



BEFORE THE DEPARTMENT OF PERSONNEL ADMINISTRATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Request by

[REDACTED]

Case No. 97-3438

For reinstatement after automatic resignation as absent without leave (AWOL) from the position of Certified Nursing Assistant with the Veterans Home of California, Department of Veterans Affairs at Yountville

PROPOSED DECISION

This matter came on regularly for hearing before Shawn P. Cloughesy, Administrative Law Judge (ALJ), State Personnel Board (SPB or Board), on October 20, 1997, at Yountville, California. The matter was submitted for decision after oral closing argument at the end of the hearing.

The appellant, [REDACTED], was present and was represented by Terrence Ryan, Labor Relations Representative, California State Employees Association (CSEA).

The respondent, Veterans Home of California (VHOC), Department of Veterans Affairs (DVA), was represented by Bruce A. Crane, Attorney, DVA.

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

[REDACTED] continued)

I

JURISDICTION

On June 24, 1997, CSEA filed a written request for reinstatement after automatic resignation as absent without leave (AWOL) on behalf of [REDACTED] (appellant) from her position as a Certified Nursing Assistant with VHOC at Yountville. The appeal was received by Department of Personnel Administration (DPA) on July 2, 1997. The appeal was timely under Government Code section 19996.2.

On August 1, 1997, DPA forwarded the appeal to the SPB Hearing Office for hearing, where it was received on August 4, 1997. Receipt of the appeal was acknowledged by SPB by letter on August 21, 1997.

The above automatic resignation as AWOL, effective June 13, 1997, and request for reinstatement, comply with Government Code section 19996.2.

II

EMPLOYMENT HISTORY

Appellant began working for VHOC as a Hospital Aid on April 7, 1980. She was later appointed as a Geriatric Nursing Assistant on March 2, 1983 and a Certified Nursing Assistant on April 21, 1994 and remained in that classification until she was AWOL separated on June 13, 1997.

III

ALLEGATIONS

Appellant was AWOL from May 29 through June 5, 1997.<sup>1</sup> Appellant claims she was absent due to a back injury and that she thought that her doctor had contacted her employer and informed them that she would not be back to work.

IV

FINDINGS OF FACT

Appellant is a Certified ~~Nursing~~ Assistant working at VHOC. Her normal working shift was from 6:30 a.m. to 3:00 p.m. Her indirect supervisor was Supervising Registered Nurse II [REDACTED]

On December 18, 1996, appellant received a sick leave restriction memorandum which required her to provide medical verification that she was seen by her doctor on the first day of her illness for every absence where she was requesting sick leave. Appellant was to present her medical verification to her employer on the first day she returned to work. Appellant was also expected to call work at least one hour prior to the start of her shift (5:30 a.m.) when she was going to absent from work and the call was to be made to the nursing shift supervisor.

Appellant testified that she understood that she was expected to call her supervisor every day that she was absent. [REDACTED] testified that it was the obligation of the absent

<sup>1</sup> All dates are for the year 1997, unless otherwise specified.

[REDACTED] continued)

employee to call her supervisor prior to the shift to inform her that she would be absent. [REDACTED] also stated that any medical verification presented should be in writing, as VHOC could not confirm that it was the employee's actual doctor that was calling the employer's representative.

Since May 7, appellant was off work due to a back injury. Appellant telephoned her employer every day that she was going to be absent from work from May 7 to May 28.

On approximately May 24, appellant testified that she telephoned [REDACTED] and [REDACTED] told her that she needed to bring a medical verification to work or have her doctor speak to [REDACTED] the VHOC return to work coordinator. [REDACTED] testified that she did not speak with appellant on May 24, but that her attendance records demonstrated that appellant telephoned her night shift supervisor on May 24 and obtained leave to be absent from VHOC from May 24 through 29. Appellant was therefore scheduled to work on May 30.

