UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DAVID NOBLE, JR.,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

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

DATE: October 20, 2011

ORDER AND SUMMARY OF SECOND PREHEARING CONFERENCE

I conducted a second telephonic status conference with the parties on October 17, 2011. The parties are notified that every matter that I ruled upon in my previous Order and Summary of Prehearing Conference ("Summary") dated September 27, 2011, remains in full force and effect, unless otherwise noted below. The following matters were discussed:

1. **SETTLEMENT**: Both parties wrote and indicated that they believe this case will not settle.

2. **ISSUES**: On October 6, 2011, the appellant requested that I modify the issues I identified in the Order and Summary of Prehearing Conference dated September 27, 2011. *I discussed this matter at length with the parties during the first and second prehearing conferences, and, upon further reflection, I have decided to handle this matter differently than how I told the parties I would handle it at the second conference*. After reviewing the appellant's arguments contained in his submissions and the assertions he made during the first and second prehearing conference about this matter, I am granting in part and denying in part his request.

By way of background, I note that on page 1 of the appellant's appeal form, when asked to check the box that best "describe[d] the personnel action or decision taken by the agency," he clearly noted that the action he was contesting was a "Removal." Although the appeal form provided him with alternate options, he did not check any other box listed therein, such as "Suspension for more than 14 days," or "Other action" (under which catch-all category he could have written the words "constructive suspension"). While the appellant mentioned that he believed the agency subjected him to intolerable working conditions, he never once stated on his appeal form that he believed this caused him to be constructively suspended.[1] Instead, he repeatedly referred to the removal action as the matter he was challenging in his answers to various questions on the appeal form. Appeal File, Tab 1, MSPB Form 185-2, pages 1-2 (Answers to Question Nos. 1, 6, 7) (Continuation Sheet); *see also id.*, MSPB Form 185-4A (Answers to Question Nos. 1-2). In addition, he attached a copy of the agency's removal decision letter to his appeal form, which he apparently did to show evidence of the matter he was challenging.

The appellant, for the first time in his prehearing submissions, explicitly stated that he believed he may have been constructively suspended as well as removed. Appeal File, Tab 11, at page 1. During both prehearing conferences, the appellant asked that I include the constructive suspension claim as an additional issue in this appeal. When I initially denied this request, as noted in the earlier "Summary," the appellant filed a written objection to my ruling. I will now respond again to the appellant's written objection.

First, I am denying the appellant's request to modify the issues identified in my previous Summary, but only as those issues pertain to the pending case.

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[1] That is why I accepted as an issue in this case his intolerable working conditions claim as an affirmative defense.

Stated differently, I will not add the constructive suspension claim as a new issue in the current appeal.

Second, I am granting the appellant's request to litigate the constructive suspension claim, but in a different manner than the way he asked for it. I find that his new (or more clearly identified) allegation constitutes a separate, discrete action. This separate action involves issues of timeliness and jurisdiction that are not directly related to the pending removal action. I must provide the parties with explicit information as to what is required to establish an appealable jurisdictional and timeliness issue on the constructive suspension claim. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). For these reasons, I have decided to docket the appellant's constructive suspension claim as a separate appeal. The parties will receive information about the newly docketed appeal within the next several days.

3. **STIPULATIONS**: The parties did not stipulate to any matters.

4. **AMENDED ORDER ON LAW OF THE CASE DOCTRINE, COLLATERAL ESTOPPEL AND RES JUDICATA**: The agency, in its September 30, 2011 motion to correct, clarify, and amend the "Summary," asked that I add another previously-adjudicated case to my listing of the appellant's four other earlier appeals. The agency identified the additional case as *Noble v. U.S. Postal Service*, MSPB Docket No. DC-3443-11-0235-I-1 (Initial Decision, Apr. 1, 2011) (Administrative Judge Sherry A. Zamora dismissed the appellant's appeal of the agency's action denying his request for holiday pay). I am granting the agency's request that I add this former *Noble* case to the ones listed in my previous "Summary." Thus, to the extent the appellant has not already done so, he must specifically discuss if any or all of the matters addressed in his appeal before Judge Zamora might preclude him from re-litigating them in these current proceedings. The appellant must follow the explicit instructions I provided him on this topic in my earlier "Summary." The appellant is ordered to respond to

this matter so that his reply is received by the agency and the Board no later than 5:00 p.m. Eastern on Wednesday, October 26, 2011.

