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## STATEMENT OF RELATED CASES

There are no related cases.

v.

## JURISDICTIONAL STATEMENT

The Merit Systems Protection Board ("the Board") had jurisdiction over Petitioner Noble's removal and constructive suspension appeals under 5 U.S.C. §§7511(a)(1)(B)(ii), 7512(1), and 7513(b). The final decision of the Board (DC-0752-11-0880-I-1 and DC-0752-12-I-1) was issued as a final non-precedential order on October 25, 2012. This Court has jurisdiction to review that decision pursuant to 5 U.S.C. § 7703. This appeal was timely filed on or about December 24, 2012.

## STATEMENT OF THE ISSUES

1. Did the Board abuse its discretion or otherwise err when it did not find that the administrative judge failed to give proper instructions as to two affirmative

defenses?

2. Did the Board abuse its discretion or otherwise err when it failed to find that the administrative judge wrongly used his power to schedule to interfere with Noble's attempts to take discovery?

3. Did the Board abuse its discretion or otherwise err when it did not undertake a complete review of the record after Noble showed that the Initial Decision contained at least eleven errors of fact?

4. Did the Board abuse its discretion or otherwise err when it failed to rule that the administrative judge improperly excluded argument?

5. Did the Board abuse its discretion or otherwise err when it failed to rule that the administrative judge wrongly found that the Postal Service had proven its charges?

6. Did the Board abuse its discretion or otherwise err when it failed to rule that Noble had proven that he was treated disparately?

7. Did the Board abuse its discretion or otherwise err when it concluded that Noble failed to show the administrative judge had wrongly conducted the harmful error analysis?

8. Did the Board abuse its discretion or otherwise err when it ruled that Noble did not prove that he was subjected to intolerable working conditions?

9. Did the Board abuse its discretion or otherwise err when it found that the administrative judge had correctly ruled that the deciding official properly considered the *Douglas* factors?

10. Did the Board abuse its discretion or otherwise err by finding that Noble did not provide evidence to support disqualification of the administrative judge where Noble provided undisputed evidence that the administrative judge had made false statements about Noble on an official document?

11. Did the Board abuse its discretion or otherwise err by dismissing Case No. DC-12-0054-I-1 for lack of jurisdiction without a hearing and without determining whether appellant had made a non-frivolous allegation of jurisdiction?

## STATEMENT OF THE CASE

This is an appeal from a decision of the Board. Petitioner David W. Noble, Jr. ("Noble") challenged his removal from his position as a city letter carrier for the United States Postal Service. During the pendency of the case the administrative judge ("AJ") of the Board docketed a separate case for Noble's claim that he had been constructively suspended. After a hearing the AJ issued an Initial Decision ("ID") on the removal case on December 14, 2011 upholding the charges against Noble and affirming the agency action removing him. Noble petitioned the Board for review. Without holding a hearing the AJ issued an ID on the constructive

suspension case on February 14, 2012 dismissing the case as untimely. Noble again petitioned the Board for review. In the Final Decision the Board joined the petitions for review, affirmed as modified the initial decision that upheld his removal and vacated the initial decision that dismissed Noble's constructive suspension claim as untimely, instead dismissing the claim for lack of jurisdiction.

## STATEMENT OF FACTS

### A. Background.

This case is about the removal on AWOL charges of petitioner David W. Noble, Jr., who had been a city letter carrier employed by the Postal Service for more than 36 years[1] and who had an unblemished disciplinary record at the time of his removal.[2] From 1979 through most of 1993 Noble took leave from his job with the Postal Service to work on behalf of the National Association of Letter Carriers, AFL-CIO, the union that represents the Postal Service's city letter carriers.[3] While working for the union, Noble was honored by the union and by the Postal Service for contributions to a joint effort "to make the Postal Service a better place for

[1]Appendix, p. 216.

[2]Addendum p. 75, (Tr. p. 85 ll. 17 – 20)

[3]Appendix, p. 216, ¶ 2.

letter carriers to work."[4] Noble lost his job with the union in 1993 when he filed internal charges against the union's entire 28-member executive council for making payments to themselves which had not been approved by the membership, and which had not been reported to the membership.[5] In 1994 Noble filed a suit in federal court against the union's highest ranking officers for breaching their fiduciary duty as to the secret payments.[6] The suit is still active, back now at the district court after having been remanded by the circuit court. The suit was brought for the common benefit of the union's membership. The most recent decision in the case is reported at *Noble v. Sombrotto*, 525 F.3d 1230 (D.C. Cir. 2008). Noble's legal standing to continue to pursue the suit depends on his membership in the union, which, in turn, depends on his employment status with the agency.[7] Thus, at stake in this appeal is not only a 36-year career, but perhaps also the final resolution on the merits of a lawsuit that has survived numerous other efforts to kill it for more than nineteen years.

**B. Constructive suspension.**

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[4]Appendix, p. 219.

[5]Appendix, p.216. ¶ 3.

[6]*Id.,* ¶ 5.

[7]*Id.,* ¶ 6.

In 2009 and 2010 Noble's working conditions became so bad that he wrote letters to the Postal Service describing his working conditions and telling the agency that his attendance was suffering as a result.[8] Included among the bad conditions identified by Noble were: 1) blocking Noble's access to grievance procedure (federal labor law-violating misconduct for which the National Labor Relations Board twice issued complaint against the Postal Service during this period), [9] 2) a badly overburdened route, 3) numerous instances of baseless discipline. Noble also orally informed his supervisor that his bad working conditions were making it difficult to be regular in attendance.[10]

From July 2010 through January 2011 appellant's working conditions continued to worsen. In July a new manager (Sterling Colter) tried to set appellant up for discipline on false charges of being AWOL. In September, with the arrival of a new supervisor (William French), the agency constructively cut appellant's pay by refusing to pay him for holidays. The new supervisor ordered Noble to work overtime on his overburdened route every day, although appellant's physician had recommended that appellant not work overtime. Noble was thus daily placed in the

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[8]Appendix, pp. 220 – 228.

[9]Appendix, pp. 229 – 237.

[10]Appendix 118 – 135, ¶ 47.

position of having to choose between following his supervisor's orders or his physician's recommendations.

Appellant did not work after January 13, 2011. When the agency wrote appellant on January 31st and directed him to return to work or provide medical documentation, appellant wrote back that he considered himself to have been constructively suspended since January 14, 2011 as a result of intolerable working conditions.[11] The agency did not reply to the letter.

