No. 1 Fenceline Drive
Gaithersburg, Maryland 20878
November 5, 2013

The Honorable Timothy B. Dyk
The Honorable Kathleen M. O'Malley
The Honorable Richard G. Taranto
U.S. Court of Appeals, Federal Circuit

Re: Noble v. U.S. Postal Service
Case No. 2013-3045

Dear Judges Dyk, O'Malley, and Taranto:

Pursuant to Federal Circuit Rule 40(f)(1) Petitioner David W. Noble, Jr. submits this Informal Petition for Panel Rehearing.

Argument

In its September 18, 2013 decision affirming Petitioner David W. Noble, Jr.'s removal from employment, the Court makes numerous statements of fact, many of which are wrong.

1. On page seven the Court states: "[A]s evidenced by his prior declaration addressing the [elements of a constructive suspension claim], at the hearing Mr. Noble was fully aware of the correct legal standard and the burden he carried to establish Board jurisdiction." That is wrong.

Noble's declaration was made on December 7, 2011.[1] The administrative judge had notified Noble of the proper legal standard on November 22, 2011.[2] The hearing was held on November 4, 2011, before either the notice or the declaration. Thus, there is no evidence that Noble was aware of the proper standard before the only hearing that was conducted in Noble's cases.

The fact the Court misapprehended is key to the correct resolution of Noble's arguments that because of improper notice both the removal and constructive suspension claims must be reversed and remanded to the MSPB for processing anew. If there were evidence that Noble was aware of the proper standard before the hearing, it would have been appropriate to discount those claims. But there is no such evidence, and in accordance with long-standing Court and Board precedent in cases where there is no evidence of prior knowledge the Board's decision affirming the agency's action must be reversed.

2. On page three the Court states: "[On March 3] the Postal Service provided Mr. Noble another letter again providing notice that

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[1]Respondent's Appendix, p. 87.

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

Mr. Noble would be considered AWOL, and face possible disciplinary action, if within five days he did not report to work or provide medical documentation justifying his continued absence." That is wrong. The letter was not sent to Noble. Citation to the proof that it is wrong is provided on pages 1 and 2 of Reply Brief of Petitioner.

3. On page three the Court states: "[Noble] assert[ed] that he would return only after the Postal Service [paid him]." There is, however, no evidence in the record that Noble asserted that he would return to work "only" after anything. That detail was an editorial addition. While neither this error nor the one preceding (nor the ones following) are key to any issue, please note that every error of fact at every level of this proceeding has favored the agency or disfavored the petitioner. The probability that the Court, the Board, and the administrative judge could flip an unbiased coin thirty times without it once coming up on petitioner's side is so close to nil as to be indistinguishable from it.

4. At pages four and five the Court stated that Noble argued that certain pay stubs showed that he was in an authorized leave status during the period he was charged with being AWOL, and that

Supervisor Colter provided an effective rejoinder. However, nowhere did Noble argue anything about pay stubs, so Colter knocked down a straw man.

5. At page three the Court stated: "In the decision, the administrative judge treated the [intolerable working conditions] argument as an affirmative defense in Mr. Noble's removal appeal, but later granted his request to try to litigate it as a separate appeal." That is wrong in two respects: First, the administrative judge's decision to docket a separate appeal was made before the hearing on the removal appeal, not after.[3] Second, the administrative judge's decision was not made at Noble's request – instead, it was made over Noble's objection.[4] The timing implies that the administrative judge envisioned taking testimony about the intolerable working conditions claim in a separate proceeding, after the November 4, 2011 hearing on the removal case. That implication was buttressed when the administrative judge expressed anger at Noble at the start of the removal hearing as Noble tried to address a stipulation concerning one of his array of working

[3]Appendix, pp. 257 – 261.

[4]Appendix, pp. 301 – 307.

condition complaints.[5]

6. At page seven the Court stated: "In this case, 'at the hearing on [Mr. Noble's] removal, witnesses testified at length about the issues related to [his] constructive suspension.'" Here, the Court uses a finding of fact as though it were a fact. In this instance, that is wrong because the finding is not supported by any evidence. The transcript shows that only one of Noble's witnesses – Nirlep Sidhu – testified concerning Noble's working conditions, and that Sidhu testified briefly concerning only one event.[6] (While Sidhu's testimony was completely ignored by the administrative judge in the instant case, that same testimony was fully credited by an administrative law judge in a case involving the National Labor Relations Board.[7])

7. At page five the Court states: "The Board found that the Notification of Personnel Action, by itself, 'does not outweigh the other considerable evidence of his AWOL status,' including the testimony of several of Mr. Noble's supervisors and his time and attendance

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[5]Appendix, pp. 62 – 64.

[6]Appendix, pp. 105 – 106.

[7]Appendix, pp. 386 – 401.

records. Noble v. U.S. Postal Serv., No. DC 0752-11-0880-I-1, slip op. at 4 (M.S.P.B Oct. 25, 2012). We see no evidentiary or other error in that determination. See 5 U.S.C. § 7703." It was wrong of the Court not to see an evidentiary error in the determination that Noble was AWOL. At all levels of the instant appeal it has been recognized that AWOL has two elements: "[T]he agency must show that the employee was absent and that his absence was unauthorized, or that his request for leave was properly denied."[8] The Postal Service's own regulations define the second element slightly differently: "LWOP is different from AWOL (absent without leave), which is a nonpay status due to a determination that no kind of leave can be granted either because (1) the employee did not obtain advance authorization or (2) the employee's request for leave was denied."[9]

Failure to support each element of a charge will result in a finding that the entire charge must fall. See Coyle v. Department of the Treasury, 62 M.S.P.R. 241, 245, review dismissed, 36 F.3d 1114 (Fed. Cir. 1994) (Table).