Appellant testified that she had a doctor's appointment with her treating chiropractor, [REDACTED], on May 28. Appellant told [REDACTED] that he needed to speak with [REDACTED] at VHOC. [REDACTED] told appellant that he had already spoken to her that morning. [REDACTED] did not release appellant to return to work and he told her that he needed to review her progress on a day by day basis. Appellant testified that she did not telephone her supervisor from May 30 through June 5 on these

( [REDACTED] continued)

days which she was absent because she thought [REDACTED] had satisfied that requirement by speaking to [REDACTED].

[REDACTED] testified that he was on vacation from May 12 through 27, but he had another doctor see his patients during this period of time. Appellant was seen by [REDACTED] associate approximately seven to eight times, beginning on May 12. When [REDACTED] returned from vacation on May 28, he treated appellant. [REDACTED] also saw appellant on May 30 and 31. [REDACTED] testified that appellant was unable to work because of her back injury from May 29 through June 5.

[REDACTED] remembered being telephoned by someone from the VHOC, but he could not remember the date. The VHOC asked about appellant's status and [REDACTED] responded that she was being treated for an industrial injury. [REDACTED] was asked what she was being treated for and whether the injury was a continuance of an industrial injury.

On June 18, [REDACTED] wrote a note which stated that appellant had been treated by him for an industrial back injury since 1993. [REDACTED] stated that during the latter part of April 1997 appellant's back problems became "progressively worse" and by early May 1997 she could barely move. [REDACTED] stated that appellant had not been able to work because of the condition and that he expected her to return to work on July 1.

On June 23, [REDACTED] completed a return to work order for appellant stating that she had been off from work due to her back

[REDACTED] continued)

injury from May through July 1 and that she was able to return to work on July 1.

On June 24, appellant attended her Coleman hearing (*Coleman v. DPA* (1991) 52 Cal.3d 1102) before Coleman officer [REDACTED]. [REDACTED] June 18 note and June 23 return to work order were presented to the Coleman officer.

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

Government Code section 19996.2 provides in relevant part:

Reinstatement may be granted only if the employee makes a satisfactory explanation to the department 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, willing and able to resume the discharge 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 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, the California Supreme Court held that an employee terminated under the AWOL statute, Government Code section 19996.2, has a right to a hearing to examine whether she had a satisfactory reason for her absence, a satisfactory explanation for not obtaining leave from the employer for the absence, and if she is ready, able, and willing to return to work

[REDACTED] continued)

or, in the alternative, has obtained the consent of the department for a leave of absence upon his reinstatement. An appellant bears the burden of proof and persuasion to establish all three elements of the AWOL statute, and must discharge that burden by a preponderance of the evidence.

Reason for Absence

Appellant provided unrebutted testimony from [REDACTED] that she was absent from work from May 30 through June 25 due to a disabling back condition. She provided a satisfactory explanation as to the cause of her absence.

Reason for Not Obtaining Leave

Appellant admits that she did not telephone her employer from May 30 through June 5 of her absence. She stated that she did not because she relied on her doctor's statement that he had already been contacted by VHOC. [REDACTED] could not place a date on his conversation with the VHOC employee and he did not discuss how long appellant would be out due to her injury. It was the employee's obligation, not her doctor, to notify her employer as to each day of her absence. Her reliance on her doctor in this situation does not constitute a satisfactory explanation for failing to obtain leave from her employer.

Ready, Willing, and Able to Return to Work

Appellant demonstrated by a preponderance of the evidence that she was ready, willing, and able to return to work. [REDACTED]



( [REDACTED] continued)

had cleared appellant to return to work since July 1. The testimony was unrebutted by respondent.

It is noted that the separation from state service is by automatic resignation. As such, appellant retains permissive reinstatement rights under Government Code section 19140 (a)(4).

Appellant has failed to meet one of the three criteria for reinstatement under Government Code section 19996.2. Therefore, it is concluded that appellant's request for reinstatement must be denied.

\* \* \* \* \*

WHEREFORE IT IS DETERMINED that the request for reinstatement after automatic resignation as absent without leave (AWOL) of appellant [REDACTED], effective June 13, 1997, is 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 6, 1997



Shawn P. Cloughesy  
Administrative Law Judge  
State Personnel Board