The agency scheduled appellant for a pre-disciplinary interview ("PDI") on February 23, 2011. Such interviews are standard under the collective bargaining agreement before disciplinary action is initiated. The subject of the interview was appellant's alleged absence without leave between January 14, 2011 and February 16, 2011.[12] Appellant left the interview a few minutes after it began. There is a dispute as to what was said during the interview. Tony Jones, the agency representative who scheduled and conducted the interview, testified that he warned appellant that he would be considered AWOL if he left the meeting. Appellant recorded the interview and included a transcript of the recording in a sworn

[11]Appendix, pp. 213 – 215

[12]Appendix, p. 238

declaration.[13] The transcript shows that Jones did not warn appellant that he would be considered AWOL. Appellant tried to include the actual recording of the interview as an exhibit at the hearing, but the judge would not accept it.[14] The judge credited Jones' version without explanation, and without acknowledging the contradictory evidence.[15] No disciplinary action was taken against appellant for the absences that were the subject of the February 23, 2011 PDI.[16]

**C. Removal.**

By notice dated April 28, 2011 the Postal Service proposed removal of Noble for being AWOL from February 24, 2011 through April 28, 2011. The notice of proposed removal informed appellant of his right to respond to the notice in person or in writing, but did not tell appellant where to send a written response. When he received the proposed removal appellant sent a fax to the proposing and concurring officials (William French and Sterling Colter) and, *inter alia*, noted the omission of an address to which to send a written response.[17] The officials did not reply.

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[13]Appendix, pp. 118 – 135, ¶ 56

[14]Appendix, p.72 (Tr. p. 71 ll 6-22)

[15]Addendum, 29.

[16]Appendix**,** pp 118 – 135, ¶ 91.

[17]Appendix 239.

Appellant also telephoned the person designated as the deciding official (Paris Washington) and left messages asking for a return call.[18] According to the appellant he did not receive a return call. According to the deciding official appellant did not contact him.[19] The judge credited the deciding official's version.[20]

By letter dated June 21, 2011 (which was 43 days after the proposed notice of removal was dated, and 14 days before the letter of decision was issued), with accompanying Form 50, the agency notified Noble that he had been placed on long-term LWOP effective January 14, 2011.[21] Under the Postal Service's regulations LWOP is an approved leave status, and is distinct from AWOL, which is not an approved leave status.[22]

In the zone in which appellant worked, a letter carrier named Leonard Poe had been AWOL for significant periods of time, refused to discuss why he had been absent, had the same supervisors as Noble for at least a portion of the time,

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[18]Appendix 118 – 135, ¶ 62.

[19]Appendix 98 (Tr. pp. 175–176, ll 22–9).

[20]Addendum, p.42.

[21]Appendix p. 212, 240, 241.

[22]Appendix p. 211.

and was given lesser discipline than removal, even though Poe had received prior discipline for attendance.

On July 5, 2011 Paris Washington issued a letter of decision upholding appellant's removal effective July 22, 2011. The letter of decision asserted that several *Douglas* factors had been considered, which assertion was later contradicted by Washington's hearing testimony. The instant appeal followed.

**D. Pre-hearing processing.**

**1. Discovery and motions for postponements and suspension of case.**

By notice dated August 18, 2011 the AJ set a hearing date of September 28, 2011.[23] By motion dated September 19, 2011, Noble requested that the hearing be postponed, explaining that he had served discovery requests for which responses were not due until October 2nd, that he expected that he would have to file a motion to compel, that he planned to take a second round of discovery, and that he expected that he would have to file another motion to compel as to the second round.[24] In a conference call on September 26th the AJ postponed the hearing until October 19, 2011. The AJ's postponement ruling was memorialized in a summary

[23]Appendix, pp. 242–245.

[24]Appendix, pp. 216–218.

of the pre-hearing conference.[25] Appellant filed objections to the summary on October 6th, expressly including an objection to the October 19th hearing date.[26] Appellant noted that in the interim the agency had refused all of appellant's first discovery requests. On October 11, 2011 appellant filed an unopposed motion to postpone the hearing scheduled for October 19th.[27]

On October 14, 2011 appellant filed a motion to compel discovery.[28] On October 17th, the AJ conducted a conference call with appellant and the agency's representative. During that call, as memorialized in an October 20, 2011 summary,[29] the AJ re-set the hearing date for November 4, 2011, and granted in part appellant's motion to compel discovery, setting an October 31st at 5:00 p.m. deadline for the agency to respond.

On October 25, 2011 appellant filed a motion to postpone the hearing set for November 4, 2011.[30] Appellant noted that he had served discovery requests on the agency and that the agency's responses were not due until November 4th. Appellant

[25]Appendix, pp. 246–256.

[26]Appendix, pp. 257–261.

[27]Appendix, 262–264.

[28]Appendix, 265–277.

[29]Appendix, 278–297.

[30]Appendix, 298–300.

also noted that the agency had informally told him that it would object to his attempt to take depositions of the agency's witnesses. Appellant stated that he believed that it would be necessary for him to file at least one more motion to compel. On October 28, 2011 appellant filed objections[31] to the AJ's October 20, 2011 summary, expressly including an objection to the November 4, 2011 hearing date.

On November 1, 2011 the agency filed a joint motion to suspend case processing for thirty days so that the parties could complete discovery.[32] Also on November 1, appellant filed a motion to compel the agency to produce witnesses for depositions.[33] By notice sent to appellant by e-file on November 2[34] at 10:05 a.m. – less than 48 hours before the scheduled hearing – the AJ granted appellant's motion as to the depositions in part, but refused the parties' request to suspend case processing, thus leaving appellant less than two days to arrange for and conduct four depositions. The AJ also ordered the agency to respond to certain of appellant's discovery requests by noon on November 3rd.

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[31]Appendix, 301–307.

[32]Appendix, 308-310.

[33]Appendix, 310-324.

[34]Appendix, 325–330.

On November 3, 2011 Noble filed an unopposed motion to postpone the hearing[35] telling the AJ that he had been unable to take the depositions in the time allotted, telling the AJ that the agency had not provided the discovery material that had been due on October 31st until late in the afternoon on November 1st, and that Noble had not had enough time to finish reading it. The AJ denied the motion,[36] and the hearing proceeded on November 4th.

