

Navigating an Enforced Leave Appeal

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Introduction

Enforced leave cases are frequently misunderstood by agency attorneys and personnel specialists. Understanding the type of situations where enforced leave comes up will help the agency avoid problems as well as enable the agency to correct mistakes before they become costly.

This article will define enforced leave and provide counsel with an analytical framework for evaluating such cases. The article will also address public policy problems created by the current enforced leave case law and suggest reform to cure these problems.

Enforced leave is any situation where management requires a civilian employee to take leave, whether it is annual leave, leave without pay, or sick leave.¹ On the other hand, there is no enforced leave when the employee voluntarily initiates an absence, even an indefinite one.² Put another way, enforced leave is a type of constructive suspension. An employee who is put on enforced leave for thirty days is considered to have been suspended for thirty days.

An agency may formally propose an employee's placement on enforced leave for fifteen days or more, in accordance with Title 5 procedures,³ affording the employee thirty days advanced notice of the reasons for the action and an opportunity to respond to the deciding official either orally, in writing, or both. Such actions are plainly within the Merit Systems Protection Board's (MSPB) jurisdiction and are not the subject of this article. This article focuses on the problems created when an agency does not follow Title 5 procedures and the employee claims to have been placed on enforced leave.

Similar to an employee who is given a disciplinary suspension, an employee who is placed on enforced leave may be entitled to file a grievance, an appeal to the MSPB, or an Equal Employment Opportunity (EEO) complaint. The key to analyzing an enforced leave case is determining whether the employee was actually required to take leave by the agency or whether the employee voluntarily requested leave.

Determining whether there is an enforced leave situation may turn on whether the agency was obligated to accommodate the employee. Making this determination requires a thorough understanding of the agency's obligations under the Rehabilitation Act,⁴ as well as an evaluation of any obligations owed to the employee under the collective bargaining

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¹ An authorized absence with pay, although commonly called "administrative leave," is not really leave since the employee remains in a duty status for pay purposes. Since the employee is paid for such absences, administrative leave is not appealable to the Merit Systems Protection Board. *LaMell v. Armed Forces Retirement Home*, 104 M.S.P.R. 413, ¶ 9 (2007).

² See *Perez v. Merit Sys. Protection Bd.*, 931 F.2d 853, 854 (Fed. Cir. 1991).

³ 5 U.S.C. § 7513 (2000). Federal civilian employees may submit appeals to the MSPB from any agency action which is appealable to the MSPB under any law, rule, or regulation. *Id.* § 7701(a). Under Chapter 75 of Title 5, an agency may take disciplinary action for "such cause as will promote the efficiency of the service." *Id.* § 7513(a). These actions include generally removals, suspensions for more than 14 days, reductions in grade reductions in pay, and furloughs of thirty days or less. *Id.* § 7512. To take an action under Chapter 75, an agency must provide the employee with procedural protections to include:

- (1) at least thirty days' advance written notice . . .;
- (2) a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefore at the earliest practicable date.

Id. § 7513(b). Federal employees who are removed or demoted under Chapter 43 of Title 5 receive comparable procedural protections. *Id.* § 4303. An appellant has a right to judicial review of MSPB decisions in the U.S. Court of Appeals for the Federal Circuit. *Id.* § 7703(a)(1). Although federal agencies may not directly appeal an adverse MSPB decision to the Court of Appeals, the Director of Office of Personnel Management may obtain such review upon certification that the MSPB erred in interpreting civil service law and that the MSPB's decision will have a substantial impact on the civil service law. *Id.* § 7703(d). The Federal Circuit's statutory review of the substance of MSPB decisions is limited to determining whether they are unsupported by substantial evidence or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7703(c).

⁴ Rehabilitation Act of 1973, 87 Stat. 357, amended by 29 U.S.C. §§ 701-797.

agreement, agency regulations or policy, or other requirements of law.

