing the constitutional defect and reissuing the discipline. The agency did not reissue the discipline, however.

14. Because of my long experience working with Steve Furgeson I was sure that after the judge's decision the agency would delay its restoration efforts for as long as legally possible, which was about 90 days. I know as a result of my experience working for the union that restoring health benefits takes only a few minutes, and I checked every couple of weeks to see if my health benefits had been reactivated by asking the pharmacy to run my prescriptions through my health benefits provider. All of those attempts to use my health benefits failed.

15. In early April, as the 90 days was close to ending, I emailed Brian Fletcher, an agency labor relations representative, and Steve Furgeson, and asked why my health benefits hadn't been restored. Neither Fletcher nor Furgeson responded to my email. In late April, after the 90 days had expired, I again emailed Fletcher and Furgeson, told them that my health benefits still hadn't been restored and threatened to file a compliance action with the MSPB if they didn't act swiftly to have the benefits restored. Neither Fletcher nor Furgeson answered that email.

16. My wife and I both have heart problems, and in late April my son started having heart palpitations. I could not obtain all of the diagnostic tests I wanted for my son because I was broke and had no health insurance.

17. In early May I filed a compliance petition as to my health benefits and life insurance. In early June Steve Furgeson filed a response to the petition, from which I learned for the first time that the agency contended that it had restored my health benefits sometime in late winter, and had then quickly recancelled it because I had been in unpaid leave status for too long. The MSPB's administrative judge and the full Board denied my compliance petition, ruling that the agency's unnoticed (and short) reinstatement of my health benefits sometime in the late winter of 2010 constituted a restoration to the status quo ante. I do not ask the judge in the instant appeal to rule on or in any way revisit the rulings of the administrative judge or the full Board as to my compliance petition. The above facts, which are undisputed, are offered merely to complete the narrative.

18. I returned to work as a letter carrier in May 2010 armed with a to-whom-it-may-concern note from my physician indicating that he recommended that I not work overtime. Exh. X.

19. Upon learning from Steve Furgeson's response to my petition that I should not be waiting for the agency to restore my health benefits, I immediately began the process of trying to re-enroll in FEHB so that I could get proper treatment for my son. Steve Furgeson asserted that I would have to work for four months before I could re-enroll, which, as I learned by contacting OPM, was false. Brandon Toatley managed to frustrate my efforts to re-enroll for some time by stalling on contacting human resources to confirm that I had returned to active duty. I was not able to complete the re-enrollment process until late June, by which time I had been without health benefits for seven months. My son is okay, but the coverage gap created by the secret reinstatement and secret recancellation of my benefits will prevent me from carrying them into retirement unless I can work for five years from the date I was able to re-enroll, which will take

until after I am 69. I probably will not be able to do that.

20. I plan to appeal the Board's denial of my compliance petition to the circuit court, and to take the position that I had health benefits when I was suspended, but that I no longer had health benefits when the agency unsuspended me, and, therefore, I should not be considered to have been restored to the status quo ante.

21. When I learned in June that the agency contended that it had cancelled my health benefits sometime in the late winter, and that it was further contending that the late-winter cancellation was beyond MSPB's jurisdiction, I asked the union to process a grievance concerning the cancellation because it had been made without notification to me, which notification is required by the agency's rules. The union took no action on the grievance for at least a year and, if it is still active at all, it remains at the installation level, through which it should have passed by July 2010. I have asked the union on numerous occasions for information about the status of the grievance, all of which requests the union ignored. I plan to file another unfair labor practice charge this week.

22. A week or so before the hearing in the instant case and completely out of the blue the union sent me a proposed settlement that appears to be a promise by the agency to close any coverage gaps in my health benefits that occurred in 2009, 2010, or 2011, in exchange for which I would have to refrain from appealing the denial of the compliance petition to the circuit court and withdraw some grievances pertaining to Toatley's June 2010 stalling on calling human resources. I have not decided whether to accept the settlement, primarily because of the almost two decades of history of the agency refusing to honor settlements, and the corresponding history of the union failing to enforce the settlements. I have been fooled many more times than twice.

23. That the agency deprived me and my family of health benefits for seven months seems to me repulsive and indecent, and it still makes me very angry when I think about it. It was that memory that caused to me lose my composure toward the end of the hearing on November 4th.

