

Sick as a Dog. A User's Guide to Sick Leave.

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In the midst of flu season, you might be asking yourself just how sick you need to be before your agency must grant you sick leave (provided you have any to use). Do you have to be “sick as a dog,” as the title of the article of this article implies? And if you do, what medical evidence must you give to the agency, upon your return to work, to prove that you had been that sick?

(In this article, I will not cover: Limitation on advance sick leave; Use of sick leave during annual leave or to become eligible for donated leave; Sick leave used in computation of annuity; Substitution of sick leave for annual leave for adoption-related purposes; or Sick leave recredit. See generally 5 CFR §§ 404-502.)

Sick leave---a statutory entitlement

Postal Service employees don't have a statutory or regulatory right to sick leave;¹ their right to sick leave, unless granted in a collective-bargaining agreement, is spelled out in the ELM.² Federal employees do have a statutory right to sick leave,³ but Congress left it to OPM to list the conditions under which an agency must grant sick leave.⁴ 5 CFR § 630.401(a) provides as follows:

- (a) Subject to paragraphs (b) through (f) of this section, an agency must grant sick leave to an employee when the employee--
 - (1) Receives medical, dental, or optical examination or treatment;
 - (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth;
 - (3)(i) Provides care for a family member who is incapacitated by a medical or mental condition or attends to a family member receiving medical, dental, or optical examination or treatment; or
 - (ii) Provides care for a family member with a serious health condition.
 - (4) Makes arrangements necessitated by the death of a family member or attends the funeral of a family member;
 - (5) Would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease; or
 - (6) Must be absent from duty for purposes relating to the adoption of a child, including appointments with adoption

This article is not intended as a substitute for competent legal advice. It is intended only to pique the reader's interest in the legal issues being discussed.

agencies, social workers, and attorneys; court proceedings; required travel; and any other activities necessary to allow the adoption to proceed.

This article discusses only 5 CFR § 630.401(a)(2) and the comparable ELM section: 513.32.⁵

Administratively Acceptable Evidence of Incapacitation.

What evidence must an employee provide to the agency to warrant the grant of sick leave? The OPM regulation on point is unhelpful because it begs more questions than it answers. 5 CFR § 630.403 provides in pertinent part as follows:

(a) An agency may grant sick leave only when supported by administratively acceptable evidence. Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his or her absence as administratively acceptable evidence. For an absence in excess of 3 workdays, or for a lesser period when determined necessary, the agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a).

Accordingly, to take sick leave under 5 CFR § 630.401(a)(2), the employee must supply the agency with administratively acceptable evidence that he/she was "incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth."⁶ But what does "incapacitated" mean? And how many of the duties of his/her position must the employee be "incapacitated" from performing? And what is the difference, if any, between "evidence of incapacitation" and "administratively acceptable evidence of incapacitation"?

I have done a Westlaw search---you all have Westlaw, right? ---on "administratively acceptable evidence of incapacitation," and I have not found one Federal Circuit or MSPB decision which defines "incapacitation". The Encarta Dictionary defines "incapacitate" to mean, "to deprive somebody or something of power, force, or effectiveness." The WorldNet dictionary defines the same word to mean. "make unable to perform a certain action." Let's settle on "unable" as a more common synonym for "incapacitate".

Must the employee be unable to perform all of the duties of his/her position description or just some of them? More troublingly, can an agency deny sick leave to an employee who requests it by assigning the employee duties other than those listed in his/her position description? The OPM regulation says no more than that the employee must be "incapacitated for the performance of *duties*." (Italics added.) Once again, the caselaw provides no answers (perhaps arbitration decisions to which I have no access do), but let

me assure you, these questions need to be answered, and I will attempt to answer them in the following hypothetical.

Assume that you and I own a small delicatessen and our stock clerk has broken his ankle playing soccer. For sure he cannot climb the ladder to put stock on the shelves which is the essential function of his position. Assume that he has provided us with administratively acceptable evidence from his physician that he cannot climb the ladder. Question: Must we grant him sick leave? Think hard, for this is a trick question. Answer: We don't have to grant our stock clerk *bupkis* (Yiddish for large beans) because he is an employee at will. But let's put that aside since it ruins my hypothetical.

