STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION

In the Matter of the Appeal by

[redacted]

Medi-Cal Technician I
For Reinstatement After Automatic Resignation

Case No. 99-W-0058

Represented by:

Joyce M. Lee
Attorney
California State Employees Association
3200 West Temple Street
Los Angeles, CA 90026

Respondent:

Department of Health Services
Personnel Management Branch
714 P Street, Room 850
Sacramento, CA 95814

Represented by:

Michael E. Kilpatrick
Senior Counsel
Department of Health Services
Office of Legal Services
714 P Street, Room 1216
Sacramento, CA 95814

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: July 29, 1999.

K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

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Medi-Cal Technician I For Reinstatement After Automatic Resignation	Joyce M. Lee Attorney California State Employees Association 3200 West Temple Street Los Angeles, CA 90026
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Department of Health Services Personnel Management Branch 714 P Street, Room 850 Sacramento, CA 95814	Michael E. Kilpatrick Senior Counsel Department of Health Services Office of Legal Services 714 P Street, Room 1216 Sacramento, CA 95814

PROPOSED DECISION

This matter was heard before Mary C. Bowman, Administrative Law Judge (ALJ), Department of Personnel Administration (DPA) at 11:30 a.m. on July 13, 1999, at San Diego, California.

Appellant, [redacted] was present and was represented by Joyce M. Lee, Attorney, California State Employees Association (CSEA).

Respondent, Department of Health Services (DHS), was represented by Michael E. Kilpatrick, Senior Counsel, DHS.

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

I

JURISDICTION

Appellant automatically resigned effective April 13, 1999, and filed a request (appeal) for reinstatement after automatic resignation on April 27, 1999. The appeal complies with Government Code section 19996.2.

II

WORK HISTORY

Appellant was employed by DHS as a Medi-Cal Technician I. At the time of her automatic resignation, she was assigned to the San Diego Medi-Cal Field Office, DHS at San Diego, California. She began working for DHS on January 3, 1977.

Appellant's duties as a Medi-Cal Technician I were to review, justify and recommend the approval or denial of specified Treatment Authorization Requests for the Medi-Cal Program and to perform other paratechnical duties specifically related to administration of the Medi-Cal Program.

III

CAUSE FOR APPEAL

Respondent notified appellant in writing on or about April 21, 1999, that effective April 28, 1999, she would be considered automatically (AWOL) resigned on April 13, 1999, based upon her absence without leave from April 14 through April 20, 1999. Thereafter, appellant filed her appeal with DPA. At the hearing appellant claimed she had a satisfactory reason for being absent without approved leave from April 14 through April 20, 1999, and that she was currently ready, able and willing to return to work.

IV

REASON FOR BEING ABSENT

Appellant was absent from work from April 14 through April 20, 1999, to care for her mother who was ill with colon cancer. She was the primary caregiver while her mother was receiving treatment under a hospice program for terminally ill patients. On April 29, 1999, respondent received confirmation from [redacted] Staff Physician at San Diego Hospice that appellant's mother was being provided care as a terminally ill patient in appellant's home and that appellant had served as her primary caregiver since the hospice care program began on April 1, 1999.

At the hearing respondent did not dispute appellant was absent to provide care to her terminally ill mother.

V

REASON FOR NOT OBTAINING LEAVE

Appellant called and reported her absences on April 14 through 20, 1999. However, she did not request or obtain advanced approval for leave. The following circumstances led to respondent not approving appellant's absences from April 14 through April 20, 1999.

Appellant was placed on leave restriction in December 1997 due to excessive absenteeism, primarily caused by family care. The terms of restriction included: 1) calling daily to her supervisor within 30 minutes of her regular start time; 2) providing written substantiation of all absences due to illness, medical or dental appointments for herself or her family by a licensed practitioner; 3) providing medical certifications which contained the date, the signature and telephone number of the doctor and the general nature of illness; and 4) securing a medical certification during the period of the absence which confirmed that appellant was unable to work for the entire period of the absence due to her condition or to a family member's condition which required her care.

On February 19, 1998, the restriction was modified to account for appellant's mother's serious health condition, which qualified her for 12 work weeks of Family Medical Leave (FML). The serious health condition was colon cancer. The original restriction was modified to allow appellant to use vacation, personal leave, or compensating time off in lieu of sick leave, if the absence related to the FML qualifying condition.

On December 16, 1998, respondent advised appellant in writing that her attendance restriction was still in effect and would remain so until her attendance was "satisfactory."

On February 9, 1999, respondent sent appellant a memorandum advising her that any leave time utilized effective February 3, 1999, was subject to the attendance restriction provisions previously in effect. The memorandum also stated,

> "Also, in an attempt to assist you in the provision of necessary care for your mother, the Department would be willing to approve a leave of absence if needed, if the request is submitted with appropriate medical certification. This should enable you to provide unlimited care for your mother."

Appellant did not request the formal leave of absence, which was suggested, because of the uncertain progress of her mother's illness and her need for the income which her job provided.

Appellant was absent February 16, 17, 18 and 19, 1999, to care for her mother. She was absent additionally on February 23, 24, and 26, 1999, and on March 5 and 8, 1999.