**2. No closing arguments.**

In an order dated October 20, 2011 the AJ ruled that no closing arguments would be allowed at the hearing.[37] On October 28, 2011 Noble objected to that prohibition, if it meant that no written closing arguments would be allowed after the hearing.[38] On November 1, 2011 the AJ responded to Noble's objection, stating that no written arguments would be permitted.[39] **3. Motion to disqualify.**

On September 26, 2011 the AJ held a conference call with the agency's

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[35]Appendix, 184, 185, 186, 187, 188, 189

[36]Appendix, 331.

[37]Appendix, 278–297.

[38]Appendix, 301-307.

[39]Appendix, 325–330.

representative and appellant. Appellant recorded the call, which lasted for about an hour. In his September 27, 2011 summary of the call,[40] the AJ wrote: "During the prehearing conference, the appellant continually questioned my authority to narrow the list of his 19 witnesses to only those I deemed appropriate. The appellant is mistaken in his belief that I lack the authority to do this." The AJ also wrote: "At times, I did interrupt [appellant] when he repeatedly claimed that I lacked the authority to deny any of his witnesses... ." Both statements are false. Appellant did not even once question the AJ's authority to do anything. While the AJ interrupted appellant on numerous occasions, none of the interruptions came while appellant was making a claim that the AJ lacked the authority to deny any of his witnesses.

On October 6th appellant filed objections to the AJ's September 27, 2011 summary, and specifically objected to the AJ's statements about appellant's conduct during the conference.[41] Also on October 6th appellant filed a motion to disqualify the judge.[42] The agency did not file an opposition to appellant's disqualification motion.

The AJ conducted a conference call with the agency's representative and

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[40]Appendix, 246–256.

[41]Appendix, 257-261.

[42]Appendix, 332–335.

appellant on October 17th. In that call he denied appellant's motion to disqualify, and memorialized that ruling in a summary dated October 20, 2011.[43] In his ruling the AJ wrote that his statements about appellant's conduct had been accurate. On October 21, 2011 the appellant filed a motion to certify the issue of the AJ's disqualification as an interlocutory appeal,[44] to which motion he appended a copy of the transcript of the September 26th conference call.[45] The AJ denied the motion to certify an interlocutory appeal on October 28, 2011, calling the appellant's recording of the September 26th conference "at best, discourteous."[46] Neither the AJ nor the agency disputed the accuracy of the transcript.

**4. Constructive suspension, Part 2.**

By letter dated February 8, 2011 appellant wrote to the agency, notifying it that he considered himself to have been constructively suspended since January 14, 2011 because of intolerable working conditions.[47] The agency included at least a partial copy of the letter in its disciplinary file.[48] In the September 26, 2011 pre-

[43]Appendix, 278–297.

[44]Appendix, 336–337.

[45]Appendix, 166--183.

[46]Appendix, 338--340.

[47]Appendix, 213–215.

[48]Appendix 341.

hearing conference there was a discussion of the issues to be litigated. Appellant stated that one of the affirmative defenses he was raising was that the absence from work for which he was removed should be considered to have been a constructive suspension because of intolerable working conditions, rather than an unauthorized absence.[49] During the conference the AJ stated that he rejected appellant's claim that he was constructively suspended, but accepted appellant's claim of intolerable working conditions as an affirmative defense.[50] The AJ memorialized his rejection of the constructive suspension claim and his acceptance of an intolerable working conditions claim in his September 27, 2011 summary of the pre-hearing conference, giving somewhat different reasons than those stated during the conference.[51] On October 6, 2011 appellant filed objections to the September 27th summary, and specifically addressed the AJ's treatment of the constructive suspension issue.[52] On October 20th the AJ addressed appellant's objection by ruling that he would docket the constructive suspension as a separate case.[53] On October 28th appellant objected

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[49]Appendix, 166–183.

[50]*Id.*

[51]Appendix, 246–256.

[52]Appendix, 257-261.

[53]Appendix, 278-297.

to the constructive suspension being docketed separately, saying that the suspension and the removal were cause and effect and that it did not make sense to address them separately.[54] (The AJ subsequently docketed the constructive suspension as a separate case, and dismissed it as untimely.[55] )

## SUMMARY OF ARGUMENT

After years of abuse which intensified during the last months of 2010, Noble notified the Postal Service that he considered himself to have been constructively suspended due to intolerable working conditions as of January 14, 2011, and did not work thereafter. The Postal Service sent Noble a Notice of Proposed Removal on April 28, 2011, charging him with having been AWOL since February 24, 2011. On June 21, 2011 the Postal Service sent Noble documents showing that he had been placed on LWOP – an approved leave status – effective January 14, 2011. On July 5, 2011 the Postal Service sent Noble a Letter of Decision removing him from employment after 36 years of previously unblemished service. Noble, a preference eligible veteran, appealed the removal to MSPB. The AJ conducted a conference call in September and issued a summary a few days later, in which he stated that during the call Noble had many times questioned his authority to decide which

[54]Appendix, 301-307.

[55]MSPB Docket No. DC-0752-12-0054-I-1

witnesses would be permitted to testify. The statements were false, and Noble filed a motion asking the AJ to disqualify himself. After Noble filed the motion the AJ took a number of actions that seemed antagonistic, including scheduling the hearing in such a way as to prevent Noble from taking any depositions of the Postal Service's witnesses, preventing Noble from making any oral or written argument to him, and denying a joint request to suspend case processing to allow the parties to complete discovery. The judge failed to properly notify Noble of the burdens and elements of two of Noble's defenses. In the ID, the AJ made up numerous facts, some of which were directly and plainly material to Noble's case. Having prevented the parties from making argument to him, the AJ made up arguments for both parties, dismissing the arguments he made up for Noble, and smiling on the arguments he made up for the Postal Service. The AJ also passed over arguments Noble wished to make, such as that was treated disparately from another employee in his work location who had also been charged with AWOL. In the petition for review, Noble raised all of these points, and more. The Board belittled Noble's complaints, finding as to many that Noble had failed to show how he had been harmed.

## ARGUMENT

### I. STANDARD OF REVIEW

This court reviews MSPB decisions to determine whether they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been file; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703©.

Issues of statutory or regulatory interpretation are reviewed without deference.

Note: Arguments II. A through J pertain to Docket No. DC-0752-11-0880-I-1, which is the appeal of Noble's removal. Argument II. K. pertains to Docket No. 0752-12-0054-I-1, which is the appeal of the constructive suspension.