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[8]Little v. Department of Transportation, 112 M.S.P.R. (2009).

[9]Appendix, p. 211.

While each level of review recognized AWOL's two elements, none conducted even a rudimentary elemental analysis. Had they done so, it would have been obvious that the Postal Service had a complete failure of proof as to the second element. The Postal Service did not produce any witness to testify that Noble failed to obtain advance authorization for his absence beginning on February 24, 2011 and did not produce any witness to testify that Noble's request for leave for that period was denied. Likewise, the Postal Service did not produce any exhibits that had any bearing on any aspect of authorization.

8. At page five the Court cites Graybill v. U.S. Postal Serv., 782 F.2d 1567, 1574 (Fed. Cir. 1986) for the proposition that: "The collective-bargaining agreement does not preclude the immediate removal of an employee who engages in serious misconduct, as long as the 'agency [can] show that the penalty imposed will increase the efficiency of the service and that it is not arbitrary or capricious.'" That reading of Graybill is wrong. Graybill does not address any issue concerning a collective bargaining agreement.

9. At page five the Court stated: "After fully considering Mr. Noble's arguments to the contrary, the Board concluded that he failed to

establish * * * that his collective-bargaining agreement prohibited the Postal Service from removing him until after it had tried less severe measures." The Court went on to find that determination to be supported by substantial evidence. That determination was wrong. Petitioner does not agree with the Court's description of what the Board did, but will assume for purposes of this argument that it is accurate.

Noble's argument that the collective bargaining agreement requires the Postal Service to attempt lesser discipline before firing an employee is commonly referred to as a claim of "harmful error." To prevail on such a argument an appellant bears the burden of showing both that the agency violated a rule or regulation and that s/he was harmed by the error.[10] To meet his burden, Noble produced a mountain of evidence, including evidence showing that in the year before Noble's firing hundreds of employees in his workplace were disciplined for AWOL by letters of warning, seven – day suspensions, and fourteen – day suspensions; that in the year before his firing a handful of employees were discharged for AWOL, but that each had

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[10]See generally Brief of Petitioner, pp. 32 – 37.

been given lesser discipline before being terminated; that the local union president had never in his nearly 40 – year career known of a postal employee to be fired for AWOL without first having been given lesser discipline; and that a postal arbitrator had ruled that it is a violation of the collective bargaining agreement to discharge an employee for AWOL without first attempting lesser discipline.[11] None of this mountain was mentioned by the administrative judge, the Board, or the Court. None of this evidence was challenged or contradicted by the Postal Service. For its part, the Postal Service produced no evidence concerning the issue of progressive discipline. Thus, there was a mountain of evidence being weighed against a void, and the nullity somehow won. That is wrong.

10. At pages three and four the Court states: " The Board considered all of Mr. Noble's allegations and determined that the administrative judge made no error that affected the outcome of the removal appeal. The Board did not, however, consider or rule on all of Noble's allegations. Included among the issues it skipped were:

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[11]Appendix, pp. 376 – 385.

A. Failure to give timely notice of the elements of "intolerable working conditions." The Board did not find facts, make any conclusions of law, or otherwise rule as to this issue.

B. Refusal of the administrative judge to permit argument. The Board failed to give an intelligible response as to this issue. The Court did not rule on it either. Petitioner continues to assert that: 1) the right to a hearing includes the right to make argument, and 2) refusal to permit argument is a due process violation.

C. Recusal of the administrative judge. Early in Noble's appeal in a summary of a conference call the administrative judge made up facts about Noble's conduct during the call.[12] What was Noble to do upon learning that the administrative made up facts? Keep quiet and hope that the administrative judge would not make up any more facts as the appeal was processed? Noble, who has been involved in litigation and arbitration for 35 years, still thinks of litigation as a truth-finding process, and that the proper role of judges is to find the true facts, not to make up the facts. So he set out on a moderate course and gently

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[12] See generally Brief of Petitioner, pp. 13 – 15.

objected to the error. The judge denied Noble's objection and asserted that the facts he had made up were true. Noble then filed a straight-forward motion asking the judge to recuse himself, and attached a transcript of the conference call, showing that he had not acted as described by the judge. The judge denied the motion, which was not opposed by the Postal Service, and when the judge issued his decision on Noble's appeal it was filled with made up facts. On appeal to the Board Noble carefully chronicled the made-up facts. The Board brushed aside the made-up facts, saying they did not affect the outcome, and made up a few facts of their own. The Board did not find any facts concerning Noble's recusal motion, simply stated the legal standard for disqualification, and ruled that Noble had not met it. There is no way to know whether the Board took the position that making up facts is not an indication of hostility and bias, or that Noble had not proven the facts he alleged. If it was the latter, it was wrong because Noble provided competent evidence of his allegations and neither the judge nor the Postal Service disputed that evidence. When the appeal reached the Court it merely noted that Noble had filed a motion to disqualify the judge, but made no findings of fact or conclusions of law as to the

motion, and included it in a catch-all section of arguments, none of which, it said, required disturbing the Board's decision. The Court's silence on the recusal motion left Noble to wonder whether the Court takes the position that making up facts is something appropriate for administrative judges to do, or if the Court for some reason believes that Noble did not prove his allegations.

If it is the Court's position that making up facts is an indication of bias and hostility , it should, upon remand, direct that Noble's cases be reheard by a different administrative judge.

Conclusion

There are other mistakes of fact as well, but Noble does not have enough space to list them all. In addition, there is a mountain-range of facts omitted by the Court to be found in Petitioner's Brief and Reply Brief. Petitioner respectfully requests that the panel rehear Noble's appeal, allow Noble to bring in an attorney for oral argument, and carefully consider those facts.

Respectfully submitted,

David W. Noble, Jr.