24. My route is overburdened, as are most of the routes in my zone. Most carriers don't object to having overburdened routes because it results in extra pay for them. Most of the carriers in my zone have volunteered for overtime by signing the overtime desired list, and it's easier to work overtime on one's own route than it is to work on other carriers' routes. The top level pay for a letter carrier is presently about $56,000 annually, but it is not unusual for carriers in my zone to make $80,000, $90,000, or even $100,000 per year because of overtime. In general, however, carriers dislike being forced to work overtime on the unfamiliar routes of other carriers.

25. Exh. QQ shows my performance on Route 16011 on 27 days in 2009 and 2010. This is the kind of data the union and management use to adjust routes, although 23 days is too small a sample to do a really accurate adjustment. There are some "data anomalies" that need to be taken

out. These include 12/19/09, 2/8/10, and 2/10/10. I didn't work on any of those days, as I was waiting for the agency to restore my health benefits (*see* ¶ 11, *supra*), and it is never possible to deliver a route in 0:00, as some of that data shows. 8/31/10 should also be taken out because my total route time on 16011 has never been that low. (When adjusting a route, removing such data anomalies would be the first thing done by the union and management.) I have doubts about the accuracy of some of the other dates, but even when only the four I identified are removed the average total time for my performance is 12:46, and the route has been added to since the last date on the print-out.

26. In May, June, and July 2010 Toatley honored my physician's recommendation, and abstained from his practice of several years of requiring me to work overtime every day. Toatley immediately replaced the stress I was freed from of working overtime, however, with a new stress that was much worse: Rather than giving me assistance when I requested it in the morning, as is required by regulations, he made me take all of the mail out to my route and to bring back in the late afternoon the mail I had been unable to deliver. The evening supervisors would then tell carriers who were returning after eleven or twelve hours that they would have to go back out and deliver my mail in the dark for several hours because I had brought back most of my route undelivered. Nobody else in the station was allowed to bring back mail, and some other carriers began accusing me of thinking that I was special. In short time, carriers with whom I had shared a friendly rapport for years stopped smiling at me and started to avert their eyes to avoid meeting mine, or to glare at me. Some even shouted at me when on the previous day they had been forced to adjust day care schedules so that they could deliver my mail using the caver's lamps many Zone 16 carriers bring at their own expense for night-time deliveries. Where before I had the friendliness of my co-workers as a source of emotional strength and support, now I had to contend with their hostility, as well as the hostility of my supervisors.

27. On July 29, 2010, in our first interaction, and without even introducing himself, Sterling Colter approached me shortly after I clocked in and gave me an impossible-to-comply-with instruction concerning the timely completion of my route. After we talked for about a minute he instructed me to leave the premises because he was suspending me pursuant to Article 16, Section 7 of the collective bargaining agreement. I left the station as directed.

28. As is customary when emergency suspensions are given pursuant to Article 16, Section 7 I waited at home for a written notice. When after a couple of days I didn't get one I started sending emails to Brandon Toatley, at that time still my immediate supervisor, reminding him of my right to a written notice and asking when I would be permitted to initiate a grievance concerning the suspension. On or about August 4th Toatley emailed me and said that nobody had suspended me and that I should return to work.

29. (In 1994 and 1995 I carried a mini-cassette recorder while I worked so that I could make oral notes of stray thoughts concerning *Noble v. Sombrotto*. On the day after Thanksgiving in 1995 I had an argument with an acting supervisor named Mike Johnson. As the argument ended Johnson said that he was suspending me pursuant to the emergency procedures of Article

16, Section 7. I pulled my recorder out of my pocket, turned it on, and asked Johnson what the reason for the suspension was. Johnson looked down as he answered, as do many people when they lie, and said that I had made a threatening gesture that had frightened him. He apparently didn't see the recorder because he was looking down. When the written notice was later issued it charged me with making threatening statements to Johnson, rather than threatening gestures.)

30. (I took Johnson's deposition a couple of months later and asked him about why I had been suspended. I played the recording during the deposition and asked Johnson to explain the difference between what he said at the time he suspended me and what was said in the written notice of charges. Johnson was surprised that I had a recording and could not explain. A Postal Service attorney and an assistant U.S. attorney were present at the deposition, and were furious that I had exposed Johnson as a liar. The Postal Service's attorney sought out a Postal Inspector, who tried to confiscate my tape but I refused to give it up, although I offered to make her a copy.)

