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ARGUMENT

A. Respondent's Informal Brief should be rejected for violation of Federal Circuit rules.

Federal Circuit rules distinguish between "briefs" and "informal briefs." Informal briefs may only be used by unrepresented petitioners, must use a form specified by the circuit, have time limits that are different from the limits for briefs, and so forth. Only if a petitioner files an informal brief may a respondent elect to also file an informal brief. Fed.Cir.R. 28(g) and 31(e). In the instant case petitioner did not file an informal brief: Petitioner's brief was not presented on the informal brief form, was not filed within the time limits for informal briefs, and was not labeled an informal brief. Although petitioner filed a brief, respondent elected to file an informal brief. Making that election violated Federal Circuit rules, and Respondent's informal brief, therefore, should be rejected.

B. Even if Respondent's informal brief is not rejected in its entirety, one part of the informal brief should be stricken as false.

To a record already littered with falsities, respondent's informal brief adds a another statement of fact that is false.

Beginning on page 2 and continuing on page 3 of Respondent's Informal Brief the Postal Service contends that it sent Noble a letter dated March 3, 2011

stating that Noble had been AWOL since December 14, 2010. A copy of the letter is included in Respondent's Appendix at pages 64 and 65. At page 15 of the Informal Brief the Postal Service again refers the reader to those pages in Respondent's Appendix.

At the November 4, 2011 hearing, however, the Postal Service stipulated that the March 3, 2011 letter had not been sent to Noble.[1] Therefore, the references to the March 3rd letter and the appendix items should be stricken.

C. Respondent's oppositions to Petitioner's brief are without merit.

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

The Board has consistently required administrative judges to apprise appellants of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence required to meet those burdens. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 13 (2010); *Erkins v. U.S. Postal Service*, 108 M.S.P.R. 367, ¶ 8 (2008).

In his petition for review to the Board, Noble contended that he was not properly informed by the administrative judge of the elements and burdens of two affirmative defenses: First, that he had been subjected to intolerable working

[1]Appendix, p. 71 (Tr. 67–68).

conditions, and, second, that the Postal Service had violated the collective bargaining agreement by having a second level supervisor initiate his removal.

The Board decided only the second of the contentions, finding that the administrative judge's instructions as to other defenses given six weeks before Noble raised the wrong supervisor defense had given Noble sufficient notice. The Board did not discuss or decide Noble's first contention. In his petition to the Court, Noble argued that notice is due when the appellant first raises a defense and that generic notice given about other defenses weeks earlier is not sufficient. As to the Board's failure to discuss or decide Noble's contention that he had not been properly informed as to the burdens and elements of proving intolerable working conditions, Noble argued that the failure to decide the question was an abuse of discretion.

In its opposition brief, the Postal Service first argues that the Board was correct in finding that the distant notice given as to other defenses was sufficient for the wrong supervisor defense. The Postal Service concedes the administrative judge's failure to notify as to the elements of the intolerable conditions defense, but terms the failure a hollow technicality because Noble knew "[W]hat the burden of proof was, he knew what the elements of the defense were, and he was given ample

opportunity to establish the defense."[2] The Postal Service does not defend the Board's failure to discuss and decide Noble's contention that he did not receive proper notice as to the intolerable conditions defense.

The Court should ignore the hollow technicality argument because that issue is new and was not presented to the Board below.[3]

Even if the hollow technicality argument is entertained, however, it is meritless. The Postal Service's sole evidence about what Noble knew is Noble's December 7, 2011 declaration.[4] That declaration was made, however, 15 days after the administrative judge gave Noble proper notice as to the elements of the defense of intolerable working conditions in Case No. DC-0752-12-0054-I-1,[5] so it is evidence of what Noble knew only after that date, which was 18 days after the record was closed in Case No. DC-0752-11-0880-I-1.[6] The notice given Noble, therefore, was too late to provide him any benefit for purposes of planning, preparing for, or presenting the case as to his removal.

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[2]Respondent's Informal Brief, page 12.

[3]Appendix, pp. 402 – 441

[4]Respondent's Appendix, p. 87

[5]Respondent's Appendix, pp. 79-86.

[6]*Id.*

2. 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.