**II. A. The Board erred when it did not find that the AJ failed to give proper instructions as to two affirmative defenses.**

When an appellant raises an affirmative defense, the AJ must inform the appellant of the burdens and elements of proof necessary to establish that defense. *Sarratt v. U.S. Postal Service*, 90 M.S.P.R. 405, ¶ 12 (2001) (citing *Thompson v. Department of the Army*, 80 M.S.P.R. 245, ¶ 6 (1998)); *Clarke v. Office of Personnel Management*, 73 M.S.P.R. 435, 441 (1997). Here, the record shows that the AJ did not properly inform Noble of what he needed to prove to establish his claims: 1) that he had been subjected to intolerable working conditions, and 2) that

the agency had violated the collective bargaining agreement when a second level supervisor initiated Noble's removal. Thus, the appellant did not receive "a fair and just adjudication" of these affirmative defenses. *Milner v. Department of Justice*, 77 M.S.P.R. 37, 46 (1997). Noble's petition for review to the Board presented both notice issues.[56]

In its decision the Board ducked the issue of the AJ's failure to inform Noble of the burdens and elements of proof necessary to establish the defense of intolerable working conditions and failed to either discuss or decide the issue. By failing to decide an issue properly before it the Board abused its discretion.

As to the defense that the Postal Service had violated the collective bargaining agreement when a second level supervisor initiated Noble's removal, the Board ruled that the AJ's instructions as to other defenses given by the AJ about six weeks before Noble raised the claim about the second level supervisor was notice enough.[57] The Board's case law, however, requires that notice be given *when* a defense is raised, which was at the November 4, 2011 hearing. *Sarratt*. The Board erred, therefore, by relying on the September notice as to other defenses.

**B. The Board erred when it failed to find that the AJ wrongly used his power to schedule to interfere with Noble's attempts to take discovery.**

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[56]Appendix, 136–164.

[57]Addendum, 5.

If a request for a continuance presents good cause and clearly relates to a matter that is material to the appeal, the request should be granted in the absence of a showing that it would be unduly burdensome, harassing, or cause unwarranted delay. *Biberstine v. Department of Defense Dependents Schools*, 37 M.S.P.R. 248, 254 (1988).

MSPB regulations provide the parties with an opportunity to take discovery.[58] Appellant attempted to avail himself of that opportunity. By using his power to schedule the AJ shaped appellant's discovery efforts so that: 1) Appellant didn't get any discovery material until three days before the hearing, then got so much that he was unable to read it all by the afternoon before the hearing. 2) Appellant got a less than 48-hour window in which to conduct four depositions, with no advance notice that the window would be opening. 3) Appellant got a second pile of discovery material 21 hours before the hearing. In motions filed during the week of the hearing scheduled for Friday, November 4th both parties told the AJ that they needed more time for discovery, but the AJ rejected their requests without making any finding that the requests would be unduly burdensome, harassing, or cause unwarranted delay.

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[58]5 CFR 1201.71–.75

Appellant was harmed by the AJ's interference, particularly by being prevented from taking the depositions of the agency's witnesses. That he could take no depositions meant that every question appellant asked of the agency's witnesses during the hearing necessarily violated the first rule of cross-examination – that one should never ask a question to which one does not know the witness's answer. Furthermore, one of the primary purposes of discovery is to prevent surprise, and appellant was surprised by Jones' hearing testimony about allegedly having warned appellant that he would be considered AWOL if he left the February 23, 2011 PDI, and was also surprised by Washington's hearing testimony that he did not consider the *Douglas* factors, which testimony contradicted Washington's statement in the decision letter. If appellant had had the opportunity to take their depositions he could have prepared for Jones' and Washington's testimony. Instead, appellant was ambushed.

Rather than minimizing the harm suffered by Noble, the Board should have followed the principle announced in *Biberstine* and sent the case back for rehearing after the parties completed discovery.

**C. The Board erred when it failed to undertake a complete review of the record after Noble showed that the ID contained at least eleven errors of fact.**

A complete review of the record by the Board is justified only when a

petition for review contains sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge. *See,* e.g.*, Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992).

In his petition for review to the Board, Noble identified eleven specific errors of fact in the ID.[59] The Board did not undertake a complete review of the record, however. Instead it ruled that Noble had not shown any impact on his substantive rights and had, therefore, not provided a basis for reversal.[60] Some of the errors, however, were of plainly material facts, as shown by the following examples:

First, at page 19 of the ID the AJ stated: "The appellant's supervisors all testified credibly that they advised him repeatedly that he must return to duty or be disciplined, and they even held off disciplining for a very long time . . . ." This statement is false. None of the Postal Service's four witnesses – three of whom might be considered to be Noble's supervisors – testified that they advised appellant repeatedly that he must return to duty or be disciplined, or that they held off disciplining for any period of time. Whether Noble was advised that he must return to duty or be disciplined is directly relevant to the factors which deciding officials are required by Board case law to consider when deciding upon the

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[59]Appendix 146-150.

[60]Addendum, pp. 2-3.

appropriate penalty.[61]

Second, at page 14 of the ID the AJ stated: "The appellant, meanwhile, offered no evidence in support of his bare assertion that he provided medical evidence to justify his AWOLs." However, Noble made no assertion, bare or otherwise, that he provided medical evidence to justify the February 24 – April 28 absence for which he was removed. Instead, as he notified Jones in his letter dated February 8, 2011, Noble considered himself to be constructively suspended.[62] This error is relevant because failure to provide medical evidence is one of the primary bases upon which the AJ concluded that discipline was warranted.[63]

Included among an employee's substantive rights, as implied by statutes concerning perjury and rules concerning burden and quantum of proof, is that his case will be decided by actual facts, rather than by facts that the AJ assumed or imagined. The Board erred by holding to the contrary. The Board should have followed the policy suggested by *Tines* and conducted a complete review of the record, rather than by offering an unelaborated assertion that Noble's substantive

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[61]*Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 332 (1981) "(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question."

[62]Appendix, 213-215.

[63]Addendum, p. 37.

rights were not affected by an ID that was riddled with falsities.

**D. The Board erred when it failed to find that the AJ improperly excluded argument.**

[Administrative judges] are required to use fair procedures that afford each party to an appeal an opportunity to respond to any other party's arguments and evidence. *Eriksen v. Department of Energy*, 20 M.S.P.R. 135, 138 (1984).

