

A recent MSPB decision, *Hedges v. USPS*, has raised some questions about the practice of placing employees with MSPB appeal rights (managers, supervisors, preference eligible craft employees) in an off-duty status without pay under the emergency placement provisions of the ELM and the various CBAs, and then later issuing an appealable adverse action against the employee for the same underlying misconduct. The issue that was raised in *Hedges* was whether this constitutes an impermissible double punishment, or “double jeopardy,” for the same offense.

**Background:** It is well settled that employers cannot subject employees to multiple disciplinary actions for the same reason. Temporarily placing an employee in an off-duty status without pay for disciplinary reasons, regardless of length of time, falls within the statutory definition of a suspension. The MSPB has traditionally recognized the distinction between the Postal Service’s use of its emergency placement procedures to immediately remove an employee from the workplace for certain, limited reasons (safeguarding the health and well-being of employees, protecting the mail and/or postal funds, preventing disruption of postal operations), and any subsequent adverse action that is based on the same facts that precipitated the use of the emergency placement procedures in the first place. The distinction being that when properly invoked, the emergency placement procedures are not disciplinary in nature, but are instead an immediate management response to preserve the integrity of postal operations, and to allow for a timely investigation to determine whether corrective disciplinary action is warranted. In *Hedges*, the Administrative Judge failed to recognize this distinction and found that placing the employee in a non-paid status for thirteen days under the emergency placement provision of the ELM constituted a disciplinary suspension, such that the employee’s subsequent demotion constituted an impermissible second disciplinary action for the same offense. While the Law Department strongly disagreed with these findings, appeal was not a viable option given a separate finding that the employee’s due process rights had also been violated.

**Guidance Summary:** The key to the proper use of the emergency placement procedures is to clearly articulate that it is being utilized as an emergency process (for one or more of the reasons articulated in Article 16.7 or the applicable ELM provision) to safeguard postal employees and operations, and to allow management to investigate whether misconduct that would warrant the issuance of corrective disciplinary action actually occurred.

**Guidance Detail:** There are essentially two sources of authority for placing an employee in an emergency off-duty status without pay: section 651.4 of the ELM and article 16.7 of the various CBAs.

Under the ELM provision, an employee may be placed in an emergency off-duty status without pay if he/she exhibits: (1) characteristics of impairment due to alcohol, drugs or other intoxicant; (2) fails to observe safety rules; (3) fails to obey a direct order; (4) provides reason to be deemed potentially injurious to self or others; or (5) disrupts day-to-day postal operations in any other way.

Article 16.7 is not as broadly worded and is somewhat more limiting as it allows for an employee to be placed in an emergency off-duty status without pay when the “allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others.” There is nothing within article 16.7 that expressly allows the Postal Service to invoke the emergency placement process for failing to follow a direct order.

Regardless of their relative distinctions, both section 651.4 of the ELM and article 16.7 of the CBA contemplate that subsequent discipline may be issued if the facts warrant.

To guard against/curb abuse or misapplication of emergency placement procedures Doug Tulino issued the attached memorandum, dated October 29, 2009, in an attempt to clarify when emergency placement is appropriate. The Tulino memo states in relevant part:

Emergency placement in an off-duty status without pay is to be used in those instances where it is necessary to remove the employee from the premises immediately. This provision should not be utilized when it is more appropriate to use other corrective measures such as a normal suspension or indefinite suspension.

Where it is necessary to ensure that an employee does not have access to the work place for a period in excess of a few days, the employee may be placed on administrative leave. This is the appropriate measure to take in those situations where allegations of misconduct are being investigated and the nature of the misconduct makes it impractical to temporarily assign the employee to another work location. However, managers have the responsibility to periodically review the retention of an employee on administrative leave to ensure that continuation in this status is necessary. When additional options become available, such as having information available as a basis to place the employee on a regular or indefinite suspension, appropriate action should be initiated.

When correctly applied, both section 651.4 of the ELM and article 16.7 of the CBA are interim protective measures immediately enacted to safeguard postal operations and ensure employee safety. These provisions allow the Postal Service to take quick action in ameliorating any potential hazard to these twin concerns, and to subsequently investigate the underlying issue(s) to determine whether corrective disciplinary action is warranted. As you can see, when properly invoked, section 651.4 of the ELM and article 16.7 of the CBA are issued for reasons separate and apart from any misconduct that is subsequently corroborated and used as a basis for an adverse action.

Whether section 651.4 of the ELM or article 16.7 of the CBA is being invoked, the written notice should at a minimum state:

1. That the emergency placement is being invoked pursuant to either section 651.4 of the ELM or article 16.7 of the CBA;
2. That the emergency placement is being invoked because of the nature of the allegations satisfying either of these two provisions (i.e., safeguarding the health and well-being of employees, protecting the mail and/or postal funds, preventing disruption of postal operations);
3. That the employee will remain in such status until further notified; and
4. That a further decision as to whether to issue corrective disciplinary action for the alleged deficiencies will be made following the Postal Service's investigation of the allegations.