Pre-hearing discovery is permitted by MSPB regulations within certain time limits.[7] While staying within those limits Noble propounded various discovery requests, including serving notices of deposition on four Postal Service witnesses.[8] On October 24, 2011 the Postal Service notified Noble that it objected, *inter alia*, to the manner in which Noble proposed to record the depositions.[9] On October 31, 2011 Noble filed a motion to compel the Postal Service to produce the witnesses. The administrative judge granted Noble's motion to compel in part on November 2, 2011, giving Noble an opportunity of one day in which to arrange for four depositions before the hearing scheduled for November 4, 2011.[10] On November 3, 2011 Noble filed an unopposed motion to postpone the hearing, explaining that he had been unable to make arrangements to conduct the depositions in the time permitted by the November 2, 2011 order.[11] The administrative judge denied the

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[7]5 C.F.R. 1201.71-.75

[8]Appendix, p. 315

[9]Appendix, p. 325

[10]Appendix, p. 188

[11]Appendix, p. 184

motion to postpone and the hearing proceeded on November 4, 2011.[12]

In his petition for review to the Board, Noble argued that the administrative judge had wrongly used his power to schedule to interfere with Noble's attempts to take discovery. In response, the Board did not rule as to whether the administrative judge's decision to deny Noble's motion to postpone was an abuse of discretion, but recast the issue in terms of the harm suffered by Noble in being prevented from taking the depositions, and found that the harm was insufficient to prejudice his substantive rights.

In his petition to the Court, Noble notes that MSPB case law provides that 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 Dependants Schools,* 37 M.S.P.R. 248, 254 (1988). In its opposition, the Postal Service essentially endorses the Board's analysis of the extent of Noble's harm. That position is unavailing.

First, it is wrong to minimize the harm caused to Noble by the turning of the hearing into an ambush in which Noble was surprised by the testimony of two of

[12]Appendix, p. 197.

the witnesses. One of the important purposes of discovery is to prevent surprise.

Second, it is error to focus on harm at all. Under the principle stated in *Biberstine* the focus should have been on good cause, materiality, and the extent to which Noble's request was unduly burdensome, harassing, or would have caused unwarranted delay. Neither the administrative judge nor the Board considered any of those factors, however.

3. 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.

In his petition to the Board Noble showed that the ID contained at least eleven errors of fact and requested that the Board conduct a complete review of the record consistent with Board case law.[13] The Board declined, stating that none of the facts were material.

In his petition to the Court Noble focused on two of the errors as being plainly material. In opposition the Postal Service attacks Noble's contention that the facts were erroneous.

First, the administrative judge found that: "The appellant's supervisors all testified 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... ." Noble says

[13]Appendix, p. 136

no such testimony was given by anyone. The Postal Service says that the record shows that one supervisor held a conversation with Noble concerning AWOL and includes a portion of a transcript that does not show any warning to Noble to return to duty or be disciplined.[14] The Postal Service also cites one letter in which Noble is warned that continuing AWOL may result in disciplinary action,[15] one letter in which Noble is scheduled for a meeting to discuss the claim that he has been AWOL, but which does not warn him of anything,[16] and one letter to Noble which was not sent.[17] The Postal Service does not show any testimony about holding off disciplining. All of that fails to put a dent in Noble's contention that the administrative judge's finding about what all supervisors *testified* is false. The Postal Service tries to cast this as a credibility issue, but credibility involves conflicting testimony. Here there is no conflict – the judge simply manufactured testimony that was not given.

Second, the administrative judge found that "The appellant, meanwhile, offered no evidence in support of his bare assertion that he provided medical

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[14]Respondent's Appendix p. 111.

[15]Respondent's Appendix pp 55-56.

[16]Respondent's Appendix p. 59.

[17]Respondent's Appendix pp.64-65.

evidence to justify his AWOLs."[18] Noble says that he did not make any such assertion – bare or otherwise. The Postal Service says that the judge's point was that Noble provided no justification for his AWOL status other than his claim that he was subjected to intolerable working conditions. If that was the judge's point he should have stated it, rather than making up a purely imaginary bare assertion to put into Noble's mouth.

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

In its opposition the Postal Service directs the Court to the opportunities provided Noble to introduce evidence, but that misses the point. Noble is complaining here about the administrative judge's rulings preventing Noble from presenting oral or written argument after the hearing. It is customary in our society to hold a hearing at which evidence is adduced and, after both sides have had a chance to see what facts have been established, to present argument explaining how the facts fit into the applicable law. It is the second part of that Noble was prevented from doing.