5. **MOTION TO POSTPONE THE HEARING**: On September 30, 2011, the agency asked that I postpone the hearing (or, in the alternative, add a later, second hearing date) because a key witness requested by both parties, Antonio Jones, would be on annual leave and out of the Washington, D.C. area from October 15-25, 2011. The agency did not provide evidence to support this assertion (for example, copies of previously purchased non-refundable airline tickets), did not specify how far away Mr. Jones would be from the hearing site, did not say if he would be able to testify by video or telephone at a different location, or disclose if his need to be out of town was the result of an emergency situation. Assuming that Mr. Jones was expecting to be on vacation on the scheduled hearing date, I note that it is not my practice to reschedule a hearing merely because of an unsupported claim that one of the witnesses wished to take annual leave. Instead, it is my practice to expect that when I approve federal employees as witnesses, they should attend a scheduled Board hearing, even if they would prefer to be on annual leave.

On October 6, 2011, the appellant filed a "renewed objection" to my decision to grant his request that I reschedule the hearing. To be clear, I previously allowed the appellant's request to delay the hearing, but he is now objecting because he wants even more time. On October 11, 2011, the appellant filed an unopposed motion to postpone the hearing, reiterating the reasons for why he wants another delay. At the prehearing conference, the agency's representative confirmed that the agency did not object to the appellant's request.

The parties' motions to postpone the hearing are granted. At the prehearing conference, I initially told the parties that I would reschedule the hearing for October 27, 2011. At that point, however, both parties objected and asked me to delay the hearing yet again. In light of the parties' continuing

objections, the hearing is rescheduled for Friday, November 4, 2011, beginning at 9:30 a.m. Eastern. **No further delays will be granted, absent exigent circumstances**.

6. **OBJECTIONS**: The appellant, in his October 6, 2011 Objections to my previous "Summary," asserted that I erroneously stated that he questioned my authority to make rulings on witnesses ("Objection No. 4"). To the extent the appellant is asking that I modify the previous "Summary" on this point, his request is denied. The statement I made on this is accurate.

Next, the appellant, in his October 6, 2011 Objections, took offense that I characterized the proffers for his witnesses, as contained in his prehearing submissions, as "general, vague, and cryptic." ("Objection No. 5"). He likewise argued that his proffers:

> were at least as informative as the agency's, which summaries the judge found unremarkable. Appellant objects to being singled out.

To the extent the appellant is asking that I modify the previous "Summary" on this matter, his request is denied. I note that, in my August 18th hearing order, I directed the parties to file prehearing submissions, including "[a] list of witnesses with a brief summary of the expected testimony of each witness." The Board's regulations require me to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *See* 5 C.F.R. § 1201.41(b)(10); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). The agency, in its prehearing submissions, provided witness proffers that specifically identified who the individuals were, where they worked, and which particular issue(s) they would be expected to testify about at the hearing. As an example, the agency's proffer for its first witness, Antonio Jones, states:

> Acting Manager, Customer Service, Capital District, United States Postal Service will testify that he issued a return to duty letter to the Appellant, met with the Appellant for a Pre-disciplinary Interview (PDI) until the Appellant abruptly left never to return. Mr. Jones also entered some of the Absences Without Leave (AWOL) into the

> Time and Attendance Control System (TACS) because the Appellant never returned to work or Presented documentation for his absences after he abruptly left the PreDisciplinary Interview (PDI).

In contrast, the appellant's proffer for this same witness tersely states: "Adjustment of routes; annual and sick leave; holidays; 2/11 PDI." Reviewing the appellant's proffer for this witness, it fails to explain where Mr. Jones works (or even if he is a Postal Service employee), what his job title is, what his relationship is to the appellant or anyone else in this appeal, or how he will be providing testimony that is both relevant and material to the facts in this case. I believe that, by comparing the parties' proffers, it is readily apparent that my previous characterization of the appellant's proffers was accurate and that I was not "singling [him] out," as he claimed.

7. **MOTION TO DISQUALIFY**: The appellant, on October 6, 2011, asked that I be disqualified because I made "false statements about appellant's conduct during the September 26th prehearing conference." The appellant's request is denied. As I indicated above, the statements I made in the "Summary" are accurate. I also want to assure both parties that I do not have, as the appellant asserted, any "deep-seated antagonism" towards them or their arguments. I fully understand that the parties who appear before me do not always agree with my rulings.