The MSPB enforced leave cases often pose jurisdictional issues. The MSPB only has jurisdiction over suspensions longer than fourteen days⁵ and, therefore, appeals of enforced leave actions of fourteen days or less will be dismissed for lack of jurisdiction.⁶

Requests for leave are presumed voluntary. Where the employee has a signed leave slip, the MSPB will only have jurisdiction if the employee can show that his absence from the workplace was involuntary, such as where he was instructed to request leave by a supervisor.⁷ If he cannot prove the leave was involuntary, the administrative judge will dismiss the case for lack of jurisdiction. However, if the employee establishes that his leave request for fifteen days or more was involuntary, he will win his case by operation of law since enforced leave is a constructive suspension and, unlike a disciplinary suspension, the employee will not have received any due process rights.⁸

In the case of an alleged constructive suspension, the employee is entitled to a hearing on the issue of MSPB jurisdiction only if he makes a non-frivolous allegation⁹ casting doubt on the presumption of voluntariness.¹⁰ However, the MSPB tends to construe non-frivolous allegations liberally, generally erring on the side of affording the employee a hearing.

Finally, enforced leave cases are especially confusing because an employee placed on enforced leave may still not be entitled to back pay if he was not ready, willing, and able to work.¹¹ In other words, the MSPB may determine that the employee was constructively suspended, but the agency may still win the war by avoiding back pay liability.

The Two Types of Enforced Leave

There are two types of enforced leave situations, and each has its own analytical framework. The threshold question is to determine which of the two types applies to your situation. The distinction is simple, but essential. The first type is where an employee is at work and leaves. The second is where an employee is not at work and is prevented from coming back.

Type 1: The Employee Is at Work and Leaves

When the employee is at work, leaves, and then later claims that his absence was enforced leave, the merits of the enforced leave claim turns entirely on the answer to a single question: Who initiated the absence? If the employee initiated the absence, the agency will win. If the agency initiated the employee's absence, the employee may win if the MSPB finds that the employee was placed on enforced leave.

This concept may sound simple, but in many cases, understanding who initiated the absence can be difficult. If the

⁵ See 5 U.S.C. §§ 7512(2), 7513(d), 7701(a).

⁶ See *Williams v. U.S. Postal Serv.*, 95 M.S.P.R. 16, ¶¶ 9–10 (2003).

⁷ See *Burns v. Dep't of the Navy*, 67 M.S.P.R. 285, 288–89 (1995).

⁸ *Barnes v. U.S. Postal Serv.*, 103 M.S.P.R. 103, ¶ 10 (2006).

⁹ Nonfrivolous allegations of MSPB jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the MSPB has jurisdiction over the matter at issue. *Solomon v. Dep't of Agric.*, 106 M.S.P.R. 172, ¶ 11 (2007).

¹⁰ See *Burgess v. Merit Sys. Protection Bd.*, 758 F.2d 641, 643 (Fed. Cir. 1985).

¹¹ See, e.g., *Donovan v. U.S. Postal Serv.*, 101 M.S.P.R. 628 ¶ 11 (2006). In the past, to constitute a constructive suspension, and therefore a valid appealable action, it was necessary for an employee's placement in a nonpay status be: (1) involuntary; (2) occur when the employee is ready, willing, and able to work; and (3) stem from a disciplinary situation. *Mosely v. Dep't of the Navy*, 4 M.S.P.R. 135, 137 (1980), *aff'd*, 229 Ct. Cl. 718 (1981). The three-part test articulated in *Mosely*, has been overruled sub silentio. Specifically, jurisdiction over an appeal from enforced leave no longer depends on whether the employee was ready, willing, and able to work. See *Vargo v. U.S. Postal Serv.*, 49 M.S.P.R. 284, 286–87 (1991). Furthermore, whether there is work available within any medical restrictions an employee may be under has no bearing on jurisdiction over an appeal from the employee's placement on enforced leave. See *Rivas v. U.S. Postal Serv.*, 61 M.S.P.R. 121, 126 (1994). Finally, enforced leave based not on alleged misconduct, but on the agency's belief that an employee cannot perform his duties without endangering himself or others, is nevertheless "'disciplinary' in the broader sense of maintaining the orderly working of the Government. . . ." *Pittman v. Merit Sys. Protection Bd.*, 832 F.2d 598, 599 (Fed. Cir. 1987) (quoting *Thomas v. Gen. Servs. Admin.*, 756 F.2d 86, 89 (Fed. Cir.), *cert. denied*, 474 U.S. 843 (1985)).

