

CalHR Case Number 14-K-0061
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: December 18, 2014
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 1:00 p.m. on November 17, 2014 in Riverside, California.

The appellant was present and represented by Sherry McPhee, Staff Attorney, Service Employees International Union Local 1000 (SEIU Local 1000). Anne T. Nguyen, Senior Attorney, represented the Department of State Hospitals – Patton (DSH – Patton), respondent.

I – JURISDICTION

On June 27, 2014, DSH – Patton, respondent, notified appellant she was being automatically resigned for being absent without leave (AWOL) from June 1, 2014 through June 27, 2014. Appellant filed a request for reinstatement appeal with CalHR on July 21, 2014.

California Government Code section 19996.2 authorizes CalHR, after timely appeal, to reinstate an employee after automatic resignation if she makes a satisfactory explanation as to the cause of her absence and her failure to obtain leave and CalHR finds she is ready, able, and willing to resume the discharge of the duties of her position. The appeal complies with the procedural requirements of Government Code section 19996.2. CalHR has jurisdiction over the appeal.

II – ISSUES

Appellant contends she had a satisfactory explanation for her absence, believes she obtained leave and is now ready, able, and willing to return to work as a Registered Nurse (Safety).

Respondent argues appellant failed to report to work, failed to obtain leave and the AWOL separation should be sustained.

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for her absence from June 1, 2014 through June 27, 2014?
2. Did the appellant have a satisfactory explanation for failing to obtain leave from June 1, 2014 through June 27, 2014?
3. Is the employee ready, able, and willing to return to work as a Registered Nurse (Safety)?
4. Is the appellant entitled to back pay?

III – FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence. The appellant began her career with respondent on March 1, 2001 until February 13, 2003. She returned to respondent's Patton State Hospital on May 2, 2005. Her most recent appointment was as a Registered Nurse (Safety) in Section EB-10. She worked a morning shift from 6:30 a.m. to 3:00 p.m. on Cycle 6. Cycle 6 is one method used by respondent to rotate its staff for 24-hour, 7-day per week coverage at its Patton State Hospital.

The appellant's supervisor, who is a Unit Supervisor, explained respondent's Administrative Manual requires that, "each employee is responsible to notify his/her supervisor, as soon as possible each working day concerning unanticipated illness, injury or personal emergency that will prevent him/her from reporting to work as scheduled

unless an off-work order (OWO) for a specific time period has been issued and the supervisor has been notified of this time period.” The policy also states,

“Employees assigned to nursing services shall notify the assigned Base Unit a minimum of two hours in advance of their assigned start time each workday, unless an off-work order for a specific time period has been issued and the supervisor has been notified of this time period.”

The appellant was on an approved vacation from April 16, 2014 through May 18, 2014. A Registered Nurse working the ‘NOC’ shift from 10:45 p.m. to 6:45 a. m., is a co-worker of appellant. She spoke with the appellant sometime in May 2014. The appellant told her she was going to be off the rest of the month. She also spoke with the appellant sometime in June 2014 but does not recall the exact time or date. She does recall the appellant told her she had an OWO and FMLA and to write this on the calendar for part of June 2014.

Another Psychiatric Technician Supervisor, who is also a Unit Supervisor, explained that it is common practice to call the Base Unit when calling in sick. The Base Unit will, in turn, contact the Staffing Office to indicate the employee called in sick. When an employee has an OWO, a call to the Base Unit is all that is required and the OWO can be faxed, dropped off or provided to respondent upon the employee’s return to work. The appellant did not have an OWO and did not call the Base Unit.

The appellant traveled to Nigeria on her vacation which she has done every other year for the last few years. Before she left for vacation, her supervisor told her to make sure she had an OWO if her vacation needed to be extended for illness. She explained that this warning was important because the appellant had failed to return timely from previous vacations to Nigeria. The appellant was scheduled to return to work on May 22, 2014. She did not return to work, did not provide an OWO and did not call her supervisor. She was scheduled to work on June 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 23, 24, 25, and 27, 2014.

The appellant testified she was “very sick” in Nigeria on May 19, 2014 and was told by a doctor not to fly back to the United States. She left Nigeria on July 11, 2014 and returned to the United States on July 12, 2014. At some point while she was in Nigeria, she called her co-worker and told her to, “take me off the whole month of June.” On July 3, 2014, she again called respondent and spoke with a Psychiatric Technician who did not have authority to grant leave and was too busy to speak with her. The appellant admits she never called her supervisor or provided an OWO.

When the appellant failed to return to work, her supervisor called the appellant’s daughter, her home, and left a message with her emergency contact in an attempt to locate the appellant. She explained that all of her employees have her cell phone number, home phone number and office extension where messages can be left if she is unavailable. The supervisor contacted the Base Unit, the Staffing Office and checked her email and voice mail to see if the appellant had left a message. When the appellant could not be located, she forwarded appellant’s absentee information to the Nursing Coordinator for an AWOL separation under Government Code section 19996.2.

At the hearing, the appellant produced a note from MBEN Health Services Cottage Hospital, Ohafia, Nigeria. The note was signed by a B.O. Orji, Medical Officer, and indicated the appellant was placed on a sick list beginning May 22, 2014 and excused from duty from June 12, 2014 through July 12, 2014. The appellant also produced a medical report dated November 8, 2014, signed by the same Medical Officer indicating the appellant had been ill since May 20, 2014.

Respondent’s counsel objected to the note and medical report on the grounds of Hearsay and Authentication. No doctors testified.

IV – CREDIBILITY DETERMINATION

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of this testimony at the hearing, including but not limited to . . . (f) The

existence or nonexistence of a bias, interest, or other motive . . . (Evid. Code, § 780.)

The ALJ makes the following credibility determination.

