

STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION

In the Matter of the Appeal by

Case No. 03-W-0104

[REDACTED]

Represented by:

Food Services Technician I

Susan Gerakaris
Labor Relations Representative
California State Employees Association
1111 Riverside Avenue, #401
Paso Robles, CA 93446

For Reinstatement After Automatic
Resignation (AWOL)

Represented by:

Respondent:

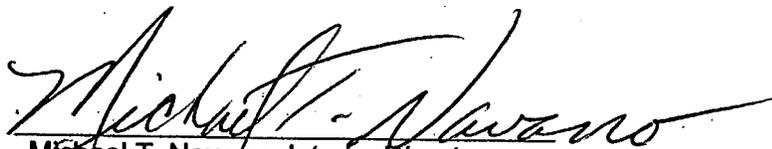
Department of Mental Health
Human Resources
1600 9th Street, Room 121
Sacramento, CA 95814

Linda Persons
Human Resources Director
Atascadero State Hospital
Personnel Office
10333 El Camino Real
Atascadero, CA 93423-7005

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED: April 12, 2004.



Michael T. Navatno, Interim Director
Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Wesley M. Travis, Jr., Administrative Law Judge (ALJ), Department of Personnel Administration (DPA) at 10:30 a.m. on March 22, 2004, at Atascadero, California.

, appellant, was present and was represented by Susan Gerakaris, Labor Relations Representative, for the California State Employees Association (CSEA).

Linda Persons, Human Resources Director, represented the Department of Mental Health (DMH), respondent.

Evidence having been received and duly considered, the ALJ makes the following findings of fact and Proposed Decision.

I
JURISDICTION

Respondent automatically resigned appellant effective September 24, 2003, for being absent without approved leave from August 22, 2003 through September 17, 2003. Appellant filed a request (appeal) for reinstatement after automatic resignation on September 19, 2003. The appeal complies with the procedural requirements of Government Code section 19996.2.

II
WORK HISTORY

At the time of appellant's resignation, appellant was employed as a Food Service Technician I at the Atascadero State Hospital of the DMH. Appellant began working for the DMH on July 2, 2001.

The duties of a Food Service Technician I are to serve or assist with the preparation of foods and beverages; to clean and maintain food service equipment, utensils, and work areas; to instruct and work with helpers from the resident population, as required; and/or may instruct, lead, or supervise inmates, wards, or resident workers; and do other related work.

III
CAUSE FOR APPEAL

Appellant argued that her incarceration was a valid excuse for being absent and a valid excuse for not obtaining leave. She also argued that she was ready, able and willing to return to work on at least a part time basis.

IV
REASON FOR BEING ABSENT

Appellant violated the terms and conditions of her probation and was sentenced to the San Luis Obispo County Jail from August 21, 2003 to October 29, 2003.

V
REASON FOR NOT OBTAINING LEAVE

Appellant alleges that she tested "dirty" while on probation for an unspecified drug related conviction, and that the judge decided that jail time was necessary. Consequently, she was sentenced to the San Luis Obispo Jail from August 21, 2003 to October 29, 2003. The county jail where she was incarcerated only allowed inmates to make collect calls; therefore, she was unable to call her supervisor. Appellant asked members of her family and her probation officer to call her supervisor on four different occasions in order to obtain leave. The evidence corroborates the fact that two calls were received by respondent on August 28, 2003, one call on September 8, 2003, and one call on September 10, 2003. The callers provided

information that appellant was in jail and that she would not be able to return to work until after October 29, 2003.

VI

READY, ABLE AND WILLING

Appellant stated that she has a problem with alcohol abuse. She presented evidence to show that she regularly attends meetings of Alcoholics/Narcotics Anonymous. She claims she has been clean and sober for the past seven months. Although appellant stated that she was ready, able and willing to return to work, even on a part time basis if necessary, she presented no medical evidence or independent testimony in support of her claim.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ALJ MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Code section 19996.2 provides an automatically separated employee with the right to file an appeal for reinstatement with the DPA. Section 19996.2 also provides:

“Reinstatement may be granted only if the employee makes a satisfactory explanation to the department [DPA] as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.”

Pursuant to *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the Court held that an employee terminated under the automatic resignation provision of section 19996.2, has a right to a hearing to examine whether she had a valid excuse for being absent, whether she had a valid reason for not obtaining leave and whether she is ready, able, and willing to return to work. DPA is not charged with examining whether the appointing power acted properly with regards to the actual termination. Further, appellant has the burden of proof in these matters and must prove by a preponderance of the evidence that she had a valid excuse for her absence and failure to obtain leave and that she is currently able to return to work.

Appellant stipulated to the fact that she was absent without leave. However, she argues that her incarceration in the San Luis Obispo County jail should be considered a valid excuse for her being absent, and a valid reason for not obtaining leave because her absence from work was involuntary.

Many State employees have been automatically resigned for being absent without leave because they are incarcerated for five or more days. For a number of years, both DPA and the

State Personnel Board (SPB) have relied upon the former SPB decision in Frank C. Santiago (1995) SPB Case No. 35488 to determine whether or not to reinstate an employee who is absent from work due to incarceration. The decision states in relevant part:

"Incarceration is not a satisfactory reason for being absent without leave unless the circumstances are beyond the control of the employee, such as arrest without just cause or innocence."

In this case, appellant admits that she violated her probation by testing positive for a controlled substance. Therefore, the court had "just cause" for sentencing her to jail because she violated the terms and conditions of her probation. Appellant engaged in misconduct which resulted in her being arrested and incarcerated for criminal activity. Such activity and subsequent incarceration does not excuse her absence.

Also in this case, appellant did not provide a satisfactory explanation for not obtaining leave. Granted, appellant made efforts to comply with reporting requirements of the respondent after her incarceration. However, respondent has the discretion to determine whether to approve or deny vacation leave. It is not unreasonable for respondent to deny a request for leave for over two months because it was not timely, and because of its potential adverse impact upon other workers and the overall workload.

And finally, although appellant testified that she was ready, able and willing to return to work, even on a part time basis if necessary, she presented no medical evidence or independent testimony in support of her claim.

* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [REDACTED] for reinstatement after automatic resignation from the position of Food Services Technician I, effective September 24, 2003, is denied.

* * * * *

The above constitutes my Proposed Decision in the above-entitled matter. I recommend its adoption by DPA as its decision in the case.

DATED: April 8, 2004.



Wesley M. Travis, Jr., Administrative Law Judge
Department of Personnel Administration