Providing an opportunity to present argument is a fundamental and traditional part of the way courts and boards operate in our society. MSPB's website cautions against including too much material with the initial appeal and states: "Both parties will have several opportunities to provide additional evidence and argument as the appeal proceeds toward a decision." Here, appellant was given no opportunity to argue the merits of his or the agency's cases.[64] Instead, the AJ made up arguments for appellant and knocked them down. The result was that the AJ addressed arguments – sometimes at considerable length – that Noble would not have made, while failing to address arguments appellant wished to make. For example, the AJ devotes more than a page of the ID to a discussion of denial of minimum due process, an argument Noble did not wish to make.[65] The AJ, however, did not address at all the argument Noble wished to make that his removal

[64] *Id.*

[65] Addendum, pp. 44, 45.

had been initiated by a second level supervisor, thereby violating the collective bargaining agreement.[66] The AJ also did not address Noble's argument that he was treated disparately in comparison to Leonard Poe. Because the AJ permitted no argument, Noble was prevented from putting before him persuasive and mandatory authority that supported Noble's characterization of his mistreatment by the Postal Service as severe. The AJ did not restrict himself to making up arguments for Noble – he also made up arguments for the Postal Service. For example, the AJ made up two charges against Noble that the Postal Service had not thought to bring and sustained the charges, which were eventually vacated by the Board.[67]

Finally, the AJ's approach swiftly reduces to absurdity: In general the Board will not consider an argument raised for the first time in a petition for review. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Therefore, by allowing no argument at the hearing level an AJ could immunize him- or herself from any review of the initial decision by the Board.

On petition for review the Board found that Noble failed to show how he was harmed by the exclusion of argument. As shown above, however, the harm to Noble and to the process itself is obvious – exclusion of argument makes for sloppy

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[66]Appendix 60, (Tr. 22 ll 8-12.).

[67]Addendum, pp. 4, 5.

proceedings. The Board erred by failing to follow the principle announced in *Eriksen*.

**E. The Board erred when it failed to rule that the AJ wrongly found that the agency had proven its charges.**

In order for an agency to prove AWOL, the agency must show that the employee was absent, and that his absence was not authorized, or that his request for leave was properly denied. *Wesley v. U.S. Postal Service*, 94 M.S.P.R. 277, ¶ 14 (2003). While there is no dispute that appellant was absent from February 24th – April 28th the evidence shows that he had been placed in a long-term LWOP status – authorized leave – effective January 14, 2011 and continued in that status at least until June 11, 2011.[68]

The Board addressed Noble's contention concerning being in LWOP status in a footnote[69] that stated, "The appellant has not suggested, however, that he ever requested LWOP," which statement indicates that the Board placed the burden of proof as to the element of authorization on Noble. That was error, because in disciplinary cases the burden is on the agency to prove its charges. 5 C.F.R. § 1201.56(a)(1)(ii). Therefore, the Board should have ruled that, "The agency has not produced evidence that appellant failed to request LWOP. Therefore, the

[68]Appendix 212, 240-241.

[69]Addendum, p. 3.

agency has failed to carry its burden as to the element of authorization."

**F. The Board erred when it failed to rule that Noble proved that he was treated disparately.**

. An appellant's allegation that the agency treated her disparately to another employee, without a claim of prohibited discrimination, is an allegation to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty, but it is not an affirmative defense. *See Taylor v. Department of Veterans Affairs*, 112 M.S.P.R. 423, ¶ 11 (2009), *modified on other grounds*, *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6 (2010). To establish disparate penalties, the appellant must show that the charges and the surrounding circumstances are substantially similar so that a reasonable person would conclude that the agency treated similarly-situated employees differently. *See Lewis*, 113 M.S.P.R. 657, ¶ 6; *see also Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009); *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). If the appellant does so, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *Lewis*, 113 M.S.P.R. 657, ¶ 6. To trigger the agency's burden, there must be a great deal of similarity, not only between the offenses committed by the appellant and a proposed comparator, but as to other factors, such as whether the employees were in the same work unit, had the same supervisor and/or deciding

official, and whether the events occurred relatively close in time. *Id*., ¶ 12. While the fact that two employees are supervised by different individuals may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties. *Boucher v. United States Postal Service,* 2012 MSPB 126 (2012). *Williams v. Social Security Administration*, 586 F.3d 1368 (Fed. Cir. 2009).

Through Leon Tucker,[70] a former steward in appellant's work location, and through his own declaration testimony,[71] Noble showed that a letter carrier named Leonard Poe had been AWOL for significant periods of time, refused to discuss why he had been absent, had the same supervisors as Noble for at least a portion of the time, and was given lesser discipline than removal, even though he had received prior discipline for attendance. Furthermore, by placing Poe in Zone 16 with French and Colter, Tucker's testimony established that the events were relatively close in time, because Colter didn't arrive in Zone 16 until about August 2010,[72] and French didn't arrive until September 2010.[73] These similarities were sufficient

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[70]Appendix 109 (Tr., p.112, l.36 - p. 113, l. 25; p. 115, l.34 - p. 116, l. 34).

[71]Appendix 348, ¶ 17.

[72]Appendix 73 (Tr. p. 77).

[73]Appendix 91 (Tr. p. 149).

to trigger the agency's burden to prove a legitimate reason for the difference in treatment. The Postal Service, however, did not address the evidence about Leonard Poe, and neither did the AJ.

The Board took up the disparate treatment issue when it considered Noble's petition for review and found that the similarities were not sufficient to trigger the agency's burden. The Board based that conclusion on the following: Tucker was unsure whether Poe was AWOL or on LWOP, and he did not indicate when the action occurred. Tucker thought that William French (the proposing official in Noble's removal) disciplined Poe once and that other named officials disciplined him on other occasions. Tucker was not asked who the deciding official was in Poe's case (Paris Washington was the deciding official in Noble's case). French and Washington both testified at the hearing, but the appellant did not specifically question either about Poe.[74]

As to the first two points, Tucker did not express any uncertainty as to Poe's status – Poe was AWOL.[75] And while Tucker did not directly testify about when Poe was disciplined, Tucker did indicate that both French and Colter were involved and they did not arrive at Poe's and Noble's workplace until a few months before

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[74]Addendum, p. 7.

[75]Addendum, pp. 108 – 110 ( Tr. pp. 217 – 223)

Noble's discharge.