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

The Postal Service's opposition on this issue sets up and knocks down a

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[18]Addendum, p. 37.

straw person – it says that Noble claims that his pay stubs show that he was on LWOP, an approved leave status. The Postal Service does not indicate where in the record Noble allegedly made that claim. In fact Noble does claim that he was on LWOP during the entire period he was charged with being AWOL, but supports that claim not with pay stubs, but with two headquarters-generated documents: a letter dated June 21, 2011[19] and a PS Form 50 also dated June 21, 2011.[20] The Board dismissed Noble's contention in a footnote, implying that Noble should have provided evidence that he applied for LWOP. By doing so it placed the burden of proving authorization on Noble, rather than placing the burden of proving non-authorization on the Postal Service, where it belonged. The Postal Service points out that the Board in its decision correctly noted that the burden of proving that Noble's absence was unauthorized was on the agency. That, however, was merely lip service. The footnote shows the Board's true thinking.

The Board concluded that the Postal Service had proven that the absence was unauthorized based on the unelaborated opinions of supervisors that Noble's absence was unauthorized (they do not state there reasons for concluding that Noble was AWOL) , and of computer printouts they had generated which reflected

[19]Appendix, p. 240

[20]Appendix, p. 212

their opinions. In the courts, such conclusions with no underlying detail would be insufficient even to create an issue of material fact and, for present purposes, should be found not to constitute substantial evidence. They certainly cannot be found to be weightier than a Form 50 showing that Noble was in approved leave status.

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

The Postal Service cites *MacLeod v. Dep't of Treasury,* 332 Fed App'x 631, (Fed. Cir. 2009) for the proposition that "The appellant 'must establish that the comparator employee was in the same unit, had the same supervisors, and engaged in substantially similar misconduct." However, *MacLeod* is no longer good law.

Board law concerning disparate treatment has changed on a number of occasions since 2009. The present Board position is stated in *Boucher v. United States Postal Service*, 2012 MSPB 126 (2012):

"To establish disparate penalties, the appellant must show that there is 'enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors.' *Lewis v. Department of Veterans Affairs*, 113

M.S.P.R. 657, ¶ 15 (2010). If she does so, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. Id."

In Note 4 of *Boucher* the Board also stated:

"We overrule Board cases such as *Reeves v. U.S. Postal Service,* 117 M.S.P.R. 201 (2011) and *Bencomo v. Department of Homeland Security,* 115 M.S.P.R. 621 (2011) to the extent that they cite *Lewis* for the proposition that "there must be a *great deal* of similarity, not only between the offenses committed and the proposed comparator, but as to other factors, such as whether the employees worked in the same unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time." (emphasis added). This quotation from *Lewis* appears in the context of the Board's discussion of its framework for analyzing disparate penalty claims as it existed prior to our reviewing court's decision in *Williams v. Social Security Administration,* 586 F.3d 1365 (Fed. Cir. 2009), discussed below. *See* 113 M.S.P.R. 657, ¶¶ 12-13."

The discussion below in *Boucher* of *Williams* stated:

"In *Williams*, the court rejected an administrative judge's determination that a comparator employee was not similarly situated to the appellant for purposes of a

disparate penalties claim simply because the employees were supervised under different chains of command. *Id.* at 1368. The court stated that, although a difference in supervisors may sometimes justify different penalties, the administrative judge did not explain, and the record did not reveal, *why* the difference would justify the difference in penalties in that case. 586 F.3d at 1368-69. The court remanded the appeal with instructions to the Board "to develop, as fully as possible," the facts relating to the agency's actions concerning the comparator employee; make findings and conclusions about those issues; and based on that augmented record and those findings and conclusions, reconsider the reasonableness of the penalty. *Id.* at 1369."

The Postal Service mistakenly contends in its opposition that the sole source of information as to disparate treatment came through the testimony of Leon Tucker. Instead, evidence concerning disparate treatment came through Tucker, Noble, and Branson. The Postal Service did not contradict any of their testimony concerning disparate treatment. Together the witnesses established that Noble and Poe worked in the same work unit, had the same supervisors for at least a portion of the time, and the Postal Service charged both with having been AWOL for a least a month, but that Noble was discharged while Poe was given lesser discipline even though Noble had no previous discipline, but Poe had been given discipline earlier

for attendance-related misconduct. It is Noble's position that this is a sufficient showing to shift the burden to the Postal Service to explain the difference in treatment. The Board disagreed saying, *inter alia,* that Tucker was unsure whether Poe was AWOL or on LWOP. That was a mistake on the Board's part, as Tucker expressed no uncertainty as to Poe's status. The Postal Service endorses the Board's conclusion, pointing to a number of places in the record that were not completely filled in by Tucker.