I say to you, my partner, "I want the clerk here to take phone orders. I will climb the ladder to put up stock."

You say, "But answering the phone is not in his position description."

I say, "I don't care what is in his position description. I am running a business here and I am not paying him to stay at home when he could be doing something useful here."

Assume we order the stock clerk to report for duty, but he refuses and we fire him for being AWOL. Assume that he has the right to appeal to MSPB and he does. Who wins?

I don't know for sure, but I do have a hunch however that the Board will take pity on you and me as small business owners whose shoe-string budget does not allow us to hire temporary employees when the stock clerk and I could switch jobs while he is on the mend. Although answering the phone is not specifically mentioned in the stock clerk's position description, the position description does include the catchall phrase "other duties as assigned." In summary, although the stock clerk has provided us with administratively acceptable evidence that he is incapacitated from performing the essential functions of his position, he still is not entitled to sick leave, because he is not disabled from performing all useful duties.

What if the stock clerk and his doctor state stated that, owing to his broken ankle, he cannot drive a car and hence cannot commute to work? I do not believe that that is a valid reason for granting him sick leave. Commuting to work is not a "duty" of the stock clerk's position; so his incapacitation from commuting is irrelevant. MSPB, moreover, has made it clear that an employee's commuting problems are his alone.⁷ If the stock clerk cannot drive to work, I say as a co-owner of the deli: let him take a cab.

Having said that, I must warn you that the previous regime of the Board, composed of mainly Clinton appointees, might have been more sympathetic to the stock clerk than the current one, composed of Bush appointees. In the 1998 decision in *House v. Postal Service*,⁸ the Postal Service demoted Donald House from EAS-16 Supervisor to the position of Part-Time Flexible Distribution Clerk, PS-05 because (1) on November 9, 1996, he falsely reported that he worked ten hours, starting at 6:30 a.m., when he in fact did not arrive until about 8:20 a.m.; and (2) from November 14 through November 24,

1996, he requested and was granted sick leave whilst he worked multiple shifts at a tavern. On appeal to the Board's regional office, the administrative judge (AJ) found, following a hearing, that the agency had proven both specifications by preponderant evidence. He further found that House failed to establish that the agency committed harmful procedural error, and that the demotion penalty was within the bounds of reasonableness.

House petitioned MSPB to review the initial decision; MSPB denied the petition; but reopened the case on its own motion, reversed the initial decision, sustained the first specification only, and reduced the penalty from a demotion to a suspension. MSPB found that the evidence did not support the agency's second specification--that House was guilty of improper conduct for claiming sick leave for the November 14-24 time period.

House testified that he became quite ill on November 14, but that he did not see his physician until November 18, when he was diagnosed as suffering from bronchitis and prescribed medication. He further testified that, due to his illness, he did not work any of his regular shifts (midnight to 5:00 a.m.) at the tavern during the period in question. Instead, he arranged for two individuals, Joseph Alex and Michael Brady, to substitute for him. Because these substitutes were not regular tavern employees, however, they were unable to perform all the tasks necessary at the beginning and end of their shifts. House traveled the mile from his house to the tavern to perform these tasks. By contrast, he lived about 22 miles from his Postal Service employment. Not surprisingly, House's testimony was corroborated by Alex and Brady, with Alex describing the appellant as being "sick as a dog" during this period. The appellant also submitted documentary evidence to corroborate his medical condition, viz., copies of prescriptions issued by his physician on November 18, and a receipt for payment made to his physician on November 18.

The administrative judge did not believe that House was incapacitated. The AJ reasoned that if House was able to travel to the bar to open and close the tavern, he was not so sick that he could not go to work at the post office. MSPB disagreed with its judge:

According to the uncontroverted testimony, [House's] duties were limited to short periods at the beginning and end of the substitute bartenders' shifts. That a sick employee is capable of driving one mile to perform a few minutes of work at a time does not necessarily mean that he is able to drive 22 miles and work an eight-hour shift. And unlike a large organization like the Postal Service, a small business cannot so easily accommodate an employee's complete absence from the workplace under circumstances like those in this appeal. Because the substitute bartenders did not have access to the safe or the keys to the establishment, the only alternative the appellant would have had would have been to ask one of the bar owners, who lived far away, to come in at midnight and 5:00 a.m. to

perform the duties that the appellant performed. That the appellant would have been reluctant to ask this of his part-time employer is understandable.