8. **MOTION IN LIMINE**: The agency, in a pleading dated October 11, 2011, requested that I deny certain of the appellant's exhibits as irrelevant and immaterial. The agency explained that the appellant submitted certain exhibits with his prehearing submissions that pertain to issues identified in some of his previous Board cases, but not this one. The agency's motion, as to the exhibits, is denied. I will admit these exhibits into the record over the agency's objection. However, I will assess the probative value of these exhibits in my review of them.

Next, the agency asked that I strike the appellant's affirmative defense of harmful procedural error because the exhibits he submitted in support of this

issue have no relevance to his claim and he has failed to show that the agency's alleged failure to use progressive discipline hen it removed him constituted harmful procedural error. The agency's request to strike the appellant's harmful procedural error claim is denied.

9. **MOTION TO COMPEL**: On October 14, 2011, the appellant filed a motion to compel. At the prehearing conference, I made the following rulings concerning the motion to compel.

The appellant asked that I direct the agency to respond to Interrogatories 1-9, and 12.

> **Interrogatory 1 states**:
>
> Identify any and all city letter carrier employees of the Washington, DC post office who have been removed since 1/1/06 based on a charge or charges of unsatisfactory attendance and/or AWOL and who had at the time the removal action was taken: a) thirty or more years of postal employment, and b) an unblemished disciplinary record.

In support of this request, the appellant argued that when he was removed, he had over 36 years of unblemished employment with the agency. He asserted that he believed that, over the past five years, he was the only city letter carrier in Washington, D.C. with 30 or more years of unblemished service to be removed for unsatisfactory attendance and/or AWOL. He explained that an answer to this interrogatory related to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the appellant's interrogatory is too general and overly cumbersome.

Ruling: The appellant's request to compel a response to Interrogatory 1 is granted in part and denied in part. His request to obtain such information from the entire Washington, D.C. post office for the past five years is overly broad and unduly burdensome. Nonetheless, I am directing the agency to respond to the

appellant's interrogatory for one year from the effective date of the removal action.

Interrogatory No. 2 states:

> Identify any and all employees of the Washington, DC post office who have been issued lesser discipline than removal since 1/1/06 based in whole or in part on a charge of unsatisfactory' attendance and/or AWOL.

In support of this request, the appellant asserted that he believed the agency has issued discipline short of removal in hundreds of instances where identified employees have been charged with unsatisfactory attendance and/or AWOL. He declared that the answer to this interrogatory related to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the appellant's interrogatory is too general, too broad, and overly cumbersome.

Ruling: The appellant's request to compel a response to Interrogatory 2 is granted in part and denied in part. I agree with the agency that his request for such information from the entire Washington, D.C. post office for the past five years is too general, overly broad, and unduly burdensome. Nonetheless, I am directing the agency to respond to the appellant's interrogatory for one year from the effective date of the removal action. The agency's answer may be limited to only those employees who have been charged with the same offenses as the appellant in these proceedings.

Interrogatory No. 3 states:

"Rank the letter carriers in Zone 16, Washington, DC, by the speed at which they deliver mail."

In support of this request, the appellant alleged that he and about 50 other letter carriers work in Washington, D.C.'s Zone 16. He indicated that, according

to the agency's regulations, letter carrier routes are supposed to be adjusted at the pace of the route's regular carrier "to as nearly eight hours daily work as possible." He argued that, for the past six years, the agency repeatedly told him that he is too slow, but the agency refused to correctly adjust his route, which usually took him about 14 hours to deliver mail.

The appellant stated that he expected that the agency would answer that it cannot rank carriers by the speed at which they deliver mail, and so this will demonstrate that he has been subjected to six years of baseless criticism. He added that this interrogatory and the expected answer are relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions, harassment....").

Agency's Answer: At the prehearing conference, the agency's representative stated that the agency has no evidence (such as statistical data) that it can provide to the appellant that ranks letter carriers by the speed at which they deliver their mail, because no such evidence exists.

Ruling: I find that the agency's answer to this Interrogatory is responsive.

Interrogatory No. 4 states:

"Describe in complete detail and with full particularity the process by which the ranking described in No. 3, above, was performed."

In support of this request, the appellant stated that this interrogatory "will prevent the agency from ginning up a phony response to Interrogatory No. 3."

Agency's Answer: At the prehearing conference, the agency's representative reiterated that the agency does not collect evidence ranking letter carriers by the speed at which they deliver their mail, and they would have no way of being able to compile such data.

Ruling: I find that the agency's answer to this Interrogatory is responsive.

