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Enforced Leave Appeals Before The Merit Systems Protection Board (MSPB)

This guide provides an overview of enforced leave claims before the Merit Systems Protection Board (MSPB) and is applicable to federal government employees.

Overview

Many federal government employees have appeal rights to the Merit Systems Protection Board (MSPB) when certain types of disciplinary action are taken against them. Appealable actions to the MSPB include being placed in a leave status for more than 14 days when the employee does not want to take leave.

When An Enforced Leave Action May Occur

A federal employee who has been required to use his or her own leave, or be on leave without pay (LWOP), as a result of the agency's failure to grant the employee's request for reasonable accommodation may have basis to file an appeal with the MSPB for the enforced leave status. Similarly, if an employee who is forced to use his or her own leave for another reason, such as during an agency's investigation of an employee, the employee also may have a basis to file an appeal with the MSPB. The MSPB only can hear cases where the enforced leave status continued for 15 days or more. Where the time period is less than 15 days, there are other avenues through which an employee may be able to file a claim, including an Equal Employment Opportunity (EEO) complaint with the agency.

Ability Of MSPB To Hear Appeals Regarding Enforced Leave

In *Abbott v. United States Postal Service*, 121 M.S.P.R. 294 (2014), the Board held that it has jurisdiction over appeals where an agency has placed an employee on enforced leave for more than fourteen days. This is because an employee's enforced leave status amounts to a suspension. *Abbott*, 121 M.S.P.R. at 298 (citations omitted); *see also Engler v. Dep't of the Army*, 121 M.S.P.R. 547, 549 (2014) (explaining that the definition of suspension includes "not just unpaid disciplinary absences but also other types of enforced leave imposed on an employee against his will.") (citations omitted). Where an employee alleges that he or she has been subjected to an enforced leave action, all the employee must show to establish that the Board has jurisdiction over his or her appeal is that he or she is an 'employee' as defined at 5 U.S.C. § 7511.

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Examples Of Enforced Leave Actions

In *Pittman v. Merit Systems Protection Board*, “[t]he employing agency placed [the employee] on enforced leave after determining that it could no longer retain him on a light-duty position and that it had no other position which he was physically capable of performing within his medical restrictions.” 832 F.2d 598, 599 (Fed. Cir. 1987). The court ruled that the Board had jurisdiction over the appellant’s claim of enforced leave, as it amounted to an improper suspension. *Id.* at 600 (citations omitted).

In *Vargo v. United States Postal Service*, 49 M.S.P.R. 284, 287 (1991), the Board made clear that the MSPB has jurisdiction over an enforced leave claim, even where the agency fails to follow the procedural requirements afforded to federal employees. In an enforced leave action, an agency is required to provide an employee with the procedural protections described in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *i.e.*, notice of the information relied upon in issuing the enforced leave action and the opportunity to respond to that information prior to being placed on enforced leave. *Id.* However, an agency’s failure to do so does not negate the Board’s jurisdiction over the enforced leave action. *See id.* Rather, just as with other types of disciplinary action, the failure to provide the required procedural protections in an enforced leave case violates the employee’s due process rights and requires that the action be set aside. *See id.* (holding agency’s enforced leave action must be set aside where it did not provide the employee with his due process rights, including notice and opportunity to respond to the enforced leave action).

Conclusion

Each situation is different. As such, this is not a question that can be answered without evaluating each case individually. Employment attorneys experienced in representing federal employees, such as those as The Wick Law Office, can provide advice to assist you with this determination.

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