

UNITED STATES POSTAL SERVICE

Washington, DC 20260

DATE: April 19, 1990

OUR REF: ER320:GHButler:20260-4245

SUBJECT: Enforced Leave

TO: Appeals Review Coordinators

On March 1, 1988 we sent out a memorandum discussing the precedent of the Merit Systems Protection Board (MSPB or Board) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) regarding enforced leave, and offering possible alternative actions. The following will address the placement of an employee on enforced leave in a manner which will meet the procedural requirements of the statutes, and, thereby, should satisfy the requirements of the MSPB and the Federal Circuit.

Background

In Pittman v. Merit Systems Protection Board, 832 F.2d 598 (Fed. Cir. 1987), 87 FMSR 7054, the Federal Circuit held that the placement of an employee on enforced leave for more than 14 days (even in situations where the agency has medical documentation stating that the employee is physically unable to carry out the duties of his or her position) is inherently disciplinary and is tantamount to an appealable suspension. The court held that "indefinite enforced leave is tantamount to depriving the worker of his job--without any review other than by the agency--until the agency itself changes its mind and decides that he can perform his job." Id., at 600.

The MSPB follows the precedent of the Federal Circuit, and considers the court's Pittman decision binding in regard to claims of constructive suspension arising from periods of enforced leave which exceed 14 calendar days.

Implications of the Pittman Decision

The result of this decision is that for postal employees who are entitled to appeal to the MSPB, indefinite periods of enforced leave, as well as specific periods of enforced leave over 14 days, must be considered to be constructive suspensions falling within the MSPB's jurisdiction. Consequently, if an employee is involuntarily placed on sick leave, annual leave, or leave without pay without receiving

- 2 -

all of the procedural guarantees of 5 U.S.C. 7513, and that employee appeals to the MSPB based on Pittman, the MSPB will find that it has jurisdiction. The MSPB will then find that the action placing the employee in a leave status constitutes harmful procedural error resulting in reversal. The procedural guarantees required by Pittman are a written notice of the proposed action, a minimum of a 30-day notice period, the opportunity to respond either orally, in writing, or both, and to furnish affidavits or other documentary evidence, to be represented by an attorney or another individual of the employee's choice, and to receive a letter of decision containing the specific reasons for the decision and setting forth an effective date.

Likely Enforced Leave Situations

Some of the circumstances which might create an enforced leave situation follow. These are only examples, and are not intended to be all inclusive.

Where an employee applies for a light duty assignment due to a non-job related injury, and there is no work available within his or her medical restrictions, he or she would be placed in a non-work status. If that non-work status continued for a period in excess of 14 calendar days, it would constitute a constructive suspension under the Federal Circuit's decision in Pittman.

A second example arises where an employee engages in bizarre activity on the workroom floor, and is kept from returning to the work place until management has had the opportunity to have him or her evaluated by competent medical professionals to ensure that he or she will not present a threat to themselves or others if returned to the work place. Where the employee is kept out of the workplace for a period in excess of 14 calendar days, a constructive suspension constituting an adverse action would occur.

A third example occurs where an employee sustains a non-job related injury and is no longer able to perform the duties of his or her position. The employee does not apply for light duty, but insists that he or she can actually perform the functions of his or her position despite medical evidence to the contrary. The Postal Service would keep the employee from the workplace until such time that medical evidence shows that he or she is able to return to his or her position, a light duty assignment, or an accommodation can be arranged. If the period that the employee is kept from the workplace exceeds 14 days, a constructive suspension appealable to the MSPB would result.

Placement On Enforced Leave

Where an employee who is eligible to file an appeal with the MSPB is placed on enforced leave, i.e., involuntarily placed on sick leave, annual leave, or leave without pay, it is necessary to ensure that he or she receives their full procedural guarantees. Further, even where an employee who may appeal to the MSPB voluntarily agrees to be placed in a leave status, the procedural steps should be followed since that individual may, at a later date, claim that he or she was not actually acting voluntarily, but rather, agreed to the leave status as the only means to ensure continuation of his or her pay. Such an appeal could be filed with the MSPB significantly later, and, since the employee would not have been given appeal rights at the time of taking the leave, the Board would probably waive the time limitation and accept the appeal. Should the MSPB find that the employee's action in using leave was actually involuntary, the Postal Service would be liable for the period in question since the procedural safeguards of 5 U.S.C. 7513 would not have been granted the employee.

Attached are a sample notice of proposed placement on enforced and a sample letter of decision. The letters are for use in situations involving either bargaining or nonbargaining unit employees. Further, these letters provide the employee with proper notification of his or her rights, and meet the requirements of 5 U.S.C. 7513. Therefore, the action placing the employee on enforced leave will be procedurally correct. As a result, the only matter at issue before the MSPB will be the merits of the Postal Service's action.


Use of the letters in the situation where the employee volunteers to use his or her leave will enable the Postal Service's advocate to argue in a motion to dismiss that the employee was on full notice of the time periods for appeal, and the appropriate forum in which to file that appeal, if an appeal is filed some time in the future.

The employee should be placed in a leave without pay status while involuntarily on enforced leave. However, you should be aware that an employee placed involuntarily on enforced leave need not be kept exclusively in a leave without pay status. The employee can be permitted to use sick leave or annual leave to cover the period, if that is the wish of the employee.

The footnotes following the sample letters should be reviewed since they contain additional information not discussed in this memorandum, such as who may appeal an adverse action to the MSPB.

- 4 -

Due to the nature of the issues, the information should be conveyed to both the Labor Relations and Employee Relations functions within the field divisions. In the event that you have any questions, please contact me on PEN 268-3797.


George H. Butler
Appeals Review Specialist
Employee Appeals Division

Enclosures (2)

cc: Mr. Downes
Mr. Evans
Mr. Alpern
Mr. Bennett
Mr. Bauman
Mr. Jacobsohn
Mr. Leavey
Chief Field Counsels