31. (No disciplinary action was taken against me for recording my conversation with Johnson, and no criminal charges were filed against me for the taping. No agency representative ever told me that taping Johnson violated any agency rule. I credit the tape with saving my job and my lawsuit.)

32. (The agency continued my suspension for about ten months, although it paid me administrative leave for all but the first two weeks to prevent me from appealing to the MSPB. After about ten months the agency returned me to work without explanation. The union filed a grievance to recoup the two weeks of pay I lost. After four years in 1999 the union and the agency agreed that the suspension would be rescinded and expunged and that I would be paid for the two weeks of pay I lost. Thereafter the agency refused to honor the settlement and the union refused to enforce the settlement. In or about 2001 I filed suit against the agency in federal court. Two weeks before trial, the agency settled the suit by agreeing, *inter alia*, to pay me for the 1999 settlement of the 1995 suspension. I actually received the payment in 2004, more than five years after the grievance settlement, and more than eight years after the suspension.)

33. After I got Toatley's email saying that I had not been suspended I was very angry. While supervisors often prevaricate, this was a level of falsehood I had not experienced since Johnson's big lie in 1995. After reflecting for a few days I bought a digital recorder, and made recordings on almost every day I worked for the remainder of 2010. On a few days I forgot to bring the recorder. I showed my recorder to Toatley and Colter and told them that I was making recordings. When Bill French arrived in or about September I showed him the recorder and told him I was making recordings.

34. On one occasion French and Colter told me that making recordings on postal premises was against policy. I asked them to show me the rule or regulation they thought was applicable, but they never did.

35. When I returned to work Toatley held a predisciplinary interview with me on August

12th, saying that I had been AWOL since July 29th because Colter had not suspended me on that date. Colter joined the interview after it began and said that I would be disciplined for being AWOL beginning on July 29th. No such discipline was ever issued, however. I was not paid for the period that I missed work from July 29th until I returned to work after Toatley's email. That was my rent money, and I (and my family) had to live on the brink of eviction for several months until I could make it up. That caused great emotional strain.

36. In addition to the threat of discipline he made in the August 12th predisciplinary meeting, Colter on two other occasions on August 12th threatened me with discipline. He instructed me to pull down my route and leave for the street by 9:30 a.m. (as with the July 29th instruction, that was an impossible deadline) or I would be given "corrective action." I did not come close to pulling down by 9:30, but no discipline was issued. On the afternoon of August 12, 2010 Chester Maddox and Sterling Colter came out to my route. Maddox was at that time an acting supervisor. Colter approached me and asked how I was doing. I said that I was doing fine, and that I was trying to figure out how much undelivered mail I would have to bring back to the station. Colter, in front of Maddox and members of the public, then repeatedly shouted at me: "IF YOU BRING MAIL BACK TO THE STATION I WILL HAVE YOUR JOB BECAUSE I WILL NOT TOLERATE DELAY OF MAIL." I brought back mail on that day, and every other day I worked in 2010. I was never disciplined for bringing back mail. Colter's treatment of me caused great emotional distress. There were no other multiple threat days involving Colter, although single threat days occurred now and again.

37. Notwithstanding the NLRB notice he had signed and posted on June 29th , Toatley refused to meet with me so that I could initiate a grievance concerning the suspension until more than two weeks after the time limits for a grievance-initiation discussion had expired. I then asked the union to pursue a grievance at the next step of the grievance procedure, as is provided for by the contract when management fails to timely meet at the first step.

38. When after a few months the union did not seem to be pursuing the grievance I asked it to process concerning the July suspension I filed an unfair labor practice charge against the union. After investigating the charge the NLRB issued complaint against the union for failing to process my grievance about Colter's July 29th suspension, and for misleading me about the status of that grievance.

39. Bill French arrived in Zone 16 in or about September 2010 and took over floor supervision from Toatley. French had worked with Colter downstairs in Friendship Station before coming to Zone 16.