House is anomalous precedent on at least three counts. First, the board implies that the prescriptions which *House*'s physician wrote for him constituted administratively acceptable evidence of incapacitation, when they clearly did not. That *House*'s physician wanted him to take prescription drugs does not mean that *House*'s physician found *House* to be incapacitated from performing the duties of his position. In the same vein, that *House* paid his physician an office visit implies nothing about the severity of his illness.

Second, that *House* may have been too ill to drive the 22 miles from his home to the post office provides no more justification for sick leave than any transportation problem would provide an excuse for tardiness or AWOL. In other words, if *House* were well enough to work, but not well enough to drive, then he needed to make other arrangements to get to work. It bears repeating that sick leave is warranted only when the employee is incapacitated from performing duties and commuting is not a duty of the position.

Third, the Board unjustly presumed that the Postal Service could more easily find a substitute for *House* than his part-time employer. Unaccountably, the Board was more concerned about the efficiency of the tavern than it was about the efficiency of the Postal Service; and the Board has a statutory duty to be concerned about the latter and not the former. 5 U.S.C § 7513(d).

For employees, *House* is useful only in that the Board invited sick employees to obtain certifications from coworkers and family members which attest to the employee's incapacity to report for duty. The same also held true in *Barry v. Dept. of Navy*,⁹ in which the appellant submitted evidence from a church pastor and deacon attesting to visits to the appellant while he was ill prior to his hospitalization to prove incapacitation..

As co-owners of the deli, we might have a more difficult time in distinguishing our clerk's facts from those of the appellant in the Board's decision in *Atchley v. Department of the Army*.¹⁰

The agency removed the *Atchley* from his position as a Warehouse Worker for being AWOL from 7:00 a.m. to 12:00 noon on July 19, 1989. On appeal to the Board's regional office, *Atchley* stipulated that he was absent from duty during those hours, and that he did not have prior approval for that absence *Atchley* contended, however, that he should have been placed on sick leave because he was incapacitated from performing his duties that day due to an on-the-job injury he sustained to his neck and left shoulder on July 18, 1989. The Board's administrative judge affirmed *Atchley*'s removal finding that the agency properly charged him with sick leave because he failed to follow agency leave procedures. The Board reversed.

After the *Atchley*, a forklift operator, arrived at his duty station at about 12:30 p.m. on the July 19, 1989, he was seen by an agency physician, Dr. Paul Jones, Jr. Based on his

clinical examination and Atchley's report of an injury the previous day, Dr. Jones diagnosed the him as suffering from superscapular synovitis, which he described as a relatively common occupational illness affecting the area just above the shoulder blade. At the MSPB hearing, Dr. Jones testified that he concluded that Atchley was able to work that day, but with significant restrictions that would preclude him from performing his regular duties as a forklift operator. Dr. Jones listed the work restrictions on a form, which he gave to Atchley to provide his supervisor. Significantly, Atchley's supervisor sent him home, since he had no light-duty work within the appellant's work restrictions.

Dr. Jones testified that his diagnosis and assessment of Atchley's ability to perform his duties were based, not only on his clinical examination, but also on the appellant's account of experiencing an on-the-job injury the previous day, a matter about which he had no independent knowledge. He did state, however, that Atchley's account was consistent with his examination on July 19. Dr. Jones further testified that Atchley's medical condition during the morning of July 19 probably did not differ significantly from his condition when examined that afternoon. In reversing the initial decision and the removal the Board stated:

If Dr. Jones's diagnosis and determination of work restrictions, and his understanding of the origin of the appellant's condition were all accurate, it would logically follow that the appellant was incapacitated for duty on the morning of July 19. We find that Dr. Jones's notes of examination and his listing of work restrictions, which were agency documents prepared prior to the adverse action against the appellant, constituted administratively acceptable evidence of incapacity.