The remaining points mentioned by the Board all relate to the identity of the deciding official. Those points assume that there was a deciding official in Poe's case, which is false. The Postal Service does not employ the proposing official/deciding official scheme when it issues discipline of suspensions of 14-days or less, such as were given to Poe. (So that Noble will not lose his career based on one incorrectly assumed fact Noble respectfully requests that if this issue turns on this particular fact that the case be remanded to the Board for development of the issue whether the Postal Service uses the proposing official/deciding official scheme when it issues suspensions of 14-days or less, or when it issues letters of warning.)

If the issue does not turn on the identity of the deciding official, the Postal Service should lose the disparate treatment argument, because (other than its cross-examination of Tucker) its only contribution to the development of the record was to contend in discovery that it could not locate Poe's file.[76]

**G. The Board erred when it concluded that Noble failed to show error in the AJ's harmful error analysis.**

An appellant's removal may not be sustained if s/he can show harmful error

[76]Appendix 357.

in the application of the agency's procedures in arriving at its decision to remove her or him. *5 U.S.C. § 7701(c)(2)(A)*; *Romero v. Department of Defense*, 527 F.3d 1324, 1328-29 (Fed. Cir. 2008); *Rothlisberger v. Department of the Army*, 111 M.S.P.R. 662, ¶ 14 (2009). The Board will treat the provisions of a collective bargaining agreement to which an agency is a party in the same manner as it treats the provisions of the agency's regulations. *Ricketts v. U.S. Postal Service*, 94 M.S.P.R. 257 (2003). An appellant bears the burden of proof to show harmful error by the agency in effecting an adverse action. *Henton v. U.S. Postal Service*, 102 M.S.P.R. 572, ¶ 15 (2006); *5 C.F.R. § 1201.56(c)(3)*. An agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

The AJ analyzed Noble's affirmative defense as to the Postal Service's summary removal of him without first using progressive discipline as though Noble contended that his summary removal violated Board case law. That was error, because appellant does not so contend. Instead, appellant contends that his summary removal violated the *collective bargaining agreement's* requirement that progressive discipline be employed for most charges. Furthermore, appellant

contends that the parties to the collective bargaining agreement agree that the charges against appellant are part of the "most charges" that require application of principles of progressive discipline. Noble's evidence is as follows:

First, the Postal Service and the union that represents letter carriers have agreed to a Joint Contract Administration Manual, which states their accord that the collective bargaining agreement requires that discipline be administered progressively for most charges by issuing at least a letter of warning, a small suspension, and a large suspension, before discharging an employee.[77]

Second, the strongest evidence of what a collective bargaining agreement means is the way the parties to the agreement act under it. Restatement (Second) of Contracts § 202(4) and comment g, §223(2); *Air Transport Assn. of America v. Lenkin*, 899 F.2d 1265, 1267 (D.C. Cir. 1990). In discovery appellant asked the agency to identify employees discharged for AWOL in a one year period, where the employee had 1) over 30 years of service, and 2) an unblemished record at the time of the removal. The agency identified appellant as the only employee who matched those criteria and stated that other employees removed for AWOL all had been given prior discipline.[78] Appellant also asked the Postal Service to identify

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[77]Appendix, 358–361.

[78]Appendix 372-375.

employees who had been given lesser discipline than removal for AWOL over a one year period. The Postal Service identified hundreds of employees who had been given letters of warning, seven-day suspensions, and fourteen-day suspensions.[79] Witness Alton Branson, who at the time of the hearing was the local union affiliate's president, corroborated and amplified the practices shown by the agency's answers, testifying that in his almost four decades of postal employment he did not recall seeing an employee discharged for AWOL without progressive discipline being attempted first.[80]

Third, Noble presented an arbitration award in which the arbitrator ruled that use of progressive discipline was mandatory in the case of an employee discharged for being AWOL, and ordered that the Postal Service reinstate the summarily discharged employee.[81]

Taken together, these are proof that the collective bargaining agreement requires that progressive discipline be used to address AWOL charges. And the agency violated the collective bargaining agreement by discharging appellant without first attempting lesser discipline.

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[79]*Id.*

[80]Appendix 108 (Tr. p. 214 ll. 9–12).

[81]Appendix, pp. 376–385.

The harm to Noble of the Postal Service's violation of the collective bargaining agreement is obvious: In the absence of the violation the Postal Service would have given Noble a letter of warning rather than removing him.

The AJ addressed Noble's progressive discipline defense in one paragraph by: 1) quoting from the Joint Contract Administration Manual, 2) stating that Noble asserted that the agency's failure to apply the principles of progressive discipline to his offense caused harmful error, 3) finding that Noble's assertion was, in reality, an attack on the appropriateness of the penalty, 4) stating that the AJ had otherwise found that the penalty of removal was warranted, 5) stating that an agency is not required to use progressive discipline where the misconduct is serious and citing *Thomas v. Department of Defense,* 66 M.S.P.R. 546 (1995) in support of that proposition.[82]

*Thomas* is wholly inapposite because it does not deal with a collective bargaining agreement that has a mandatory progressive discipline procedure, as does the Postal Service's. And there is nothing in the Board's affirmative defense jurisprudence that permits an AJ to nullify the protections of a collective bargaining agreement by deciding that invoking the protections somehow, "in reality," constitutes an attack on the penalty.

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[82]Addendum, pp. 40, 41.

On petition for review the Board described the paragraph by stating that the AJ "analyzed [Noble's progressive discipline claim] under a harmful error standard, concluding that none of the alleged violations rose to that level and instead went to the reasonableness of the penalty."[83] The Board's description is not supported by substantial evidence. Nothing in what the AJ said can possibly be read as being a harmful error analysis, or a conclusion that something did not rise to the level of a harmful error.

An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). The Board should have followed *Spithaler* and sent the issue back to an AJ to be reworked.