40. Bill French did not honor my physician's recommendation that I not work overtime, and gave me written instructions to work overtime every day I worked for the remainder of 2010. French's written instructions forced me to make a choice every day between following my physician's recommendations or my supervisor's orders. The bind created by being forced to make that choice caused me great emotional discomfort. I had for years as a union representative

taught other letter carriers the paramount importance of following the "obey now, grieve later" rule. While there is a danger-to-health exception to the rule, it is not very strong. I made the choice to disregard French's orders and continued to bring back most of my route every day for the remainder of the year, causing other carriers' hostility towards me to continue to build as I waited every day for the other shoe to drop as to my refusal to follow my supervisor's orders.

41. At the hearing French contended that he did not recall being told that my physician recommended that I not work overtime. However, in early October Colter and French had refused to permit me to work until I furnished medical evidence that I could do so. In response I obtained Exh. X. p. 5 and put it directly into French's hand. Notwithstanding that note French continued to direct me to work overtime every day.

42. French offered to consider adjusting my route (as he testified), but conditioned that on my carrying the entire route in a single day while he walked with me. That would have entailed working for 11 – 15 hours in a day, something my physician had recommended that I not do, and something I would probably be physically incapable of doing. Furthermore, routes are not adjusted by having a supervisor walk with a carrier for a single day. Instead, they are adjusted by making an analysis of the average time the regular carrier has actually spent performing street work over a period of time, and an analysis of the average mail volume received by the route. It would have been a simple matter for French to adjust the route using approved methods with data that was readily available to him, but he instead manufactured an impossible to meet condition as an excuse to keep from doing so.

43. When Bill French arrived in Zone 16 in or about September 2010 the agency stopped paying me for holidays, a function it had performed flawlessly through the first 35 years of my postal career. French denied that he was responsible for the stoppage, but took no action to find out why I wasn't being paid. French also refused to permit the union to initiate grievances concerning the stoppage (as Leon Tucker testified on November 4th), and refused to timely provide the union with information concerning the stoppage. I tried to use discovery to obtain evidence that would have shown that French made alterations to time records to prevent me from being paid for holidays, but the judge did not order the agency to respond to those discovery requests. The factual record, therefore, is not as clear or as complete as I would have wished it to be.

44. I was in pay status the last hour of the day before or the first hour after each of the five holidays that occurred after French's arrival in Zone 16 and thereby established my eligibility for holiday leave pay. Exh. A, p.5. As French testified, the agency's pay system should have automatically recognized that eligibility and paid me. It didn't, however. That can only be explained by a human action that interfered with the pay system's automatic recognition of my eligibility.

45. The union processed a grievance concerning two of the holidays I was not paid in 2010. Exh. J. The union and the agency settled that grievance with an agreement that the agency

would pay me for the two holidays. *Id.* Since the agreement was reached more than nine months ago the agency has not honored the settlement, and the union has not acted to enforce the settlement although I asked in late February that it do so.

46. I do not ask the judge in the instant appeal to rule on or in any way revisit or relitigate the ruling of the administrative judge in MSPB Case No. DC-3443-11-0235-I-1. I do not in the instant case contend that the MSPB has jurisdiction to decide whether the denial of holiday pay constitutes a "reduction in pay." I do not in the instant case request that the MSPB order the agency to pay me for any of the five holidays. The above facts about the agency's failure to pay me, which are not contradicted by any evidence presented by the agency, are offered only as evidence of Bill French's bad faith and malice.

47. In or about November 2011 Bill French conducted a predisciplinary interview with me concerning failure to be regular in attendance/AWOL. I had been working about two days a week. Among other things, I told French that the Postal Service had condoned my poor attendance for years, and that under long-established arbitration precedent such condonation would prevent the Postal Service from making out a case for just cause until the Postal Service gave me and the union unequivocal notice that it would no longer condone my poor attendance. I also told French that the Postal Service was responsible for my poor attendance because it had made my working conditions so bad that I could not bring myself to work every day. As an example of a bad working condition, I particularly emphasized the six years that I had been forced to work on an overburdened route, and pointed French to the letter I had written to Toatley in February 2010 (Exh. F) as listing problems the Postal Service needed to address to help me improve my attendance.

48. Neither French nor any other agency representative issued discipline to me for the absences that had been the subject of the November 2011 predisciplinary interview conducted by French. Instead, the Postal Service continued to condone my poor attendance and AWOLs, and continued to fail and refuse to address any of the issues I had identified as causing my poor attendance.

