

BEFORE THE DEPARTMENT OF PERSONNEL ADMINISTRATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

[REDACTED]

Case No. 97-3039

For reinstatement after automatic
resignation from the position of
Caltrans Highway Mechanic
Supervisor with the Department of
Transportation at Bishop

PROPOSED DECISION

This matter came on regularly for hearing before Philip E. Callis, Administrative Law Judge, State Personnel Board, on August 7, 1997, at Bishop, California.

The appellant, [REDACTED] was present and represented himself.

The respondent was represented by Cris Rojas, Personnel Analyst, Department of Transportation.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above request for reinstatement after automatic resignation effective June 11, 1997, complies with the procedural requirements of the Government Code section 19996.2.

II

Appellant has been employed by the Department of Transportation since 1984. He began his employment as a Heavy Equipment Mechanic and was promoted to the supervisory level in 1988. Appellant has three adverse actions pending before the State Personnel Board: (1) a reduction in salary effective July 31, 1996; (2) a reduction in salary effective October 1, 1996; and (3) a demotion effective June 23, 1997. These appeals are presently off calendar.

III

Appellant was absent without leave from his position as a Caltrans Highway Mechanic Supervisor from June 12, 1997, through June 18, 1997. He was separated from his position under the automatic resignation statute for being absent without leave for five consecutive working days (Gov. Code § 19996.2).

IV

Appellant was one of two supervisors for the District 9 Equipment Shop. He worked from 6:30 a.m. to 3:00 p.m. The other supervisor worked from 8:30 a.m. to 5:00 p.m. Employees are required to call their supervisor to arrange leave when they are sick. This requirement was especially important for supervisors like appellant because of the need to provide supervisory coverage for the shop. Appellant was well aware of these requirements having previously been counseled and disciplined for failing to comply with them.

V

On Tuesday, June 10, 1997, appellant left work early because he was suffering from a severe headache. Appellant went to his doctor's office but was unable to obtain an appointment with his regular physician. At around 12:15 p.m., appellant called and left a message with the Acting Superintendent that he would be off sick that day and the next, and that he was trying to get in to see his physician.

VI

On Wednesday, June 11, 1997, appellant contacted the Department's Employee Assistance Program (EAP) and obtained an appointment to see [REDACTED], a psychologist, on Monday, June 16, 1997. Appellant did not call in to work or speak to the Superintendent that day. However, he was granted sick leave for June 10 and 11 because of his call to the Acting Superintendent on June 10.

VII

On Thursday, June 12, 1997, appellant did not report to work or call in. At around 9:00 a.m., the Superintendent called appellant at home and spoke to him. After the Superintendent identified himself, appellant said, "What's up?" The Superintendent asked, "Why didn't you come to work today?" Appellant responded, "I just didn't feel like it." The Superintendent told appellant that because he did not show up for work that morning, there had been no supervisor on the floor.

([REDACTED] continued)

Appellant told the Superintendent, "That's your problem, not mine," and hung up the phone.

VIII

On Friday, June 13, 1997, appellant did not call in or speak to the Superintendent.

IX

On Monday, June 16, 1997, at approximately 5:52 a.m., appellant called the Superintendent's telephone number at work and left the following message on the Superintendent's answering machine: "This is [REDACTED] calling in sick today. I'll bring in a doctor's slip today or tomorrow."

X

On Tuesday, June 17, 1997, and Wednesday, June 18, 1997, appellant did not call in, speak to the Superintendent, or bring in the promised doctor's slip. As a result, the Department counted appellant as absent without leave from June 12, 1997, through June 18, 1997, and terminated appellant's employment under the automatic resignation statute for being absent without leave for five consecutive working days (Gov. Code § 19996.2).