The appellant's testimony she called her co-worker on May 20, 22, 31, 2014 and again on June 30, 2014 is not supported by the evidence. In fact, it is contradicted by her co-worker who only remembers two phone calls from the appellant sometime in May 2014. Most unbelievable however, is her testimony her co-worker was responsible to obtain leave for the appellant by calling the appellant's supervisor. Appellant's supervisor provided credible testimony and a leave policy which instructed the appellant to contact her if she was not able to return to work as scheduled.

The appellant has a specific motive to fabricate her testimony in order to meet her burden of proof she obtained leave. She acknowledged receipt of respondent's Administrative Manual but says she, "gets so busy when we [go to work]" and therefore never had the opportunity to read the policies and her supervisor never told her she was supposed to read the policies. It is not believable that the appellant, a Registered Nurse responsible for the care of others, would fail to read respondent's Administrative Manual required for the safety of patients.

Moreover, appellant's selective amnesia regarding when she was to return to work is questionable. She remembered clearly her last day of work, her first day of vacation, but conveniently forgets when she was scheduled to return to work. Because of her evasiveness, the appellant's testimony is unreliable and suspect.

V – ANALYSIS

Government Code section 19996.2(a) provides: "[a]bsence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked." It is not disputed the appellant was not at work on June 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 23, 24, 25, and 27, 2014.

Section 19996.2(a) also provides: “[r]einstatement may be granted only if the employee makes a satisfactory explanation to the department [CalHR] as to the cause of [her] absence and [her] failure to obtain leave therefor, and the department finds that [she] is ready, able, and willing to resume the discharge of the duties of [her] position or, if not, that [she] has obtained the consent of [her] appointing power to a leave of absence to commence upon reinstatement.”

In the California Supreme court case of *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the court concluded an employee’s unapproved absence is deemed an abandonment of employment or a constructive resignation. The state employer need not attempt to locate AWOL employees and prove the employee intended to abandon [her] position. It is the appellant that bears the burden of proof in these matters and must prove by a preponderance of the evidence each of the elements required by Section 19996.2. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

The appellant did not have a satisfactory explanation for her absence.

The appellant produced two doctor’s notes from a MBEN Health Services Cottage Hospital, Ohafia, Nigeria. Respondent’s counsel objected to the documents on the basis of Hearsay. ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Generally, hearsay evidence is inadmissible, however, in an administrative hearing it is admissible if it is relevant, and it is of the character or quality on which responsible persons are accustomed to rely in the conduct of serious affairs. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044.)

Doctor’s notes are generally relevant in determining whether an employee had a satisfactory explanation for an absence. However, these doctor’s notes do not have a sufficient indicia of reliability because it is impossible to determine the authenticity of the documents. Therefore, the two doctor’s notes from Nigeria are hearsay because the writings are an out-of-court statement made by a non-testifying witness offered to prove the matter asserted. Specifically, that the appellant was sick during the AWOL period.

Because the notes are hearsay, they are not sufficient to support a finding the appellant had a satisfactory explanation for her absence.

Assuming the doctor's notes were admissible under the hearsay laws, respondent's authenticity challenge would be sufficient to render them inadmissible. Authentication of a writing means [t]he introduction of evidence sufficient to sustain a finding that it is the writing the proponent of the evidence claims it [to be.] (Evid. Code, § 1400.) The only other evidence offered to sustain a finding the doctor's notes are authentic is the appellant's testimony. Because the appellant did not provide credible testimony, there is no evidence to support the authenticity of the doctor's notes.

Therefore, respondent's hearsay and authenticity objections are persuasive. The doctor's notes proffered by the appellant are insufficient to support a finding she was ill during the AWOL period of June 1, 2014 through June 27, 2014.

The appellant did not have a satisfactory explanation for not obtaining leave.

An employer has a right to expect an employee to report for work unless the employee has been excused for illness or injury or for other non-medical reasons. As opined in *Bettie Davis v. Department of Veterans Affairs* (1986) 792 F.2d 1111, 1113:

“an essential element of employment is to be on the job when one is expected to be there.” The appellant was scheduled to work in June 2014, but never appeared. She did not contact her supervisor as required by respondent's Administrative Manual and she did not request leave at any time during the month of June 2014.

The appellant's argument she did not understand she needed to speak with her supervisor to obtain sick leave is neither believable or persuasive. Her supervisor testified credibly the appellant had failed to timely return after previous trips to Nigeria, and she gave the appellant specific instructions what to do should she be unable to return to work as scheduled after her vacation. She told the appellant she must follow respondent's Administrative Manual regarding leave and warned her an OWO would be required. The appellant, for reasons unknown, decided to contact a co-worker instead

and tell her to write OWO and FMLA on the calendar in derogation of respondent's leave policy.

The conduct by appellant does not assist her in meeting her burden of proof she had a satisfactory explanation for not obtaining leave.

The appellant's readiness, ability, and willingness are no longer at issue.

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that she is asserting. (Evid. Code, § 500.) Appellant has failed to meet her burden of proof of certain elements required for her request for reinstatement appeal. Because each element is essential to her appeal, no purpose would be served in determining her readiness, ability, and willingness to discharge the duties of a Registered Nurse (Safety).

The appellant is not entitled to back pay.

Because the appellant has failed to meet her burden of proof she had a satisfactory explanation for her absence or for not obtaining leave, she is not entitled to back pay.

VI – CONCLUSIONS OF LAW

Appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for her absence. Appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for not obtaining leave. Because all elements of her appeal were not met, there is no need to address whether appellant is ready, able, and willing to return to work. Additionally, she is not entitled to back pay.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation, from the position of Registered Nurse, Safety, with the Department of State Hospitals – Patton, effective June 1, 2014, is denied.