Interrogatory No. 5 states:

> Identify any and all letter carrier employees of USPS nation-wide who were in a pay status the last hour of the employee's scheduled

> workday prior to or the first hour of the employee's scheduled workday after the Columbus Day holiday, the Veterans Day holiday, Thanksgiving holiday, and Christmas holidays in 2010, and the New Year's holiday in 2011 but who were not paid holiday leave pay for four or more of those holidays.

In support of this request, the appellant stated that his former supervisor, William French, arrived in Zone 16 in September 2010, at which time the agency stopped paying him for working on holidays, and refused to permit the union to initiate grievances on his behalf concerning the stoppage. He wrote that he expected the agency to answer that he was the only carrier out of 190,000 who was eligible, but was not paid, for holiday pay. He stated that this interrogatory related to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions, . . . harassment, or bad faith, malice . . . on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this interrogatory is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling: The appellant's request as to this interrogatory is denied for the same reasons offered by the agency. In addition, I note that, by this interrogatory, the appellant is seeking information that clearly pertains to at least one of his previous Board cases that was dismissed, and so the issue may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. To the extent that the appellant is seeking an answer to this interrogatory because it may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including him, who will testify to this matter at the hearing. I also instructed both parties to submit a joint stipulation on whether the agency paid the appellant either holiday pay, or any other type of pay, for the four specific holidays listed in the interrogatory.

Interrogatory No. 6 states:

"How many letter carrier employees of USPS nation-wide requested [annual leave] and/or [sick leave] for the first pay period in January 2011?"

Interrogatory No. 7 states:

"Of the employees identified in 6, above, how many weren't paid for the [annual leave] and/or [sick leave] until March or later?"

In support of these two requests (Nos. 6-7), the appellant stated that, in January 2011, he asked his supervisor, William French, for 64 hours of sick leave and annual leave, and that French initially approved the request. The appellant indicated that he should have been paid for the leave request in late January 2011, but he only received a partial payment in March 2011, and he still has not been paid for the full amount. He suspected that French intentionally delayed the payment to harm him. The appellant stated that Interrogatories 6 and 7 are designed to show that, in the event the agency asserts that this occurred as the result of an innocent error, the probability of such an error "is essentially nil." He maintained that these interrogatories and the expected answers are relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions,. . . harassment, or bad faith, malice . . . on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by these two interrogatories is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling: The appellant's request as to these interrogatories is denied for the same reasons offered by the agency. In addition, I note that, by these interrogatories, the appellant appears to be seeking information that concerns one or more of his previous Board cases and so these issues may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. Furthermore, to the extent that the appellant is seeking answers to these

interrogatories because they may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including the appellant, who will testify to these matters at the hearing.

Interrogatory No. 8 states:

"List the Zone 20016 clock rings for every letter carrier who worked in Zone 20016 for the period 7/28/10 through 9/12/11."

As support for this request, the appellant stated that he anticipated that testimony may be given at the hearing concerning: a) the length of his route; b) the length of other routes in Zone 16; c) the amount of overtime worked in Zone 16; d) his eligibility for holiday pay; and e) the availability of assistance to carriers (such as him) who were not on the overtime desired list. The appellant explained that his request for Zone 16's clock rings would be relevant to the credibility of that testimony.

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this interrogatory is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling: The appellant's request as to this interrogatory is denied for the same reasons offered by the agency. In addition, I note that, by this interrogatory, the appellant appears to be seeking information that concerns one or more of his previous Board cases, and so these issues may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. Furthermore, to the extent that the appellant is seeking an answer to this interrogatory because it may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including the appellant, who will testify to these matters at the hearing.

Interrogatory No. 9 states:

"Identify any and all city letter carrier routes in Washington, D.C. that required sixteen or more hours to complete on 9/6/11."

In support of this request, the appellant argued that, according to the agency's regulations, "letter carrier routes are supposed to be adjusted at the pace of the route's regular carrier 'to as nearly eight hours daily work as possible.'" He asserted that the agency has held his route far out of adjustment for more than six years. He added that he expected the agency's answer to be that his route was the only route in Washington, D.C. that required 16 or more hours to complete on September 6, 2011. He contended that the expected answer to this interrogatory is relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions,... harassment, or bad faith, malice . . . on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this interrogatory is irrelevant to these proceedings.

Ruling: I granted the appellant's request as to this interrogatory.