As shown above, it is the Board's present position is that disparate treatment issues should not be based on an incomplete record. That indicates that the Board's disposition in the instant case was error. Rather than punish Noble for having left a couple of loose ends, it should have, at the least, sent the case back to the administrative judge for fuller development of the facts. At the most, it should have found that Noble had made enough of a showing to require the Postal Service to make an explanation, and that the Postal Service, having failed to do so, should lose. Please note, again, that the Postal Service's sole contribution to the record as to disparate treatment was to deny that it had any of Leonard Poe's disciplinary records.[21]

[21]Appendix, p.372

7. The Board erred when it concluded that Noble failed to show mistake in the AJ's harmful error analysis concerning progressive discipline.

Noble contends: 1) That the Postal Service violated the collective bargaining agreement by discharging him without first attempting lesser discipline, and, 2) that the violation was harmful to Noble because if the Postal Service had followed the collective bargaining agreement, it would have given Noble a letter of warning rather than firing him. The administrative judge did not rule up or down on either question.

Regarding the question of violation, Noble presented four forms of evidence, as explained in Noble's brief, as to the meaning of the collective bargaining agreement: 1) An excerpt from a Postal Service and union Joint Contract Administration Manual, 2) Testimony by Alton Branson , a long-time letter carrier and president of the local union, that he was not aware of any employee having been fired for being AWOL without the Postal Service first attempting lesser discipline,[22] 3) Documents obtained by Noble in discovery showing that the practice testified to by Branson had in fact been followed by the Postal Service in the year preceding Noble's discharge, and 4) An arbitration award from 1984 in the case of an employee discharged for having been AWOL for more than a month, in

[22]Appendix, p. 108 (Tr. 214, ll. 9-12)

which the arbitrator ruled that the Postal Service violated the requirement that it attempt lesser discipline before resorting to discharge and ordered the employee's reinstatement.[23] The administrative judge mentioned the Contract Administration Manual in passing, but did not mention Branson's testimony, the discovery documents, or the arbitration award.

The failure to consider the arbitration award is inexcusable, particularly since it is on all fours with Noble's case. Moreover, the effect of an arbitration award goes beyond the disposition of a single case: It is a well-settled principle of labor law that the arbitrator is a creature of the collective bargaining agreement, and that an arbitrator's award interpreting an agreement is incorporated into the agreement until and unless it is bargained away by the parties. The contract administration manual and the arbitration award, read together, show that the relevant provisions of the agreement have not changed since 1984.

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

[23]Appendix, pp. 376-385

M.S.P.R. 587, 589 (1980).

The administrative judge's treatment of the issue of progressive discipline does not meet any of *Spithaler's* requirements, and the Board's failure to follow *Spithaler* is arbitrary and capricious.

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

It is Noble's position that he proved that the Postal Service deliberately sought to place Noble in a position that jeopardized his health, that the Postal Service encouraged him to resign, that the Postal Service reduced Noble's pay by refusing to pay him for holiday pay to which he was contractually entitled, that the Postal Service tried to set Noble up on a false disciplinary charge, that the Postal Service ostracized Noble, that the Postal Service made a public threat to discharge Noble on charges the Postal Service knew were unsustainable, and that the Postal Service blocked Noble from using the collective bargaining agreement's grievance procedure. All of these happened in the six month period before January 14, 2011– either because they started during that period or because they started earlier but continued into that period. The Postal Service did not present any evidence that contradicted Noble's evidence on any of these points.

Noble provided the Board with persuasive authority from several circuits,

and with one Federal Circuit case, all showing that treatment such as the Postal Service's of Noble can support a claim of intolerable working conditions.

Both the administrative judge and the Board found that the matters about which Noble complained were not sufficient to make working conditions intolerable. Neither the judge nor the Board cited any Board or other legal authority to support their position. Their purely subjective feelings led them to conclude that it was not bad enough. The Board flatly refused to consider the authority presented by Noble because, in its view, it did not have to.

The Postal Service in its opposition does not come up with any authority that in any way counters that offered to the Board by Noble. Instead, the Postal Service focuses its attention on cases that stand for the proposition that little weight should be given to events that happened in the distant past, and related legalistic argle-bargle. That defense fails for lack of support by substantial evidence. The record shows that Noble's situation was getting increasingly worse in the fall of 2010 and the early winter of 2011.