49. On or about January 13, 2011 I requested 64 hours of sick leave and annual leave. I submitted medical documentation at the time I made the request. Bill French approved the request at the time I made it. I told French at the time that I needed the pay for that request as soon as possible to pay for cardiac medications for me and for my wife. I should have been paid for that leave request on January 21, 2011. Instead, I received a partial payment in March. I still haven't been paid for the full amount of leave that French approved.

50. I tried to use discovery to obtain evidence to prove that French intentionally delayed my leave request, but the judge did not order the agency to produce that material. The record about this matter, therefore, is not as clear or as complete as I would wish it to be.

51. By letter dated January 31, 2011 Antonio Jones notified me that I was considered to

have been AWOL since December 14, 2010. The letter instructed me to return to work within five days or to provide medical documentation for my absences. Exh. 3.

52. On February 4, 2011 I sent a fax to the two union stewards in Zone 16. Exh. FFF. I asked them, *inter alia*, to get information from Antonio Jones and Bill French about why a second payday had passed without pay for the leave that French had approved on January 13th. I spoke to Williams on February 7th by phone to find out whether he had gotten any information from Jones or French. Williams told me that both Jones and French refused to speak with him about it, and that French refused to meet with Williams to permit Williams to initiate a grievance concerning the failure to pay me for the leave. I listed Williams as a witness for the hearing but the judge rejected him.

53. I did not at that time consider my absences from work to be a medical problem (although I have recently been rethinking that evaluation), so I did not submit medical documentation in response to Jones' January 31st letter. I also did not wish to return to work. The agency's failure to pay me on January 21st and on February 4th had been the final straw – combined with the cumulative effect over the previous years of being constantly forced to work overtime, being forced to work an overburdened route (concomitantly being forced to bring back mail every day, concomitantly resulting in the ever-growing resentment and hostility of my fellow carriers), Sterling Colter's threats and big lie about the July 29th suspension, French's cheating me out of holiday pay, the remarkable hostility shown by the agency's action in holding me without health benefits for seven months while knowing the precarious state of my health, the utter refusal of both the agency and the union to respond to my various inquiries, and the complete failure of the grievance procedure to address any of the issues I had tried to use it to resolve, and other miscellaneous insults just had become too much to bear. So on February 8th I sent Antonio Jones a letter telling him, *inter alia*, that I had been constructively suspended since January 14, 2011. Jones did not answer my letter.

54. By letter dated February 16, 2011 Jones notified me that I had been scheduled for a predisciplinary interview on February 23, 2011. The subject of the interview was an allegation that I had been AWOL from January 14, 2011 through February 16, 2011.

55. On February 18th the third payday passed since French approved the annual and sick leave, still without pay.

56. On February 23, 2011 I went to Friendship Station for a predisciplinary interview with Antonio Jones. I recorded the interview. The following is a true and accurate transcript of everything that was said from the moment I first spoke to Jones when I entered until I walked out of his office:

Noble: Do you have some money for me Tony?

Jones: Not today, I don't. The adjustment has been done, it should come.

Noble: Why wasn't the annual and sick leave paid when I asked for it?

Jones: I have no idea. I wasn't here at that time.

Noble: Are these two copies of the same thing?

Jones: I don't know. Two different things. I called you in for being (inaudible) irregular attendance (inaudible)

Noble: Geez Tony are you the station manager?

Jones: Yes I am.

Noble: That's usually something that's handled by a supervisor.

Jones: Are you aware that (inaudible) irregular attendance Mr. Noble?

Noble: No. I haven't been regular in attendance for the last nine years.

Jones: (Inaudible).

Noble: In 2003 I didn't work a single day. In 2009 I worked seven days. I'm not sure what it is for 2010. Do I know that there is a rule that letter carriers are supposed to be regular in attendance, is that what you want to know?

Jones: Yes sir.

Noble: I guess there is a rule to the same extent as there is a rule that letter carrier routes are supposed to be adjusted to eight hours. And there's a rule to the same extent that letter carriers who aren't on the overtime desired list are supposed to be the last people who are forced to work overtime. And there's a rule to the same extent that when letter carriers apply for annual and sick leave they are supposed to get paid for them.

Jones: Just answer the question Mr. Noble.

Noble: Just answer the question? You don't want to have a conversation?