**H. The Board erred when it found that Noble did not prove that he was subjected to intolerable working conditions.**

Appellant contended that the absence for which he was removed should be considered a constructive suspension caused by intolerable working conditions, rather than AWOL. The AJ dismissed most of appellant's contention in a footnote

[83]Addendum, p. 5.

on page 20 of the ID.[84]

The following facts, all of which are established by appellant's declaration,[85] together with the citations below to case law, show that the AJ's cursory dismissal of Noble's intolerable working conditions defense was error:

1. A constructive adverse action for intolerable working conditions 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 Noble on several occasions: First, by sabotaging his attempts to get paid for annual and sick leave, thereby preventing him from obtaining needed cardiac medications. Second, by holding his route far out of adjustment for more than six years and by ordering him to work overtime every day (except for three months in the middle of 2010) while knowing that his physician had recommended that he not work overtime. Third, by keeping him

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[84]Addendum, p. 44. "I will not review at length the appellant's other claims, such as his not getting holiday pay and not getting paid quickly for his requested leave of 64 hours, which issues he has challenged in other fora over the years. Suffice it to say, however, that I find these other claims are also insufficient to prove this affirmative defense." *Note* that the AJ did not cite any portion of the record to support his assertion about challenges in other fora over the years.

[85]Appendix 118-135.

without health insurance for several months in 2009 and 2010, while refusing to communicate with him about the insurance, and otherwise sabotaging and delaying his efforts to reacquire insurance.

2. A constructive adverse action for intolerable working conditions 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 appellant dated January 31, 2011 Antonio Jones included a resignation form.

3. A constructive adverse action for intolerable working conditions 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 appellant's pay by about 4% by failing and refusing to pay him for five holidays in October, November, and December 2010 although required by the collective bargaining agreement to make the payments, and although it made the payments to 200,000 other letter carriers.

4. A constructive adverse action for intolerable working conditions 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 appellant up on a false charge of AWOL by:

First, telling appellant on July 29, 2010 that he was suspended, second, by telling him on August 4, 2010 that he had not been suspended, and, third, telling him when he returned to work that he had been AWOL since July 29, 2010.

5. A constructive adverse action for intolerable working conditions 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 appellant. Notable examples of management silence include, but are not limited to: Antonio Jones' failure to answer appellant's February 8, 2011 letter, Steve Furgeson's failure to comply with the administrative judge's order to notify appellant when the agency believed it had restored him to the status quo ante after the 2009 suspension, Steve Furgeson's and Brian Fletcher's failures to answer appellant's April 2010 emails concerning his health benefits, Brandon Toatley's failure to answer appellant's May 2009 and February 2010 letters, and Bill French's and Sterling Colter's failure to respond to appellant's communications concerning the address to which he should send his response to the April 2011 notice of proposed removal.

6 A constructive adverse action for intolerable working conditions 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, in August 2010 Sterling Colter publicly threatened to fire appellant if he brought back undelivered mail to the station. Appellant brought back undelivered mail that day, as he had on every day since May 2010, and as he continued to do every day for the remainder of 2010. No disciplinary action was ever taken against appellant for bringing back undelivered mail. That is because bringing back undelivered mail, without more, does not provide cause for disciplinary action.

7. Evidence of a lack of recourse within an employer's organization can contribute to a case for constructive adverse action for intolerable working conditions. *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 appellant's access to the collectively-bargained-for grievance procedure for more than four years, and for years before that refused to honor the settlements it entered into of grievances appellant had asked the union to pursue. For appellant, filing grievances has been an almost completely futile endeavor.

8. 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).

The Board found that Noble had not shown error in the AJ's findings.

The Board completely discounted the case law presented by Noble, saying the cases were not "dispositive" because they were not issued by the Federal Circuit. (One of Noble's cited cases, in fact, was a Federal Circuit case.) The cases were, however, persuasive authority issued by high level courts and entitled to respect and due consideration. Indeed, the Board itself cites persuasive authority. *See*, e.g. *Heining v. General Services Administration,* 61 M.S.P.R. 539 (1994) (citing case law from the Fifth Circuit and from the Northern District of Illinois in support of propositions concerning constructive adverse actions). It was error for the Board to ignore the case law presented by Noble to support his characterizations of the Postal Service's mistreatment of him. That is particularly so given that neither the AJ nor the Board (nor, for that matter, the Postal Service) cited *any* authority in support of their characterizations.

The Board cites *Gerges v. Department of the Navy*, 89 M.S.P.R. 669, ¶ 11 (2001), *aff'd,* 52 F. App'x 513 (Fed. Cir. 2002) to support its statement: "The appellant has not shown error [in the AJ's] findings, particularly in view of the fact that a number of the alleged incidents upon which he relies occurred well before the period in question."

*Gerges*, however, is factually distinguishable from Noble's situation. In that case all of the matters about which the employee complained had ended more than a year before he claimed that he had been subjected a constructive adverse action. In Noble's case all of the complained of events happened within a year of his January 14, 2011 constructive suspension, and 90 % of them occurred in the last six months, including Toatley's and Colter's attempt to set Noble up on a false charge of AWOL,[86] Colter's unsupportable and very public threat to fire Noble, Jones's suggestion that Noble retire, daily orders by French to work overtime while knowing that Noble's physician had recommended that he not work overtime,

[86]At p. 10 of the Addendum the Board puts derisive quotation marks around "setting him up" on a false charge of AWOL, as if to suggest doubt about Noble's story. However, Noble's recitation of the events was presented in sworn testimony to a U.S. administrative court in a National Labor Relations Board proceeding in which the Postal Service was entitled to participate. The administrative law judge fully credited Noble's testimony and ordered the union to make Noble whole for the bogus suspension if the Postal Service refused to process a grievance concerning the incident. The Postal Service did refuse, and stuck the union with the bill. Appendix, pp 386–401.

French's sabotaging of Noble's efforts to get paid for approved annual leave while knowing that Noble needed the money to pay for cardiac medications for himself and his wife, French's cheating Noble out of holiday pay to which Noble was entitled under the collective bargaining agreement, and continuing to block Noble's access to the grievance procedure, notwithstanding the Postal Service's assurances to the National Labor Relations Board that it would stop doing so. That Noble was making stale charges is a canard, started by the AJ and continued by the Board and not supported by substantial evidence.

Finally, in its discussion of Noble's working conditions the Board states:

"It seems clear that the appellant has had a difficult relationship with Postal management over the years, as evidenced by his having filed at least six Board appeals since 2005, a number of which addressed these very issues, IAF, 0880, Tab 13 at 4-5; Tab 23 at 3, as well as various grievances and unfair labor practices. The appellant has continued to recount his years of dissatisfaction with the way in which he was treated by the agency. However, the totality of the circumstances is examined by an objective standard, not the employee's purely subjective evaluation."