employee is entitled to an accommodation under the Rehabilitation Act,¹² and requested leave because of the agency's unlawful failure to accommodate his disability, the employee is on enforced leave and suffered a constructive suspension because his absence was involuntary.¹³

On the other hand, as discussed below, if the employee requests leave reluctantly because he was denied a light-duty assignment, but is not entitled to an accommodation under the Rehabilitation Act, then the employee is not on enforced leave. This is true even though the appellant may well believe that his subsequent request for leave was involuntary.

The MSPB recognizes that a choice of unpleasant alternatives does not render an employee's decision not to request leave rather than return to her regular position, involuntary.¹⁴ In *Moon v. Department of the Army*, the MSPB rejected an appellant's argument that the agency initiated the leave where the agency issued her a letter informing her that it would not be feasible for her to continue in her light-duty status. The agency offered her the option of returning to her regular position or requesting leave.¹⁵ The MSPB emphasized that the crux of the matter was whether the agency's letter terminating the light-duty assignment instructed the appellant to cease reporting to work.¹⁶ The MSPB determined that the letter did not and, therefore, a mere choice of unpleasant alternatives did not make the leave request involuntary.¹⁷

In contrast, where the employee has not requested leave, the MSPB may find enforced leave.¹⁸ In these situations, agency managers and personnel specialists may believe that the employee's absence is voluntary if the agency was not obligated to provide an accommodation. In management's view, sick leave is intended to compensate employees who are incapacitated for the performance of duties by illness.¹⁹ Managers and personnel supervisors will typically see nothing inappropriate about telling the employee who cannot work due to illness to go home and take sick leave.

This framework is problematic because it can result in unanticipated outcomes by potentially requiring the agency to pay people who cannot work.²⁰ If an employee says to the boss, "I'm not feeling well today, can I take sick leave and go home?," the employee has initiated the absence and there is no enforced leave. On the other hand, if the employee collapses to the workroom floor suffering a heart attack and the supervisor calls an ambulance, the agency has, arguably, initiated the employee's absence and placed him on enforced leave because the employee, physically unable to do so, did not request leave.

One could argue that the employee who suffers a heart attack has "constructively" requested leave, since he would obviously desire medical attention. Yet, a review of MSPB cases in the enforced leave area suggests that the MSPB takes a more literal approach, rather than the common sense one, to determining who has initiated an absence from the workplace.

For example, in *Bennett v. Department of Transportation*,²¹ an Air Traffic Controller whose doctor had imposed medical restrictions preventing him from controlling live aircraft had been temporarily assigned administrative duties. Subsequently, the agency informed him that those administrative duties were no longer available and that he would have to take sick leave, annual leave, or leave without pay. The MSPB held that this constituted enforced leave since Mr. Bennett did not initiate his absence by requesting sick leave, and the agency did not allow him to remain in the workplace despite his inability to work in his assigned position.

¹² 29 U.S.C. §§ 791–794 (2000). Federal employees are covered by the Rehabilitation Act and not the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, amended by, 42 U.S.C. §§ 12,101–12,213. However, in a 1992 amendment to the Rehabilitation Act, the employment-related portions of the ADA were incorporated by reference into the Rehabilitation Act. See 29 U.S.C. § 791(g); *Fraser v. Dep't of Agric.*, 95 M.S.P.R. 72, 76 n.* (2003).

¹³ *Conaway v. U.S. Postal Serv.*, 93 M.S.P.R. 6, ¶¶ 7–8 (2002).

¹⁴ See *Moon v. Dep't of the Army*, 63 M.S.P.R. 412, 419–20 (1994).

¹⁵ *Id.* at 419. The agency also informed the appellant of her opportunity to apply for Office of Workers' Compensation Programs (OWCP) benefits. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 419–20.

¹⁸ See *Barnes v. U.S. Postal Serv.*, 103 M.S.P.R. 103, ¶ 8 (2006).

¹⁹ See 5 C.F.R. § 630.401 (2008).