Jones: I will get to your questions in a minute.

Noble: Will you? I don't think those were questions. I thought those were comments.

Jones: I asked a question.

Noble: Oh.

Jones: Can you answer my question?

Noble: I don't know any rule. I don't think there are any rules at all in Friendship Station. I think chaos prevails in Friendship Station. Certainly it's resisted all of my efforts to impose a modicum of order. When do you expect that pay adjustment to come through?

Jones: I don't know.

Noble: Are there no rules about that?

Jones: (Inaudible) It was sent last week (Inaudible).

Noble: Well I'll tell you what. When I get paid, call me back all right?

Jones: Is that your statement?

Noble: That's my statement.

Jones: Thank you for your time Mr. Noble.

57. At no time before April 28th did any agency representative in any way notify me that I was considered to be AWOL during the period February 24 – April 28, 2011. No agency representative conducted a predisciplinary interview with me concerning any allegation that I was AWOL during the period February 24 – April 28, 2011.

58. In late April 2011 I was working on the last submission I would file in *Noble v. Sombrotto*. After that filing, the case would be ripe for re-decision by the trial judge. The last submission was very difficult because it involved complex legal issues and I was mired in legal research. I had asked the judge for an extension until May 15th for filing the final submission. The judge, instead, granted an extension until June 1st, and indicated that no additional extensions would be allowed. I was glad the judge had given me extra time because I estimated that I would have to work long hours every day to finish by June 1st.

59. On April 29, 2011 I received in the mail a Notice of Proposed Removal dated April 28, 2011. That notice informed me of my right to answer the proposal in person or in writing, or both, to Paris Washington. The notice did not tell me where to send a written answer.

60. On April 30, 2011 I sent a fax to the proposing and concurring officials and asked a question about the letter, asked for their email addresses, noted that a form that was supposed to be enclosed with the notice was not, and noted that the notice had not indicated an address to which I should send a written response to Paris Washington. Exh. AAA.

61. Neither the proposing official nor the concurring official responded to my April 30th fax.

62. The notice did give me a telephone number for Paris Washington's office to use "if I wished to reply in person." I did not wish to reply in person. I conduct business with the agency in writing to the maximum extent possible so that there will be an objective record of what transpired. Nevertheless, I called the number on April 30, 2011 and May 1, 2011 so that I could get an address. The phone was not answered on either occasion, so I left messages for Mr. Washington to call me. I did not ever receive a return call from Mr. Washington.

63. It is not in the least bit unusual for members of management to fail or refuse to answer my communications. Indeed, by April 2011 that had become the norm. Notable examples of management silence include, but are not limited to: Jones' failure to answer my February 8, 2011 letter, Furgeson's failure to comply with the administrative judge's order to notify me when the agency believed it had restored me to the status quo ante after the 2009 suspension, Furgeson's and Fletcher's failures to answer my April 2010 emails concerning my health benefits, and Toatley's failure to answer my May 2009 and February 2010 letters. The exhibits I have submitted in the instant case mention numerous other examples of management failure or refusal to respond to my oral and written communications. I regard management's silence as a form of ostracism, and it causes me to feel emotionally strained. The union also usually ignores my efforts to communicate with it, and the NLRB has three times in the past two years issued complaint against the union for intentionally keeping me uninformed about the status of my grievances, or for misleading me about their status.

64. For two reasons I did not take the notice of proposed removal very seriously. First, because of its timing I thought that it was just a jab calculated to disturb me while I was working on an important filing in *Noble v. Sombrotto.* On many occasions in the past the Postal Service had seemed to be acting as the union's alter ego by timing actions against me to coincide with important moments in my suit. (On one occasion management reassigned me to work in Anacostia, an action that inspired CNN to do a seven-minute story about me, leaving me eight minutes short of the fifteen minutes of fame I'm due. CNN spent a whole day video-taping me in Anacostia with Uzi's being fired blocks away. The camera operator described the experience as being more frightening than when he filmed fighting in Beirut.) I knew as a former insider that the union's officers sometimes colluded with management officials about individual employees. The second reason I didn't take the notice very seriously was that the Postal Service's case against me was laughably weak. I had fifteen years of full-time professional experience in handling discipline cases and had in 1986 written a book about discipline in the Postal Service. The notice showed numerous obvious flaws, including: a. There had been no predisciplinary interview for the period I was charged with being AWOL (an omission that is always fatal to discipline), b. No progressive discipline had been administered before the proposed removal, although in my long experience the Postal Service always treated AWOL as an offense for which progressive discipline was required by the collective bargaining agreement, c. The Postal Service's treatment of me in the previous couple of years had been so dreadful that I considered