Interrogatory No. 12 states:

> Explain in complete detail and with full particularity the reason appellant was not paid holiday leave pay for the Columbus Day, Thanksgiving, and Christmas holidays in 2010, and for the New Year's holiday in 2011, identifying the person or persons who made the decision that appellant should not be paid.

In support of this request, the appellant stated that his former supervisor, French, arrived in Zone 16 in September 2010, at which time the agency stopped paying him for holidays and refused to permit the union to initiate grievances on his behalf concerning the stoppage. He wrote that he expected the agency to answer that he was the only carrier out of 190,000 who was eligible, but was not paid, for holiday pay. He stated that this interrogatory related to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions, . . . harassment, or bad faith, malice . . . on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this interrogatory is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling:[2] The appellant's request as to this interrogatory is denied for the same reasons offered by the agency. In addition, I note that, by this interrogatory, the appellant is seeking information that clearly pertains to at least one of his previous Board cases that was dismissed, and so the issue may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. To the extent that the appellant is seeking an answer to this interrogatory because it may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including him, who will testify to these matters at the hearing. I also instructed both parties to submit a joint stipulation on whether the agency paid the appellant either holiday pay, or any other type of pay, for the four specific holidays listed in the interrogatory.

Document Request No. 1:

The appellant asked that he be permitted to review and copy "Any and all notices of discipline that relate to the disciplinary actions identified in response to Interrogatories Nos. 1 and 2, above." In support of this document request, he argued that he expected these documents to provide additional evidence of the agency's use of progressive discipline in cases of irregular attendance and/or AWOL. He noted that they would be relevant to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

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[2] I told the parties that I would grant this interrogatory at the prehearing conference. However, after further review, I have decided to deny the request for the reasons provided.

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this document request is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling: The appellant's document request is denied for the same reasons offered by the agency. As stated I above, though, I granted in part and denied in part his request for responses to Interrogatories Nos. 1 and 2, which is related to this document request.

Document Request No. 2:

The appellant asked that be permitted to review and copy "Any and all worksheets of pre-disciplinary interviews that relate to the disciplinary actions identified in response to [Interrogatories] 1 and 2, above." As support for this request, he stated that he expected these documents to provide information about the seniority and past disciplinary records of employees in cases of irregular attendance and/or AWOL. He explained that this evidence would be relevant, therefore, to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the information sought by this document request is overly broad, cumbersome, and irrelevant to these proceedings.

Ruling: The appellant's request as to this interrogatory is denied for the same reasons offered by the agency. As stated I above, though, I granted in part and denied in part his request for responses to Interrogatories Nos. 1 and 2, which pertain to this document request.

Document Request No. 3:

The appellant asked that he be permitted to review and copy disciplinary records for Leonard Poe, a letter carrier in Zone 16. In support of this document request, the appellant stated that he represented Poe when he was a union steward. According to the appellant, Poe once simply disappeared for about two

months and did not contact the Postal Service. The appellant recalled that when Poe returned to work he refused to explain why he had been gone and the agency charged him with being AWOL. The appellant indicated that, although Poe had a long disciplinary record with numerous letters of warning and suspensions for AWOL, the agency only gave him two paper suspensions. The appellant stated that these records will be relevant to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the agency is in the process of trying to obtain this information, even though it believes the appellant already has copies of this evidence.

Ruling: The appellant's request for these documents is granted.

Document Request No. 4:

The appellant asked that he be permitted to review and copy Amado C. Ingram's disciplinary records. In support of this document request, the appellant claimed that Ingram was a letter carrier in Zone 16, who was disciplined more than once for irregular attendance and/or AWOL. The appellant asserted that these records would show that Ingram was given progressive discipline. The appellant noted that Ingram's records would be relevant to *Douglas* penalty factor no. 6 ("Consistency of the penalty with those imposed upon other employees for the same or similar offenses.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the agency is in the process of trying to obtain this information, even though it believes the appellant already has copies of this evidence.

Ruling: The appellant's request for these documents is granted.

Document Request No. 5:

The appellant asked that he be permitted to review and copy:

> All documents reflecting, referring to, or relating to unfair labor practice charges filed by David W. Noble, Jr. since 01/01/06 including, but not limited to, submissions by the Postal Service to the National Labor Relations Board, and notices posted in Zone 20016.