²⁰ After the MSPB makes a finding that the employee was placed on enforced leave, the agency can potentially avoid unanticipated outcomes by arguing that the employee is not entitled to any back pay as he was not "ready, willing, and able to work."

²¹ 105 M.S.P.R. 634 (2007).

Bennett is a highly troublesome case from a public policy perspective. If the agency cannot make an employee take sick leave when he cannot work safely, what exactly should the agency do? Agency's "options" include:

- (1) The agency can allow its employee to perform his air traffic controller duties even though he cannot perform them safely.

The agency cannot jeopardize aviation safety so this is a nonstarter.

- (2) The agency can pay the employee for doing nothing, or create "make work" for him.

This solution puts the employee who cannot perform his duties, but refuses to request leave, in a better position than a good, loyal employee who, acknowledging that he cannot work, applies for sick leave.

- (3) The agency can put the employee on paid administrative leave.

This solution is little better than option (2). On the one hand, the employee is out of sight and this may help the morale of his coworkers since they will be unaware that he is being paid for doing nothing. On the other hand, option (2) forces the employee to get up in the morning and come into work like everybody else.

- (4) The agency can give the employee thirty days advanced written notice of its intent to place him on enforced leave.

Presumably, this is the textbook solution under the MSPB's enforced leave case law. However, this solution means that the agency is required to keep an incapacitated employee in a duty status and pay his salary for at least thirty days. In reality, the period will be more than thirty days because of the time necessary for the personnel office to draft and staff the proposal letter.

This is an insidious option because this extra "thirty days" constitutes more paid time than a federal employee accrues in sick leave in an entire year. Federal employees earn four hours of sick leave per pay period or 104 hours per year. This means that the incapacitated employee, who does not request sick leave, can increase the time for which he is paid while incapacitated by 150% since the extra thirty days amounts to at least an extra 160 hours of pay.

- (5) The agency can put the employee on enforced leave in fourteen day increments and, thus, avoid imposing an action appealable to the MSPB.

This is the approach that the U.S. Postal Service seems to follow. Knowing that the MSPB lacks jurisdiction over suspensions of fourteen days or less, constructive or otherwise, the Postal Service and some other agencies ensure that periods of enforced leave do not exceed fourteen days, and are, therefore, not appealable to the MSPB.²² This approach may serve as a useful plaster for a wounded system by reducing the agency's payroll expense. Yet, an agency should not be required to take an unwarranted personnel action to accomplish this end, regardless of whether the action is within the MSPB's appellate jurisdiction.

- (6) The agency can put the employee on enforced leave without advanced notice and argue later that it is not liable for back pay.

The fact that an employee was placed on "enforced leave" does not mean that the employee is automatically entitled to back pay. Office of Personnel Management regulations and the MSPB's case law provide that an individual is not entitled to back pay for any period of time during which he was not "ready, willing, and able" to perform his duties because of an incapacitating illness or injury, or for reasons unrelated to or not caused by the unjustified or unwarranted personnel action.²³ Assuming, therefore, that the employee was placed on enforced leave because he was incapacitated for duty, there would be no back pay liability because the employee is not ready, willing, and able to work.

²² See 5 U.S.C. §§ 7512(2), 7513(d), 7701(a) (2000).

²³ 5 C.F.R. 550.805(c)(1); *King v. Dep't of the Navy*, 100 M.S.P.R. 116, ¶ 12 (2005); *Lyle v. Dep't of the Treasury*, 85 M.S.P.R. 324, ¶ 6 (2000).

The MSPB has long held that jurisdiction over an appeal from an alleged constructive suspension does not depend on whether the employee was ready, willing, and able to work.²⁴ The fact that an appellant was ready, willing, and able to work is a back pay/compliance issue, not a jurisdictional requirement.²⁵ Therefore, the agency may put the employee who is unable to work on enforced leave without notice, and argue later during the backpay/compliance phase of the MSPB litigation that no back pay is owed.

