CalHr Case Number 14-S-0070
Appeal of Denial of Sick Leave;
Request for Reinstatement after Automatic Resignation (AWOL)
Final Decision Adopted 11/26/2014
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge (ALJ), Department of Human Resources (CalHR) at 9:00 a.m. on September 25, 2014 in Delano, California.

Appellant, was present and represented by Eric R. Johnson, Staff Attorney, Service Employees International Union Local 1000. Stephanie Dunlap, Employee Relations Officer, represented the Department of Corrections and Rehabilitation (CDCR), Kern Valley State Prison (KVSP), respondent.

I

JURISDICTION

SICK LEAVE

Respondent denied appellant sick leave pay for the period of July 25, 2014 through July 31, 2014. The appellant, a member of Bargaining Unit (BU) 1 is entitled under the Memorandum of Understanding to sick leave approval once the respondent has ascertained the absence is for an authorized reason. Appellant filed a denial of sick leave appeal with CalHR on August 29, 2014. The appeal complies with the procedural requirements of California Code of Regulations, title 2, section 599.904. CalHR has jurisdiction over the appeal.

AWOL

On July 31, 2014, CDCR, KVSP, respondent, notified appellant, he was being automatically resigned for being absent without leave (AWOL) from July 25, 2014 through July 31, 2014. Appellant filed a request for reinstatement appeal with CalHR on August 13, 2014.

California Government Code section 19996.2 authorizes CalHR, after timely appeal, to reinstate an employee after automatic resignation if he makes a satisfactory explanation as to the cause of his absence and his failure to obtain leave and CalHR finds he is ready, able, and willing to resume the discharge of the duties of his position.

The appeal complies with the procedural requirements of Government Code section 19996.2. CalHR has jurisdiction over the appeal.

II

ISSUES

SICK LEAVE

Appellant contends he was unreasonably denied sick leave pay. Respondent argues appellant failed to provide satisfactory proof he was entitled to sick leave with pay.

The issue to be determined is:

1. Was the appellant unreasonably denied sick leave with pay?

AWOL

Appellant contends he had a satisfactory explanation for his absence, made every effort to obtain leave, and is now ready to return to work as a Correctional Case Records Analyst.

Respondent argues appellant was absent for five consecutive days, failed to obtain leave and the AWOL separation should be sustained.

The issues to be determined are:

1. Did appellant have a satisfactory explanation for his absence from July 25, 2014 through July 31, 2014?
2. Did appellant have a satisfactory explanation for not obtaining leave for the period July 25, 2014 through July 31, 2014?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Correctional Case Records Analyst?
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 his career with the State of California on September 29, 2000. His most recent appointment was as a Correctional Case Records Analyst at Kern Valley State Prison. He worked a Monday through Friday schedule from 8:00 a.m.

to 4:30 p.m. under the supervision of a Correctional Case Records Supervisor. In 2002, the appellant was diagnosed with unspecified Anxiety and Depression.[1] The functional consequences of this mental disorder is "subjective distress or impairment in functioning – frequently manifested as decreased performance at work or school."

The appellant had a pattern of unexcused absences. In May 2014, he was docked 34.75 hours for absences without leave for failing to provide a doctor's note. On June 6, 2014, the appellant provided a doctor's note excusing him from work until June 17, 2014. Upon receipt of the doctor's note excusing appellant from work, the respondent approved his June 2014 sick leave.

On July 8, 2014, the appellant called his supervisor and told her someone had attempted to break into his house the previous evening and he would not be reporting to work. The following day, July 9, 2014, appellant called his supervisor to say he would be late. Later, he called and spoke with the Correctional Case Records Manager, his supervisor's manager. He told her his car broke down on the freeway and he would not be reporting to work. She told him his absence would be considered unapproved dock.

His supervisor does not unreasonably deny employee sick leave. On July 8, 2014 and July 9, 2014, the appellant did not call in sick and did not call in sick during the absent without leave (AWOL) period. If he had produced a doctor's note, she would have accepted it and allowed him use of any accrued sick leave credits. She explained an employee must say the word sick when calling in sick. Sick leave is not automatically granted even if an employee has sick leave credits.

On July 10, 2014, the appellant called his supervisor and told her his hands hurt and he would not be reporting to work. She told him it would be unapproved dock. On Friday, July 11, 2014, the appellant called respondent and said he would not be reporting to work. The appellant was told he needed to substantiate his absence or he would be on unapproved dock. He offered to provide a doctor's note, but did not. On July 16, 2014, the appellant overslept. He called his supervisor around noon and told her he would not be reporting to work.

On July 17, 2014, the appellant called his supervisor and told her he would not be reporting to work. She recalled he sounded sad and upset and referred him to EAP,

[1] The ALJ took Official Notice of the DSM-5, Diagnostic and Statistical Manual of Mental Disorders.

the Employee Assistance Program. She also told him his absence was without leave. On Friday, July 18, 2014, the appellant reported to work. The respondent served him with a Notice of Adverse Action (NOAA) for excessive unexcused time away from work. The NOAA was disciplinary and reduced appellant's salary.

The following Monday, July 21, 2014, the appellant did not report to work and did not call respondent to report his absence. After several attempts to contact him failed, the Investigative Services Unit (ISU) was contacted to perform a welfare check. A welfare check is respondent's last option when an employee cannot be reached by telephone and is AWOL. Because calls to appellant were unsuccessful a Lieutenant from ISU was asked to perform a welfare check.

