

**STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION**

In the Matter of the Appeal by

Case No. 04-S-0085


Tax Program Technician I
For Reinstatement After Automatic
Resignation

Represented by:

In Pro Per

Respondent:

Franchise Tax Board
Human Resources Bureau
P. O. Box 550 MS: A-22
Sacramento, CA 95812-0550

Represented by:

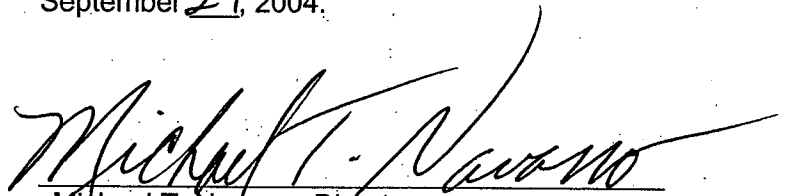
Edwin T. Shea
Tax Counsel
Franchise Tax Board
Legal Branch MS B-17
P. O. Box 1720
Rancho Cordova, CA 95741-1720

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:

September 21, 2004.



Michael T. Navarro, Director
Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Linda A. Mayhew, Administrative Law Judge (ALJ), Department of Personnel Administration (DPA) at 1:00 p.m. on September 23, 2004, at Sacramento, California.

[REDACTED] appellant, was present and represented himself.

Edwin T. Shea, Tax Counsel, represented the Franchise Tax Board (FTB), 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 close of business August 3, 2004, for being absent without approved leave from July 15 through July 22, 2004.¹ Appellant filed a request (appeal) for reinstatement after automatic resignation on August 5. 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 Tax Program Technician I in the Sacramento office of FTB. Appellant began working for FTB on October 20, 1986.

The duties of a Tax Program Technician I are to review and resolve issues regarding documents, returns, and payments or to provide technical information regarding specific laws, rules, policies, and regulations relating to various programs administered by the FTB.

III
CAUSE FOR APPEAL

Appellant claimed he had a valid reason for being absent because he was ill; he had a valid reason for not obtaining leave because he believed his employer knew he would be absent; and, he was ready, able, and willing to return to work.

IV
REASON FOR BEING ABSENT

Appellant has a history of absences related to illness. Appellant testified he suffers from headaches and depression and takes medication for this. Appellant testified this medication affects his memory. Appellant also testified that he is a recovering drug addict and alcoholic and that the narcotic medication he takes somehow affects his ability to work and challenges his recovery. Appellant testified he has been clean and sober for approximately eight (8) years.

Appellant exhausted his leave under the Family Medical Leave Act (FMLA) and he has been on nonindustrial disability leave from at least May 14 through September 1. Appellant could not recall the last day he worked. The reason for appellant's FMLA leave was not disclosed. No physician or other health care professional was called to testify.

Appellant testified he was ill and unable to work from July 15 through July 22. He testified that although he had been cleared to return to work on July 15, when he woke up that

¹ All dates are 2004 unless otherwise indicated.

([REDACTED] continued)

day he had a headache. He testified he could not get an appointment to see his physician until July 22, when his physician took him off work until August 2.

V

REASON FOR NOT OBTAINING LEAVE

Appellant testified he believed he did not have to call or otherwise contact respondent to report he would not be at work for the period July 15 through July 22 because his doctor had notified the Employment Development Department that he could not work for that period and he had been granted NDI until August 1. He testified he was not notified he had to contact respondent.

On or about January 14 appellant received a letter notifying him that he was absent without leave on January 5 through January 14 because he had not called his supervisor, reported to work, or submitted substantiation for his absence. He was further notified that five consecutive days of absence may constitute an automatic separation from State service under Government Code section 19996.2.

On or about April 13 appellant received a second letter notifying him that he was absent without leave on April 6 through April 13 because he had not called his supervisor, reported to work, or submitted substantiation for his absence. He was again reminded that five consecutive days of absence without leave may constitute automatic separation from State service under Government Code section 19996.2.

On or about April 23 appellant received a third letter from his supervisor, [REDACTED] notifying him that his FMLA leave was expiring. It instructed appellant he was expected to call his supervisor to report his absence within one hour of his work shift if he was unable to come to work. It also informed appellant that any instances when he did not call his supervisor would be reported as absence without leave.

On May 7, [REDACTED] again reiterated the procedure appellant must follow to obtain leave when he was going to be absent. Appellant was instructed both verbally and in writing that he was expected to report his absence within one hour of his start time; speak directly to a supervisor when reporting an absence; and, provide appropriate verification for his absence upon request.

When appellant did not report to work and did not call on July 15 and July 16, [REDACTED] called appellant's home. [REDACTED] left telephone messages asking appellant to call him back.

Appellant did not call and did not report to work on July 15 through July 22. He never provided respondent with substantiation of his need to be absent on these dates. Respondent notified appellant he was being automatically resigned on July 22.

VI

READY, ABLE AND WILLING

Appellant contended he was ready, able, and willing to return to work. He also admitted he had been told by his doctor that he was not released to return to work until October 1. Appellant presented no substantiation of his release to return to work on October 1. Appellant also testified that if he was given until 5:00 p.m. on September 23, he would have a doctor's statement releasing him to return to work effective on September 23.

* * * * *

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 he had a valid excuse for being absent, whether he had a valid reason for not obtaining leave and whether he 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 he had a valid excuse for his absence and failure to obtain leave and that he is currently able to return to work.

Appellant failed to prove he had a valid reason for being absent for the period of July 15 through July 19. None of the medical documentation he provided excused him from work for this period. His testimony that he had a headache on Monday, July 15 provides no reason why he could not work on the subsequent days. There was no evidence that he was unable to get to an emergency room to obtain the required documentation or why subsequent medical slips did not address his inability to work during this period. In addition, appellant's offer to obtain a release to return to work from his doctor by 5:00 p.m. on September 23, the day of hearing, does not support his testimony that he could not obtain timely documentation for his absence

[redacted] continued)

during the week in question. If he could obtain a release to return to work in a matter of hours, he could have also obtained verification of his inability to work within five days.

Appellant also failed to prove he had a valid reason for not obtaining leave. He was given clear instructions of the need to contact his supervisor when he was absent and the consequences of failing to do so on at least four occasions.

Finally, appellant failed to prove he was ready, able, and willing to return to work. Appellant's history of absenteeism leaves his medical status and/or his willingness to work unresolved. No physician or other medical health provider was called to testify.


* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [redacted] for reinstatement after automatic resignation from the position of Tax Program Technician I effective close of business August 3, 2004, 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: September 27, 2004.


Linda A. Mayhew, Administrative Law Judge
Department of Personnel Administration