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

In its opposition the Postal Service states that the Board has consistently upheld actions removing employees for lengthy periods of absence without leave,

even for long-serving employees with good disciplinary records up to that point. In support of this proposition the Postal Service cites two cases: *Walker v. U.S. Postal Service*, 112 M.S.P.R. 580 (2009) and *Davis v. U.S. Postal Service*, 54 M.S.P.R. 374 (1992). Both cases, however, involve short term employees with previous disciplinary records. The same is true of all of the cases cited for this proposition by the Postal Service, by the administrative judge, and by the Board. None of them has been able to find a case where a 36-year employee with a pristine record has been tossed out of the game on the first strike. Given that the MSPB has been in business for more than thirty years, and has decided more than 80,000 cases, their failure to find such a case is telling.

In its opposition the Postal Service continues to insist that the deciding official carefully considered all of the relevant *Douglas* factors. In doing so, they ignore that the deciding official on five occasions testified that he only considered two factors: That the charge was AWOL, and that Noble had not come to see him.[24]

The administrative judge and the Board concluded that the deciding official properly considered all of the relevant *Douglas* factors, even though the deciding official said that he had not even read Noble's letter to Jones complaining of

[24]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)

intolerable working conditions.[25] The Board sought to excuse that failure by pointing out that the administrative judge had considered Noble's working conditions, albeit in a different context. That excuse should be found to be unavailing because: First, the judge considered Noble's working conditions after a hearing that was not fair and just because the judge did not properly notify Noble of the elements of an intolerable working conditions claim at any time before the hearing, second, the judge's consideration of Noble's working conditions was essentially concentrated in one small footnote, and his treatment of the issue did not meet any of the requirements stated by the Board in *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980), third, the context in which the judge considered Noble's working conditions was in deciding whether they had become intolerable. That is very different than considering whether the Postal Service's mistreatment of Noble was sufficiently severe that it should bear some small responsibility for the bitter situation in which Noble found himself in January 2011.

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

A party alleging actual bias on the part of a judge must prove that claim by

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[25]Appendix 100 (Tr. 183 ll. 4-8)

evidence of the judge's extra-judicial conduct or statements that are plainly inconsistent with his responsibilities as an impartial decision maker. *United States v. Haldeman*, 181 U.S. App. D.C. 254, 559 F.2d 31, 132-34 & n.297 (D.C. Cir. 1974) (en banc).

In its opposition the Postal Service states that Noble did not identify the false statements of the administrative judge and did not specify where they appear in the record. That, however, is not true. At every level of these proceedings Noble identified the judge's false statements and specified where they appeared in the record, most recently in his brief to the Court at pages 13 through 15.

The administrative judge affirmatively misrepresented facts by putting words into Noble's mouth that the record shows Noble did not speak, and then chided Noble for having spoken those words. The judge made additional affirmative misrepresentations in making his decision on Noble's removal, as shown in Section C.3, above. Such misrepresentations are not mere "mistakes," are plainly inconsistent with the judge's responsibilities as an impartial decision maker, and should have caused him to withdraw or to be replaced. Neither the Postal Service nor the judge challenged the accuracy of the evidence Noble presented showing that the judge's statements were false. The evidence of the judge's bias is undisputed and plain.

11. The Board erred in 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.

In its opposition the Postal Service does explicitly what the Board only intimates in its decision: It states that the November 4, 2011 hearing on Noble's removal was the only hearing necessary for the MSPB to provide because it gave him a full opportunity to make his case on the merits of the constructive suspension.

However, the administrative judge did not give Noble proper notice of the elements and burdens of a constructive suspension claim until November 22, 2011[26] – which was eighteen days after the November 4, 2011 hearing. Therefore Noble could not and did not receive a fair and just adjudication of the constructive suspension claim at the November 4th hearing. *Milner v. Department of Justice***, 77** M.S.P.R. 37, 46 (1997)**.** Moreover, because the judge refused to permit Noble to present oral or written argument after the hearing, Noble was prevented from putting any authority before the judge concerning the kinds of agency misconduct that constitute intolerable working conditions.

CONCLUSION

For all of the reasons stated above, and stated in petitioner's brief, Noble's

[26]Respondent's Appendix, 83–84.

petition for review should be granted.

Respectfully submitted,

David W. Noble, Jr.
1 Fenceline Drive
Gaithersburg, MD 20878
(240) 477-7256
dwnoble@gmail.com