First, the documents referred to in the Board's decision show that Noble made four appeals to the MSPB since 2005, not six as asserted by the Board. (The

documents referred to by the Board show five, but one of them is a duplicate. None of them is in the record, which leaves the AJ and the Board free to count them and characterize them as they will.) Of those four appeals, three protested suspensions and one sought to compel the Postal Service to pay Noble for the holiday pay he was being shorted in 2010. Thus, the Board's assertion that "a number" of Noble's appeals addressed "these very issues" is inaccurate. Omitted from the Board's statement is the results of the appeals and unfair labor practice charges, which omission makes Noble sound as though he is a litigious lunatic. In fact, however, after Noble filed the appeals the Postal Service cancelled all of the suspensions, twice *sua sponte* and once under Board compulsion. An administrative judge dismissed the holiday pay appeal for want of subject jurisdiction, so she did not reach the merits of the case. The record shows that Noble's success rate with the National Labor Relations Board is even better, with the NLRB issuing complaint in response to every unfair labor practice charge filed. The Board ends by saying that the totality of the circumstances must be examined by an objective standard, rather than a purely subjective evaluation. Noble respectfully submits that his record before the MSPB and the NLRB establishes an objective standard. Noble further respectfully submits that the evaluations of the AJ and the Board as to the issue of intolerable working conditions have been purely subjective, unsupported as they are

by any case law.

**I. The Board erred when it found that the AJ correctly ruled that the deciding official properly considered the *Douglas* factors.**

Unless all "significant mitigating circumstance[s]" are considered, the adverse action cannot be sustained. Van Fossen v. Department of Housing and Urban Dev., 748 F.2d 1579, 1581 (Fed. Cir. 1984). Failure to consider a significant mitigating circumstance constitutes an abuse of discretion. *Id.*.

In the decision letter Paris Washington contended that he considered several of the *Douglas*[87] factors, and listed a few in *pro forma* fashion but did not address them in any meaningful way. At the hearing, however, Washington changed his position about what he had considered and five times testified that he based his decision on just two factors: 1) That appellant was charged with AWOL, and 2) That appellant had not contacted him about the removal.[88] The latter is clearly improper. The opportunity to respond to disciplinary charges is a legal right – it is not a legal obligation. If the agency wanted to use failure to contact the deciding official as an aggravating factor it should have so notified appellant.

The AJ's consideration of the *Douglas* factors was no more meaningful than

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[87]*Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981).

[88] Appendix, pp. 100 (Tr. 183 ll. 9-13) 101(Tr. 188, ll. 7-16) 101(Tr. 189 ll.13-18) 102 (Tr. 190–191 ll. 19-5) 104, 105 (Tr. 201–202 ll. 20–2).

the deciding official's. The AJ did not independently weigh the factors. Particularly inexplicable was the failure of either the AJ or the deciding official to even mention appellant's working conditions. (As it turned out the deciding official had not even read appellant's February 8, 2011 constructive suspension letter to Jones,[89] although it was part of the disciplinary file. Neither the proposing official – French – nor the concurring official – Colter – had bothered to read the letter, either.[90]) Even assuming, *arguendo*, that appellant's working conditions did not rise to the level of intolerability, holding appellant's route far out of adjustment, ordering appellant to work overtime every day for six years in contravention of his physician's recommendations, stiffing appellant for the 64 hours of leave approved on January 13, 2011, cheating appellant out of holiday pay in October, November, and December of 2010, trying to set appellant up for false AWOL charges in August 2010, publicly threatening to fire Noble in August 2010 on charges the Postal Service knew could not be sustained, and blocking Noble's access to the grievance procedure for four years from 2007 to 2011 certainly qualify as "unusual job tensions" as that term is used in *Douglas,* and they should have been considered by somebody in mitigation.

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[89]Appendix 100 (Tr. 183 ll.4–8).

[90]Appendix 80 (Tr.135) 78 (Tr. 97)

**J. The Board erred by finding that Noble did not provide evidence to support disqualification of the administrative judge.**

In making a claim of bias against an administrative judge a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if her or his comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Here Noble has shown by undisputed evidence that the AJ made false statements in an official summary about appellant's conduct during a conference call. That the AJ made false statements is sufficient to both overcome the presumption of honesty and integrity and evidences a deep-seated antagonism that would (and did) make fair judgment impossible. A letter carrier who made false statements on an official document would be in huge trouble, as would a FBI agent, a member of the secret service, or an employee of the agriculture department. Administrative judges should be held to at least that standard of honesty and integrity.

As with some other issues, on this the Board ducked and, in effect, just said

that appellant was wrong, without saying why.

**K. The Board erred by dismissing Case No. DC-12-0054-I-1 for lack of jurisdiction without a hearing and without determining whether appellant had made a non-frivolous allegation of jurisdiction.**

This is the constructive suspension case docketed separately by the AJ over Noble's objection.

Where an appellant makes a nonfrivolous allegation of Board jurisdiction, she is entitled to a hearing on the jurisdictional question; "nonfrivolous allegations of Board jurisdiction" are allegations of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Hurston v. Department of Army*, 113 M.S.P.R. 34 (2010).

The AJ dismissed this case as untimely. The Board vacated the AJ's decision and dismissed the appeal for lack of jurisdiction. Before dismissing the case the Board did not determine whether Noble had made a nonfrivolous allegation of Board jurisdiction, and did not hold a jurisdictional hearing. Those were errors.

In its discussion of the dismissal the Board notes that the AJ notified Noble of the burdens and elements of a constructive suspension claim. The Board also notes that at the hearing of Noble's removal witnesses testified at length about the issues related to the constructive removal (which Noble disputes) and implies that

the November 4th removal hearing should be considered to have been a jurisdictional hearing on the constructive removal. That is error, however, because the notice of burdens and elements was given on November 22, 2011, which was eighteen days after the hearing of Noble's removal, and eighteen days after the record in the removal case closed. Exactly as argued in II.A., above, therefore, Noble did not receive a "fair and just adjudication" of the constructive suspension issue at the November 4, 2011 hearing because he was not given notice of the burdens and elements until after the hearing.

## CONCLUSION

For the reasons set forth above, Noble requests that the Court reverse the decision of the Board and direct that it order corrective action, including his reinstatement, back pay, consequential damages, and attorney's fees and expenses. In the alternative, Noble requests that the Court reverse the decision of the Board and remand the case to the Board for processing anew before a different administrative judge.

Respectfully submitted,

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