myself to have been constructively suspended, had so notified management, and I doubted that management would give me the opportunity to document their abuse of me through litigation, d. I doubted that management would even be able to establish the elements of an AWOL charge. (That doubt was justified at the November 4, 2011 hearing when the agency failed to present sufficient evidence to prove either that my absence was not authorized or that a request for leave was properly denied.) While I had known the Postal Service to exercise terrible judgment on some occasions in the past, I didn't think that it would move this case against me.

65. I learned about myself long ago that I cannot multi-task. When I try to do two things at the same time I can't do either of them well. I was determined to try to minimize the effect the proposed removal would have on my pursuit of *Noble v. Sombrotto*. When the proposing official, the concurring official, and the deciding official all spurned my attempts to communicate with them, therefore, I turned the whole of my attention back to my suit.

66. I made the final filing in my suit on June 1st. The notice of proposed removal had set a removal date of May 28, 2011. Because that date had passed and the deciding official had not issued a decision letter I concluded that I had been correct in my evaluation of the situation, and that the Postal Service had abandoned any effort to remove me. I then turned my whole attention to a complaint the NLRB had issued against the union, and which was scheduled for a hearing before an administrative law judge on July 21st. Between June 1st and July 21st I worked at least 40 hours a week preparing for the hearing, spending about half of that time in telephone calls or direct meetings with a NLRB attorney.

67. The Postal Service sent me a letter dated June 21, 2011, notifying me that I had been on long term LWOP since January 14, 2011. Exh. TT. (In my February 8th letter to Jones, I had said that I had been constructively suspended since January 14, 2011.) Exh. E. A Form 50 accompanied the letter, and also indicated that I had been placed on long-term LWOP effective January 14, 2011. Exh. D. "LWOP" is an approved leave status, and is not a synonym for "AWOL." Exh. C. I have been involved in the administration of the collective bargaining agreement for more than 36 years, and I have never even heard a management representative assert that LWOP and AWOL are the same thing, or that an AWOL charge may be lodged against an employee who is in an approved leave status. I am unaware of any authority supporting such propositions. Exh. C was published by the agency's headquarters level and cannot possibly be superceded by a first level supervisor's opinion that contradicts it.

68. On July 5th Paris Washington issued a decision letter sustaining the proposed notice's charges and setting an effective removal date of July 22nd, the day after the scheduled NLRB hearing. The NLRB's lawyers wondered about the timing, but I thought it was just a coincidence.

69. I filed an appeal to the MSPB in August 2011.

70. I began my efforts to take discovery on September 12, 2011, when I served

interrogatories and document production requests on the agency.

71. The agency did not cooperate with my first attempt to take discovery, but waited for twenty-two days before sending objections to all of my requests. Exh. Q.

72. On September 27, 2011 the judge stated that "[i]f the parties introduce any additional exhibits at the hearing, I will specifically rule on their admissibility at a later time."

73. On October 14, 2011, I filed a motion to compel discovery as to the agency's objections to my first discovery requests. Also on October 14, 2011 I submitted a second round of discovery requests.

74. On October 20, 2011 the judge set November 3, 2011 at 12:00 p.m. as the deadline for submitting exhibits, and simultaneously set November 4, 2011 at 9:30 a.m. as the date and time for the hearing.

75. Also on October 20, 2011 the judge granted in part my motion to compel, ordering the agency to produce the compelled material on October 31, 2011 by 5:00 p.m. The agency, however, did not produce the material until November 1, 2011 after 4:00 p.m.

76. By letter dated October 24th the agency objected to the depositions I had noted on October 14, 2011.

77. On October 31st I filed a motion to compel as to the witnesses whose depositions I had noted. By an order delivered to me on November 2nd the judge granted in part my motion to compel the agency to produce four witnesses for deposition, provided that I could conduct the depositions before November 4, 2011 at 9:30 a.m. I was unable to obtain a notary public to administer oaths on the less than one day's notice given me by the judge. Thus, I was prevented from taking any depositions.