Atchley, supra, pp. 302 -303

The Board found that the Army could have disciplined Atchley for failing to follow its leave procedures, but once Atchley submitted administratively acceptable evidence of incapacitation, the Army could not charge him with AWOL:

If an employee has provided administratively acceptable evidence of incapacity, prior to the agency's decision to remove him on AWOL charges, the agency must grant sick leave, regardless of the employee's failure to timely comply with the agency's sick leave procedures. *Nash v. United States Postal Service*, 8 MSPB 8, 8 M.S.P.R. 307, 310 & n. 10 (1981). The administrative judge therefore erred in sustaining the AWOL charge solely on the basis of the appellant's failure to follow the agency's leave procedures, without deciding whether the appellant had provided administratively acceptable evidence of incapacity

Atchley supra at 301. (The Board should have noted but didn't that, even if an employee provides administratively acceptable evidence of incapacitation, the agency could refuse to grant sick leave if the employee did not have sick leave to use.¹¹

What *Atchley* leaves hanging is whether Atchley could have refused light duty once Dr. Jones found that the synovitis precluded him from performing the duties of his position. Unlike our stock clerk, who won't even take lunch orders from our customers, Atchley at least reported to work apparently ready, willing, and able to perform light duty.

As a consumer of sick leave, you should play it safe and have your doctor write that you are too sick even to report for duty much less to perform the duties of your position. That's what Air Traffic Controller Glenn Chance did, in FAA's estimation, to cover up his participation in the 1981 PATCO strike.¹²

Chance was on authorized leave of absence on August 3, 1981, and was not scheduled to return to work until August 11, 1981, the date on which the PATCO strike commenced. The record reflected that Chance went on vacation about August 2, that when he returned home on Friday, August 7, he discovered that his home had been burglarized and vandalized, and that as a result he became emotionally upset. On Monday, August 10, Chance visited Dr. Diaz, his treating physician for several years, who diagnosed Chance as suffering from anxiety-depressive syndrome. Dr. Diaz prescribed Triavil and sleeping pills for Chance and advised him not to work or drive a car. Chance telephoned the facility and advised his supervisors that he had seen a doctor, was emotionally upset, under sedation, and unable to report to work. Chance's supervisor recommended that appellant come in to perform administrative duties around the office. Chance rejected this solution, claiming he was in no condition to report for duty. FAA fired Chance; the Board's Administrative Judge reversed finding that FAA should have granted Chance sick leave; FAA petitioned the Board for review; and the Board affirmed. The Board found not only that Chance had "presented sufficient evidence to document his illness," but also that, "It is not clear what more appellant could have done to gain approval of his sick leave request." It's a pity that Dr. Diaz wrote that Chance was in no condition to drive; otherwise the Board would have been forced to decide if Chance had to go to work to perform "administrative duties," just as you and I want our feckless clerk to answer the phone.

Composing the perfect doctor's note

You may in fact be too sick or too injured to report for work but unless your doctor puts that into words that are "administratively acceptable," your agency should not grant you sick leave. Does your doctor have to incant magical words in his/her leave note? The Board here speaks with forked-tongue. In *Bergstein v. U.S. Postal Service*,¹³ for example, the Board upheld an AWOL charge because, among other things, "the [medical] certificates failed to include a statement that the appellant could not perform his duties." By contrast, in *Riley v. Department of Army*,¹⁴ the Board accepted as administratively

acceptable evidence of incapacitation a medical certificate completed by the appellant's physician, which stated as follows:

Naomi Riley was seen in our office for pregnancy complicated by Intrauterine Growth Retardation, unsure dates, gestational edema, breech presentation & low back strain. She was placed on bedrest starting 4/2/90. She delivered on 7/27/90.

Common sense dictates that the medical certificate should include the dates of incapacitation;¹⁵ that it should be prepared by the physician herself rather than someone on her staff;¹⁶ that it should be signed by the physician and not simply stamped;¹⁷ that there be a reasonably close temporal proximity between the examination of the employee and the dates of incapacitation;¹⁸ and, most importantly, that the physician make some effort to explain how the employee's illness or injury prevents her from performing one or more of the essential functions of her position.¹⁹ Call me a stickler (because I was a MSPB administrative judge), but medical certificates that include only conclusory *net opinions*²⁰ about incapacitation make me uneasy.