On or about March 8, 1999, appellant submitted a proposed leave schedule requesting time off to care for her mother from Monday through Friday from 8:30 a.m. to 12:30 p.m. on an as needed basis. On March 9, 1999, appellant's supervisor reviewed and approved the schedule on a "month to month basis." The supervisor issued a memorandum to appellant advising appellant that (no later than March 31, 1999) she would need to submit a new schedule for April if she needed additional time off in April.

On March 29, 1999, appellant obtained a medical certification from [redacted] stating,

> "This pts. daughter, [redacted] has required time away from work to care for her mother who is terminally ill and will require increasing amounts of time to care for her in the future."

On or after March 29, appellant submitted the certification to her supervisor. Thereafter, appellant was absent on April 1, 2, 5, 6, 7 and 9, 1999. On April 7, 1999, she spoke with her supervisor regarding the certification. On April 9, 1999, her supervisor issued her a formal memorandum entitled "Leave Time." In that memorandum the supervisor advised appellant the March 29, 1999, certification was "nonspecific" and the April absences, therefore, were not approved. The supervisor directed appellant to provide a "day-to-day MD certificate, i.e. one that is specific to each occurrence or one that is all inclusive or encompasses any and all dates" appellant was to be off. The supervisor reiterated that, if requested, she would approve a leave of absence for a specific time period.

Appellant was absent on April 14, 15, 16, 19, and 20, 1999. On April 16, [redacted] gave her medical substantiation for her April 1 through April 16, 1999, absences. She did not submit the medical substantiation to respondent immediately. However, appellant called each day beginning April 14 to report that she would not be at work because of her mother's illness. Respondent recorded each call in some fashion. Appellant was not granted leave for any of these days, apparently because she did not always speak directly with her supervisor and also because she did not bring in specific medical substantiation on or before April 20,1999.

Appellant was mailed a notice of automatic resignation on April 21, 1999. After her automatic resignation, appellant provided respondent with the April 16 medical substantiation from [redacted]. On April 29, 1999, [redacted] submitted a certification letter to respondent indicating that since April 1, 1999, appellant was the full time caregiver for her terminally ill mother.

(Case continued)

A *Coleman* hearing was held on April 30, 1999. After the hearing, the *Coleman* Officer concluded that appellant's April 16 certification from [redacted] was not sufficient to excuse her absences up to that date because it was not timely submitted and the appellant's telephone contacts between April 14 and 20 were made without appellant talking directly with her supervisor and getting permission to be absent.

VI

READY, ABLE AND WILLING

Appellant testified she is currently ready, able and willing to return to work. On the day of the hearing appellant advised the ALJ that her mother could die at any time. On July 15, 1999, appellant's counsel advised the ALJ and respondent's counsel that appellant's mother had in fact died on the day of the hearing. She requested to have the record reopened solely to reflect that death. Respondent's counsel objected on the basis that appellant's mother's death was "irrelevant" since it occurred after the closing of the record.

The availability of appellant to work is a primary issue in this case; and the death of appellant's mother clearly removes any impediment to appellant being able to work.

The request is granted. The record is hereby amended to reflect that appellant's mother, [redacted] died on July 13, 1999.

* * * * *

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

In this case, appellant proved by the preponderance of the evidence that she had a satisfactory explanation for being absent from work which was that she was the primary caregiver for her terminally ill mother.

Appellant's reason for not obtaining leave is exceptional. Appellant had prior excessive leave usage due to pregnancies and childcare. Appellant chose not to take a leave of absence because of the uncertainty of the progress of her mother's cancer and her need for family income. After appellant made known her continued intention to work as frequently as possible, respondent applied the traditional rules for leave approval in an unduly onerous fashion, knowing full well that the absences suffered were caused by appellant's need to provide critical care to her dying mother.

Respondent knew at all times that appellant needed to be off work on a somewhat sporadic basis to act as the primary caregiver for her mother. Appellant made significant efforts to comply with reporting requirements during an exceptionally difficult time in her life. Appellant submitted medical substantiation from [redacted], which clearly outlined the necessity for her to be off work in a sporadic manner. That need was temporary, depending upon how long appellant's mother survived. Respondent's requirements that appellant either place herself on a formal leave of absence until her mother died or obtain daily medical substantiation, and speak with her supervisor herself each day, while not inappropriate in most circumstances, clearly was unnecessary in these unique circumstances.

Due to the exceptional nature of appellant's situation, it is concluded appellant provided a satisfactory explanation for not obtaining approved leave from April 14 through 20, 1999.

Appellant also proved by the preponderance of the evidence that she is currently ready, able and willing to return to work. Since her mother is now deceased, appellant does not need to act as her primary caregiver.

Accordingly, it is concluded appellant should be reinstated, without back pay, to her former position as Medi-Cal Technician I with DHS. Respondent should effectuate said reinstatement no later than one week after receipt of the decision.

* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [redacted] for reinstatement after automatic resignation from the position of Medi-Cal Technician I with

DHS effective April 13, 1999, is granted.

* * * * *

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

DATED: July 29, 1999

MARY C. BOWMAN
Administrative Law Judge
Department of Personnel Administration