78. As ordered by the judge I submitted my exhibits by 12:00 p.m. on November 3rd. At the November 4th hearing the judge scolded me at length for having complied with his order, starting his scolding using Exh. QQ as an example. That exhibit, however, had been given to me on November 1st as part of the agency's belated discovery response.

79. The hearing was held as scheduled on November 4th. The agency's first witness was Antonio Jones. After Jones testified I indicated that I had a recording that would show that parts of Jones' testimony were false. I asked to be permitted to submit the recording as an exhibit, and I asked to be permitted to submit a transcript as an exhibit. The judge denied both requests.

80. While the judge denied my efforts to introduce evidence showing that false testimony had been given in his court, at the hearing the judge asked the agency to provide as an exhibit any agency regulations pertaining to making recordings in postal facilities. The agency responded by

furnishing a copy of Part 667.2 of the Employee and Labor Relations Manual, which is entitled "Interception of Oral or Wire Communications by Postal Employees." I have never "intercepted" by recording an oral communication between other people. I have only recorded conversations to which I have been a party, an action which I understand to be authorized by D.C. Code Ann. § 23-542. My intent in making the recordings was to protect myself against future lies about what I said or about what the other person involved in the conversation said.

81. D.C. Code Ann. § 23-542 states: "In the District of Columbia, an individual may record or disclose the contents of a wire or oral communication if he or she is a party to the communication, or has received prior consent from one of the parties, unless the recording is done with criminal or injurious intent. A recording made without proper consent can be punished criminally by a fine of no more than $10,000 or imprisonment for no more than five years, or both."

82. In the book I wrote in 1986 about discipline in the Postal Service I discussed an arbitration decision that reversed the agency's removal of an employee who had made recordings of his own conversations in postal facilities. The arbitrator noted that the recording of one's own conversations was lawful, and that postal regulations did not expressly prohibit that lawful activity.

83. I am distressed and confused as to why a judge when offered evidence of false testimony having been presented in his court showed no interest in protecting the integrity of the legal process, but showed a keen interest in determining whether anything might be done to the person who could prove the false testimony.

84. There was some testimony on November 4th about Amado Ingram, but no witness could testify as to the final disposition of his grievance. I obtained a copy of the resolution of Ingram's removal on November 3rd after the deadline for submitting exhibits. The resolution is dated September 9, 2010 and reduces the removal to a fourteen day no time off suspension for three months from the date of the signing, after which the discipline will be removed from Ingram's personnel file.

85. (In May 2009 Supervisor Brandon Toatley sent me a written predisciplinary interview concerning irregular attendance and/or AWOL.)

86. (I answered the predisciplinary interview by letter to Toatley dated May 14, 2009. Exh. G.)

87. (After receiving my May 14, 2009 letter neither Toatley nor any other agency representative issued discipline to me concerning the absences that had been the subject of the May 2009 interview.)

88. (In February 2010 Brandon Toatley sent me a written predisciplinary interview

concerning irregular attendance and/or AWOL.)

89. (I answered the predisciplinary interview by letter to Toatley dated February 25, 2010. Exh. F.)

90. (After receiving my February 25, 2010 letter neither Toatley nor any other agency representative issued discipline to me concerning the absences that had been the subject of the February 2010 interview.)

91. (As described above in this declaration, agency representatives conducted other predisciplinary interviews with me concerning AWOL on August 12, 2010, in November 2010, and on February 23, 2011. No discipline was ever issued to me as to the absences that were the subject of those interviews. These facts establish an appreciable probability that, if a predisciplinary interview had been conducted as to the February 24th – April 28th absences the agency would not have taken disciplinary action against me based on those absences.)

92. I have almost 35 years of experience preparing cases for arbitration hearings, various board hearings, and court hearings. That's something I know how to do. Over that period I have won many more cases than I have lost. Over that period I have never been as jammed as to time as I have been in the instant case, and I have never before had a trier of fact reject my repeated pleas for more time to prepare. In presenting a case about my own removal after more than 36 years of unblemished service I would have wished to present as close to a perfect case as I could. Instead, I was forced by the judge's impatience to put on a sloppy and incomplete case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 2011.

David W. Noble, Jr.