With one modification, the requirements of the medical certificate an employee must submit to request FMLA leave may be an acceptable template for requesting sick leave. Under 5 CFR § 630.1203(a)(4), an employee shall be entitled to a total of 12 administrative workweeks of unpaid leave during any 12-month period for "A serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of his or her position." Under 5 CFR § 630.1207(b), an agency may require that a request for FMLA leave be supported by written medical certification issued by the health care provider of the employee which shall include:

- (1) The date the serious health condition commenced;
- (2) The probable duration of the serious health condition or specify that the serious health condition is a chronic or continuing condition with an unknown duration and whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity;
- (3) The appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health care provider; ...
- (5) [A] statement that the employee is unable to perform one or more of the essential functions of his or her position or requires medical treatment for a serious health condition, based on written information provided by the agency on the essential functions of the employee's position or, if not

provided, discussion with the employee about the essential functions of his or her position

If you are a federal employee, you should not have to worry about paragraph (2) because the *duration* of incapacitation is irrelevant to an agency's obligation to grant sick leave.²¹ But if you are a postal worker, the medical certificate should include an estimate of the duration of incapacitation²² although the ELM seemingly does not require it:

513.364 Medical Documentation or Other Acceptable Evidence

When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

Congress regards the use of FMLA leave as being interchangeable with employer-provided sick and annual leave. According to 29 U.S.C.A. § 2612(2)(B),²³ the employee can choose to substitute annual leave or "medical or sick leave" for FMLA leave or the employer could force the employee to substitute annual or sick leave for FMLA leave. An argument can be made that Congress would not have allowed sick leave to be substituted for FMLA leave if Congress believed that the burden on the employer of using sick leave was greater than using FMLA leave. If the burdens are similar then the grounds for granting the two leaves must be similar as well. This is the clear import of the 11th Circuit's "anti-tacking" decision in *Strickland v. Water Works and Sewer Bd. of City of Birmingham*.²⁴ Moreover, 5 CFR § 630.1203(a)(4) and 5 CFR § 630.403(a) both require the medical certificate to address the employee's incapacitation to perform duties. The FMLA regulation reassures the employer that the employee is indeed unable to work by requiring the employee's health care provider not only to state the details of the employee's illness or injury, but also to explain how that injury or illness incapacitates the employee from performing one or more of the essential functions of his position. It would be unreasonable for an employer to demand more of an employee who requests sick leave, provided of course that the employee is not on a leave restriction.

Now, at the end of this article, I am having grave second thoughts about firing our stock clerk. Assuming that he was covered by FMLA which most assuredly he is not because

our deli has only one employee,²⁵ he would be entitled to 12 weeks of LWOP provided that he was too injured to perform one or more of the essential functions of his position. Nothing is more essential to us as the stock clerk's employer than to have him climb the ladder to put up stock on the shelves. Undeniably, he cannot climb the ladder owing to his broken ankle. Because our clerk cannot stock the shelves, we cannot fire him for refusing to come to work to answer the phones because answering the phones is not an essential function of his position. If we fire him for AWOL, we lose at MSPB because he was entitled to FMLA leave even if he was not entitled to sick leave.²⁶

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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Endnotes

¹ The Postal Service is not subject to 5 U.S.C.A. § 6301 et seq. and 5 C.F.R. § 630.101 et seq., and thus Postal Service employees have neither a statutory nor regulatory entitlement to use of annual or sick leave; modifying *Webb v. United States Postal Service*, 9 MSPB 749, 10 M.S.P.R. 536. *Fleming v. U.S. Postal Service*, M.S.P.B.1986, 30 M.S.P.R. 302.

² ELM 513.1 provides:

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical)

examination or treatment. A limited amount may also be used to provide for the medical needs of a family member. Nonbargaining unit employees, and bargaining unit employees if provided in their national agreements, are allowed to take up to 80 hours of their accrued sick leave per leave year to give care or otherwise attend to a family member (as defined in 515.2) with an illness, injury, or other condition that, if an employee had such a condition, would justify the use of sick leave. (See 515 for information about FMLA entitlement to be absent from work³)

³ 5 U.S.C § 6307 provides in pertinent part:

(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period, except that sick leave with pay accrues to a member of the Firefighting Division of the Fire Department of the District of Columbia on the basis of two-fifths of a day for each full biweekly pay period.³

⁴The Federal Circuit held in *Contreras v. United States*, 215 F.3d 1267 (Fed.Cir.2000), that the Annual and Sick Leave Act of 1951, 5 U.S.C. 6301-6387, in which "Congress authorized OPM to issue regulations 'necessary for the administration' " of the Act, allows OPM to "fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program." *Id.* at 1274 (quoting 5 U.S.C. § 6311). *Doe v. U.S.* 372 F.3d 1347, *1357 (C.A.Fed.,2004)

⁵ ELM 513.32 authorizes sick leave for "Illness or injury" if "the employee is incapacitated for the performance of official duties."