The downside of this option is that, by putting the employee on enforced leave without advanced notice, the agency is, in effect, intentionally violating the employee's due process rights and taking an action "not in accordance with law."²⁶

None of the agency's options are desirable. To managers, unstudied in the intricacies of the law, if an employee is not ready, willing, or able to work it makes far more sense to send him home on leave. Yet, Option (6), which is arguably the agency's best course of action, requires management officials to consciously violate the law and commit an unwarranted personnel action.

The root of the problem is that the MSPB considers an agency decision to place an employee who is incapacitated for duty into a leave status as a constructive suspension. Title 5 defines "suspension" as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."²⁷ The MSPB appears to have expanded its definition of "disciplinary reason" to include being sick.

The Federal Circuit has interpreted the term "disciplinary" broadly. In *Thomas v. General Services Administration*,²⁸ the Court considered the legislative history of the Civil Service Reform Act and concluded that Congress wished to continue the practice of the former Civil Service Commission, which specifically defined "suspension" as including the placing of an employee in a temporary non-duty and non-pay status "for disciplinary reasons or for other reasons pending inquiry."²⁹

Putting an incapacitated employee into a leave status is not "for disciplinary reasons." It is not misconduct to get sick and agencies do not routinely treat such periods of enforced leave as disciplinary suspensions. Indeed, in 1984 in *Pierce v. Department of Air Force*,³⁰ the MSPB found that placement of an incapacitated employee on enforced leave was not an appealable action because it was not a disciplinary suspension. *Pierce* has neither been overruled by the MSPB, nor has it been followed.

In contrast, not allowing an employee who states he is ready, willing, and able to work to do so pending inquiry into the employee's physical or mental status—the situation posed by *Thomas*—is materially different. That type of action was treated as an adverse personnel action before the Civil Service Reform Act,³¹ and it should continue to be treated as such.

The MSPB should reconsider the enforced leave doctrine and its unsalutary impact on federal managers in the context of dealing with incapacitated employees. For enforced leave situations which are disciplinary in nature, the law should remain as it is. Alternatively, Congress should consider amending the definition of "suspension" to specifically exclude an agency action placing an employee who is incapacitated for duty into an approved leave status.

Neither following *Pierce* nor legislatively changing the definition of suspension would harm employees. Putting an employee who is capable of working on enforced leave is disciplinary in nature. Therefore, where the employee does not agree that he is incapacitated for duty when sent home by the agency and, where the period of enforced leave exceeds

²⁴ See, e.g., *Gallejos v. Dep't of the Air Force*, 70 M.S.P.R. 483, 485 (1996).

²⁵ *Vargo v. U.S. Postal Serv.*, 49 M.S.P.R. 284, 286–87 (1991).

²⁶ 5 U.S.C. § 7701(c)(2)(C) (an agency action may not be sustained if the appellant shows that it was not in accordance with law); *Stephen v. Dep't of the Air Force*, 47 M.S.P.R. 672, 683–84 (1991) (an appealable action should be reversed as being "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C) if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for the action).

²⁷ 5 U.S.C. §§ 7501(2), 7511(a)(2).

²⁸ 756 F.2d 86, 89 (Fed. Cir. 1985).

²⁹ *Id.* In *Thomas* and cases following it, the agency proposed and took suspension actions which the court found to be appealable to the MSPB. See, e.g., *Pittman v. Merit Sys. Protection Bd.*, 832 F.2d 598, 599 (Fed. Cir. 1987); *Mercer v. Dep't of Health & Human Servs.*, 772 F.2d 856, 857 (Fed. Cir. 1985). More recently, the court in an unpublished decision found a "constructive suspension" where an agency barred an employee from returning to work based upon his apparent mental limitations. See, e.g., *Trobovic v. Gen. Servs. Admin.*, 232 Fed. Appx. 958 (Fed. Cir. 2007).

³⁰ 19 M.S.P.R. 548, 552 (1984).

³¹ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 1978 U.S.C.C.A.N. (92 Stat.) 1111 (codified in scattered sections of 5 U.S.C.).

fourteen days, the MSPB can and should continue to review such cases. But in those cases, the question of whether the employee is ready, willing, and able to work should be jurisdictional in nature.