XI

At the hearing, appellant claimed that he was too sick to work beginning June 10, 1997, because of anxiety, stress, high blood pressure, and migraine headaches. He had trouble getting an appointment with his regular physician, so he made an appointment with [REDACTED] a psychologist, through the EAP

([REDACTED] continued)

program for Monday, June 16, 1997. The psychologist recommended that appellant see another physician, [REDACTED], which appellant did on Wednesday, June 18, 1997. [REDACTED] gave appellant a physician's slip placing appellant off work until further notice for medical reasons. However, appellant did not call the Superintendent to notify him of these developments or deliver the note to the office. Instead, appellant mailed the physician's note to the District 9 Office on June 19 or 20, 1997, after respondent had already terminated his employment.

XII

At the hearing, appellant testified that he is not ready, willing, or able to return to work, nor has he obtained the consent of his appointing power to a leave of absence to commence upon reinstatement. Appellant has filed a disability claim with the State Compensation Fund which is currently pending.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

SCOPE OF REVIEW

Government Code section 19996.2 (the automatic resignation or AWOL statute) provides in relevant part:

Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last day on which the employee worked.

. . . Reinstatement may be granted only if the employee makes a satisfactory explanation to the [D]epartment [of Personnel Administration] 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.

An employee so reinstated shall not be paid back salary for the period of his or her absence or separation or for any portion thereof.

In Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, (hereafter Coleman), the court held that Due Process requires that an appointing power give an employee pretermination notice and an informal hearing before invoking the automatic resignation statute. Review of the employer's decision on these matters is by ordinary mandamus in superior court.

In addition to these pretermination rights, the employee has a right to petition the Department of Personnel Administration (DPA) for reinstatement. In order to qualify for reinstatement, the employee must satisfy three criteria:

1. The employee must make a satisfactory explanation as to the cause of his or her absence;
2. The employee must make a satisfactory explanation as to his or her failure to obtain leave therefor; and
3. The employee must demonstrate 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.

The DPA hearing is limited to these three issues. DPA does not reexamine the issues of whether the employee was actually absent without leave for five consecutive working days or whether the employer provided a proper pretermination hearing. If the three criteria of the statute are satisfied, DPA is limited to granting prospective reinstatement without back salary.

REASON FOR ABSENCE

Appellant provided a physician's slip dated June 18, 1997, which placed him off work because of medical reasons. The physician's slip, together with appellant's corroborating testimony, established a satisfactory explanation for appellant's absence from work.

REASONS FOR FAILURE TO OBTAIN LEAVE

Appellant failed to provide a satisfactory explanation for his failure to obtain leave. Appellant did call in on June 10, 1997, to say that he would be off work for two days due to illness and was granted sick leave for those two days. However, appellant did not show up for work or call in on June 12, 1997. Moreover, when the Superintendent called at 9:00 a.m. to find out why appellant wasn't at work, appellant said, "I just didn't feel like it," and hung up on the Superintendent. Appellant's only other contact with his employer was an early morning message on June 16, 1997, stating that he was calling in sick and would

bring in a doctor's slip "today or tomorrow." When appellant failed to comply his own promise, respondent separated appellant for being absent without leave. In light of the past counseling and disciplinary actions on the subject, appellant was well aware of the need to comply with attendance requirements. Appellant has not provided a satisfactory explanation for his failure to obtain leave on this occasion.

READY, WILLING AND ABLE TO RETURN TO WORK

By his own admission, appellant is not ready, willing, or able to return to work, nor has he obtained the consent of his appointing power to a leave of absence to commence upon reinstatement.

CONCLUSION

Government Code section 19996.2 provides that three criteria must be met for reinstatement after an automatic resignation. Appellant established a satisfactory explanation for his absence. However, he failed to establish a satisfactory explanation for his failure to obtain leave, that he was ready, willing, and able to return to work, or that he had the consent of the appointing power for a leave of absence. Since appellant established only one of the three statutory criteria for reinstatement, his request for reinstatement must be denied.

* * * * *

[REDACTED] continued)

WHEREFORE IT IS DETERMINED that the request for reinstatement of [REDACTED] after automatic resignation effective June 11, 1997, is hereby denied.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the Department of Personnel Administration as its decision in the case.

DATED: November 7, 1997



Philip E. Callis
Administrative Law Judge
State Personnel Board