⁶ If an employee has sufficient sick leave to cover the period in question, the agency must grant the leave request when the employee has provided administratively acceptable evidence of incapacitation because of illness or injury, regardless of whether the employee has complied with applicable leave procedures. See, e.g., *Patterson v. Department of the Air Force*, 74 M.S.P.R. 648, 652 (1997).

⁷ The Merit Systems Protection Board has held that agency was not required to excuse employee's tardiness due to transportation problems, and 21-day suspension was reasonable for repeated instances of tardiness. *Williams v. Department of Health and Human Services* 29 M.S.P.R. 525

⁸ *House v. U.S. Postal Service* 80 M.S.P.R. 138

⁹ 14 MSPR 561, 565-66 (1983)

¹⁰ *Atchley v. Department of the Army* 46 M.S.P.R. 297

¹¹ In *Riley v. Department of the Army*, 53 M.S.P.R. 683, 689 n. 4 (1992), the Board indicated that the general rule that an AWOL charge could not be sustained if the employee presented acceptable evidence of incapacitation "assume[d] that the employee ha[d] a sick leave balance sufficient to cover the period in question." It indicated further that, if the employee lacked sufficient sick leave, the agency had the discretion to grant leave without pay or to charge the employee with AWOL "regardless of whether the employee ha[d] presented administratively acceptable *309 evidence of incapacity." *Riley*, 53 M.S.P.R. at 689 n. 4; see *Patterson v. Department of the Air Force*, 74 M.S.P.R. 648, 652 (1997) (agency's obligation to grant leave request where employee has provided acceptable evidence of incapacitation applies when the employee "has sufficient sick leave to cover the period in question").

¹² *Chance v. Department of Transp.* 16 M.S.P.R. 583

¹³ *Bergstein v. U.S. Postal Service* 30 M.S.P.R. 232, *236

¹⁴ *Riley v. Department of Army*, 53 M.S.P.R. 683, *690

¹⁵ *Lawley v. Department of Treasury* 84 M.S.P.R. 253, *262; *Robinson v. Veterans Admin.* 29 M.S.P.R. 594, *594

¹⁶ *Young v. U.S. Postal Service*, 79 M.S.P.R. 25, *33

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Morris v. USPS*, 28 MSPB 202, 206 (1985)

²⁰ A diagnosis constitutes a net opinion if it is not supported by competent evidence combined with medical analysis. *State v. Cordoma* 372 N.J.Super. 524, *535, 859 A.2d 756, **763 (N.J.Super.A.D.,2004)

²¹ “This argument [about the absence of a prognosis], however, addresses not the adequacy of the appellant's evidence of incapacity for duty but the agency's long-term concern that this incapacity had no foreseeable end and impaired its ability to ensure that the duties of the appellant's position would be performed.” *Allen v. Department of Army* 76 M.S.P.R. 564, *569.

²² The Board has held that it is reasonable for the agency to request a certificate that includes a diagnosis of the appellant's condition and a prognosis for recovery, particularly if the information originally supplied by a physician does not state when the appellant is expected to return to work. *Morris v. USPS*, 28 MSPB 202, 206 (1985); *Young v. U.S. Postal Service* 79 M.S.P.R. 25, *33.

²³ 29 U.S.C.A. § 2612 (2)(B) provides:

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

²⁴ *Strickland v. Water Works and Sewer Bd. of City of Birmingham* 239 F.3d 1199, *1205 (C.A.11 (Ala.),2001)

²⁵ FMLA defines "employer" as any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees. *Nordquist v. City Finance Co.*, N.D.Miss.2001, 173 F.Supp.2d 537.

²⁶ To sustain a charge of AWOL, the agency must show that the employee was absent and either that (1) the absence was unauthorized or (2) that request for leave was properly denied. *Scorcia v. United States Postal Serv.*, 78 M.S.P.R. 588, 590 (1998).