In other words, the appellant should be able to get a hearing if he makes a nonfrivolous allegation that he was placed upon enforced leave for a period in excess of fourteen days while he was ready, willing, and able to work. If the MSPB subsequently finds that the employee was, in fact, ready, willing, and able to work, the MSPB should find jurisdiction and reverse the action as a constructive suspension. But if the MSPB finds that the employee was not ready, willing, or able to work, the MSPB would dismiss the appeal for lack of jurisdiction on the ground that there was no disciplinary suspension.

Until such time as the MSPB modifies its enforced leave doctrine or Congress amends Title 5, agency counsel defending enforced leave actions should first determine who initiated the absence. If the employee did, the agency should defend the case, presenting evidence sufficient to show that the employee voluntarily requested leave. But, if agency counsel determine that the agency initiated the absence, either by sending the employee home or telling him that he had to request leave, the agency's best recourse is to confess error on the merits of the case, but deny back pay on the theory that the appellant was not entitled to back pay because he was not ready, willing, or able to work.

Type 2: Employee Is Not at Work and Is Prevented from Returning

This situation must be further broken in to two subparts for clarity. While an employee has the right to return to full duty upon his request, and it is enforced leave if an agency denies that request, a different analysis is required depending on whether the employee wishes to return to his employee in the same job, or whether he wishes to return with altered duties.

A Type 2a situation arises when an employee who is no longer incapacitated from duty desires to return to his regular employ. For example, in *Tyler v. U.S. Postal Service*,³² the MSPB found enforced leave when an employee who was voluntarily out on sick leave was not permitted to return to work. Tyler had repeatedly requested to return to work but was not permitted to do so until a fitness-for-duty medical examination was completed, the medical evidence reviewed, and a decision made regarding his status. Furthermore, once the fitness-for-duty examination was completed, and Tyler was determined fit to return to his old duties, the agency still continued to refuse his request to return to work.³³

The issue here is similar to the public policy problem encountered in the first type of enforced leave situation. The administrative judge in *Tyler* found that the appellant was unable to work and yet the MSPB found that he was on enforced leave. The MSPB dismissed the administrative judge's concern that the employee could not work with the now familiar refrain that whether the appellant was "ready, willing, and able to work" is a back pay, compliance issue and not a jurisdictional one.³⁴

Many agencies require employees who have been on extended sick leave to obtain medical clearance before they return to work in order to ensure that their return to the workplace will not pose a danger to either themselves or others. These rules are intended to protect employee safety, but also to help avoid Office of Workers' Compensation Programs (OWCP) claims when an employee "reinjures" himself upon returning to duty.

As with the problems addressed under the first type of enforced leave, the agency is put to a Hobson's choice.³⁵ The agency can either allow an employee to return to work although he may not be able to do so safely, or potentially commit an unwarranted personnel action by placing the employee on enforced leave. Again, through want of any real alternative, the agency will probably choose not to allow the employee to return to work, paying back pay for its decision if it is later determined that the employee had recovered sufficiently to resume his regular duties, and successfully avoiding back pay if it is later determined that the employee was not ready, willing, and able to work.

³² 62 M.S.P.R. 509 (1994).

³³ *Id.* at 512 (citing *Rivas v. U.S. Postal Serv.*, 61 M.S.P.R. 121, 127 (1994) (the appellant's absence was involuntary because the agency told him to leave and not return, and advised him that if he failed to update his medical information he would not be permitted to work in either a light duty or regular capacity)); *see also* *Lewis v. U.S. Postal Serv.*, 82 M.S.P.R. 254, 257 (1999) (the medical unit's action in preventing the appellant from returning to duty without clearance warranted a finding that the agency initiated the appellant's absence); *Lohf v. U.S. Postal Serv.*, 71 M.S.P.R. 81, 84-85 (1996) (the agency initiated the appellant's absence by placing him on enforced leave and preventing him from returning to duty until he completed a 90-day inpatient treatment program for post-traumatic stress disorder).

³⁴ *Tyler*, 62 M.S.P.R. at 512.