In support of this document request, the appellant explained that the National Labor Relations Board (NLRB) has been actively involved in Zone 16 over the past three years. He claimed that, during that time, the NLRB has issued at least two complaints against the agency for blocking his access to the grievance procedures, and issued at least three complaints against the union for mishandling his grievances. The appellant stated that the requested documents will be relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions ... harassment, or bad faith, malice ... on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the documents are irrelevant to these proceedings. The agency added that the appellant is trying to relitigate his grievances through the MSPB, which is inappropriate.

Ruling: The appellant's document request is denied for the same reasons offered by the agency. In addition, I note that, by this request, the appellant appears to be seeking information that concerns one or more of his previous Board cases, and so these issues may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. Furthermore, to the extent that the appellant is seeking answers to these interrogatories because they may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including the appellant, who will testify to these matters at the hearing. Moreover, as stated

above, I asked the parties to submit joint stipulations addressing whether the appellant was, or was not, paid for the holidays in question.

Document Request No. 6:

The appellant asked that he be permitted to review and copy "All documents reflecting, referring to, or relating to any payment purportedly made to David W. Noble, Jr. for holiday leave pay for Veterans' Day 2010 including, but not limited to, pay stubs and checks."

In support of this document request, the appellant stated that, when the union processed a grievance concerning the agency's failure to pay him for various holidays, the agency's second step representative falsely stated to the union's representative that the appellant had been paid for one of these holidays. The appellant asserted that these documents will be relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances ... such as unusual job tensions ... harassment, or bad faith, malice ... on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the documents are irrelevant to these proceedings. The agency added that the appellant is trying to relitigate his grievances through the MSPB, which is inappropriate.

Ruling: The appellant's document request is denied for the same reasons offered by the agency. In addition, I note that, by this request, the appellant appears to be seeking information that concerns one or more of his previous Board cases, and so these issues may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. Furthermore, to the extent that the appellant is seeking answers to these interrogatories because they may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, I have approved witnesses, including the appellant, who will testify to these matters at the hearing. Moreover, as stated

above, I asked the parties to submit joint stipulations addressing whether the appellant was, or was not, paid for the holidays.

Document Request No. 7:

The appellant asked that he be permitted to review and copy "All documents reflecting, referring to, or relating to the two most recent adjustments to Route 16011." In support of this document request, the appellant maintained that the agency has held his route far out of adjustment for more than six years. He stated that he expected the requested documents to show numerous errors on the agency's part, and many inconsistencies with the times actually shown by his route by the data provided in response to Interrogatory No. 8. He indicated that the documents will be relevant to *Douglas* penalty factor no. 11 ("mitigating circumstances . . . such as unusual job tensions ... harassment, or bad faith, malice ... on the part of others involved in the matter.").

Agency's Answer: At the prehearing conference, the agency's representative stated that the documents are irrelevant to these proceedings. The agency added that the appellant is trying to relitigate his grievances through the MSPB, which is inappropriate.

Ruling: The appellant's document request is granted. I believe, by this request, that the appellant appears to be seeking information that concerns one or more of his previous Board cases, and so these issues may be precluded from being relitigated by the law of the case doctrine, collateral estoppel, and/or *res judicata*. Furthermore, the appellant seems to be seeking these documents because they may relate to his affirmative defense of intolerable working conditions and/or harshness of the penalty, and I have approved witnesses, including the appellant, who will testify to these matters at the hearing. Nonetheless, I will afford the appellant great latitude here and allow him to receive these documents, with the limitation that they go back only two years prior to the effective date of the removal action.

The agency must answer these interrogatories and submit the approved documents, so that they are received by the appellant no later than 5:00 p.m. Eastern on October 31, 2011.

11. **EXHIBITS**: Any remaining exhibits must be submitted no later than 12:00 p.m. Eastern on November 3, 2011. The submitting party is directed to provide the exhibits to the opposing side and the Board, so that they are received by that date and time.

12. **CLOSING ARGUMENTS**: The parties will not be allowed to present opening or closing arguments at the hearing.

13. **HEARING**: The hearing is rescheduled for November 4, 2011, beginning at 9:30 a.m. Eastern. The hearing will take place at the Board's Washington Regional Office at 1800 Diagonal Road, Suite 205, Alexandria, Virginia 22314.

If either party disagrees with this summary, they must submit a written objection or motion to supplement this memorandum, to be received no later than 5:00 p.m. Eastern on October 27, 2011.

FOR THE BOARD: _____/S/_____
Daniel Madden Turbitt
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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October 20, 2011
(Date)

/s/
Marie Sumner
Supervisory Paralegal
Specialist