³⁵ "Hobson's choice" means no choice at all. Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

A Type 2b situation arises when the employee who has been absent from work for medical reasons asks to return to work with altered duties. In this situation, where the employee cannot perform his regular duties but indicates that he can perform limited or light duty,³⁶ the agency is only required to provide the employee work with altered duties to the extent the agency is required to do so by agency policy, regulation, or contractual provision.³⁷ If the agency is so obligated and fails to do so, the employee is deemed to be on enforced leave. If the agency is not so obligated, the employee's continued absence is deemed voluntarily.³⁸

The Postal Service's collective bargaining agreements, for example, typically require the agency to make an effort to assign available light-duty, but do not guarantee a light-duty position for an ill or injured employee.³⁹ Therefore, where a collective bargaining agreement creates an agency obligation to assist employees in finding light-duty, determining whether an employee who requests light-duty was on enforced leave will typically rely on the evaluation of evidence concerning the availability of light duty work, the employee's medical restrictions, and whether the available light duty is within those restrictions.

Conclusion

The MSPB should reconsider the enforced leave doctrine in light of its underlying rationale: to prevent agencies from circumventing Title 5's procedures by constructively suspending employees. Employees who are incapacitated from duty and required to take leave because they cannot work are not being disciplined. They are not permitted to work and are not paid because they are not ready, willing, and able to work.

The MSPB's current enforced leave doctrine presents agencies with the Hobson's choice of paying an employee who is incapacitated from duty without charge to her leave account, or taking an unwarranted personnel action. The doctrine creates needless litigation when the real issue—and the outcome determinative issue on back pay—is whether the appellant can work.

If the MSPB does not reevaluate current law, Congress should amend Title 5 to exclude from the definition of "suspension" situations where a medically incapacitated employee is required to take leave. This proposed law reform does not deprive the employee who is required to take leave but is ready, willing, and able to work from receiving an appropriate remedy for an unwarranted constructive suspension.

In the meantime, unless and until there is some change in the law, counsel should evaluate an enforced leave situation through the analytical framework set forth in this article. A chart setting forth this framework follows.

³⁶ Some agencies draw a distinction between altered duties for employees who have had on the job injuries versus those who have not. For example, in the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. *Simonton v. U.S. Postal Serv.*, 85 M.S.P.R. 189, ¶ 8 (2000).

³⁷ *McFadden v. Dep't of Def.*, 85 M.S.P.R. 18, ¶ 10 (1999).

³⁸ *Id.* ¶ 11.

³⁹ *See Okleson v. U.S. Postal Serv.*, 90 M.S.P.R. 415, ¶ 16 (2001).

Appendix

ANALYZING ENFORCED LEAVE CASES

<p>Which type of enforced leave claim is being raised?</p>	<p>Type 1—where the employee is at work and leaves</p> <p>Type 2—where the employee who is out on leave requests to come back to work and is not permitted to.</p>
<p>If Type 1, who initiated the absence?</p>	<p>If the agency initiated the absence, the employee was placed on enforced leave.</p> <p>If the appellant initiated the absence, the employee was not placed on enforced leave.</p>
<p>If Type 2, has the employee requested to return to full duty (Type 2a), or altered duties (Type 2b)?</p>	<p>If the employee has requested to return to full duty (Type 2a), and the agency did not allow him to do so, the employee was placed on enforced leave.</p> <p>If the employee requested to return with altered duties (Type 2b), more analysis is necessary.</p>
<p>If Type 2b, is the agency bound by agency policy, regulation, or contractual provision to provide light-duty to employees who seek to return?</p>	<p>If the agency is bound by agency policy, regulation, or contractual provision to provide light-duty to employees who desire to return to work but cannot perform their regular duties, and the agency fails to do so, the employee was placed on enforced leave.</p> <p>If the agency is not so bound, the employee was not placed on enforced leave.</p>
<p>If the employee was placed on enforced leave, was the employee ready, willing, and able to work?</p>	<p>If the employee was ready, willing, and able to work, the agency will be obligated to pay back pay.</p> <p>If not, the agency will not be liable for back pay. In that event, the agency should consider stipulating to the MSPB that the employee was placed on enforced leave, to expedite the litigation, and allow the MSPB to proceed more quickly to the back pay/compliance issue.</p>