The Lieutenant had performed welfare checks on appellant in the past and arrived at his home just before noon. The appellant told him he drank alcohol the night before, his wife failed to wake him, his alarm was not working and he overslept. The appellant denied he was ill. He reported the results of the welfare check to the Warden. Just prior to this welfare check, the appellant called his supervisor and told her he would not be reporting to work. She told him his absence would be considered unapproved dock. The appellant did not report to work on July 22, 2014.

On the first day of appellant's AWOL, Friday, July 25, 2014, he called his supervisor at approximately 8:15 a.m. and said he was unable to come to work. At the hearing, he testified he had thrown a "fit" by trashing his room and becoming destructive the night before, and does not know "what set him off." Because of the "fit" he had a "very bad morning, everything was adding up," bills, the NOAA and family issues were creating too much stress. The appellant acknowledged the sick leave call-in policy required he speak to a supervisor and voice mail messages were not allowed.

The appellant did not report to work on Monday, July 28, 2014. He called his supervisor within 15 minutes of his start time, and seemed upset and apologetic. He told her, "just can't make it." At the hearing, he explained, "[I] never said I was unable to come to work, but that was the gist of it." Later that morning she realized the appellant had not stated he was ill, called him back and told him a doctor's note would not suffice and he would be considered AWOL.

On Tuesday, July 29, 2014, the appellant did not report to work. He testified, "[I] was not okay in my head – I was just not okay – I don't know how to explain that." He

called his supervisor at approximately 8:00 a.m., did not say he was ill. The appellant was not crying and did not make any comment as to the "weight of the world" being upon him in any conversations she had with him during the AWOL period. She told him his absence was unapproved and he was considered AWOL.

On Wednesday, July 30, 2014, the appellant called his supervisor within 15 minutes of his start time and told her he was not able to come to work. She informed him he was considered AWOL and that an absence of more than 5 days must go through the Return-to-Work Coordinator. The appellant does not recall whether she asked for a doctor's note. She knew the appellant had been upset but had no knowledge of his depression diagnosis. The appellant admits he never provided respondent with any doctor's note indicating his diagnosis of depression.

On Thursday, July 31, 2014, the appellant's supervisor was out of the office. The appellant spoke with another Correctional Case Records Supervisor. He told her he was not able to come to work that day. She explained to the appellant that he was AWOL. He never said he was ill, did not cry or say, "the weight of the world was on him" or that "he could not put one foot in front of the other." The appellant said he would provide a doctor's note. The appellant's supervisor explained the promise of a doctor's note did not indicate to her the appellant was ill.

The appellant admits he understood if he was claiming sick leave he would have to provide documentary evidence of his illness. He called in each day of the AWOL period but never provided a doctor's note substantiating his absence. His supervisor explained had the appellant provided a doctor's note, it would have been accepted.

Respondent has a sick leave policy which provides:

> "Employees are required to call in each day that they are ill and must report to their immediate supervisor. As per SEIU Local 1000 BUs 4 and 1, Article 8.2: Sick Leave, Section D: An employee may be required to provide a physician's or licensed practitioner's verification of sick leave when:
>
> 1. "The employee has a demonstrable pattern of sick leave abuse; or
> 2. The supervisor has good reason to believe the absence was for an unauthorized reason. A supervisor has good reason if a prudent

person would also believe the absence was for an unauthorized reason."

The respondent also has a punctuality policy which provides in relevant part: "ONLY a Supervisor can approve your absence."

On July 31, 2014, respondent notified the appellant it was invoking the AWOL statute. Appellant requested and received a *Coleman* hearing on August 12, 2014. He did not provide a doctor's note or any other document to substantiate he was ill during the AWOL period. Appellant believes he is able to cope and is mentally ready to go back to work. There was no medical documentation presented at the hearing to justify his absence during the AWOL period or to prove he is ready to return to work. No doctors testified.

IV

CREDIBILITY DETERMINATION

The Administrative Law Judge makes the following 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 his testimony at the hearing, including, but not limited to . . . (f) The existence or nonexistence of a bias, interest, or other motive . . . (h) A statement made by him that is inconsistent with any part of his testimony at hearing. (Evid. Code, § 780.)

Appellant's testimony he cried and said he had the, "weight of the world" on him when he spoke with his supervisor during the AWOL period is not supported by the evidence. She credibly testified the appellant never cried or made the comment "weight of the world" or the comment he "couldn't put one foot in front of the other" when he spoke with her, nor did she know about his depression diagnosis. The appellant has a motive to fabricate these comments to bolster his argument he was sick during the AWOL period.

Furthermore, his claim of illness is contradicted by his own conduct during the AWOL period. Although he claimed, "I moped and cried and felt sorry for myself," he did not see a doctor. He claims he could not see a doctor because he didn't have any money, then claims he didn't have insurance. He then contradicts his testimony by stating he made a doctor's appointment on July 30, 2014 for August 4, 2014. However,

his testimony he told his supervisor about the August 4, 2014 doctor's appointment is not supported by the evidence. Additionally, his claim he would have seen a doctor had it been an emergency, is again belied by his conduct. His admission he threw a "fit" and did not know what "set him off" would appear to be an emergent situation given his history of depression, that would warrant a doctor's visit.

Appellant's insistence he was confused by the instructions regarding a doctor's note is not a true statement of fact. He acknowledged he understood he was required to provide a doctor's note for sick leave or he would be placed on unapproved leave. Moreover, when asked if respondent required doctor's notes for absences, he responded, "for me - yes." His response "for me – yes" is evidence the appellant was not confused as to whether a doctor's note was required and further indication his testimony is not credible.

V

ANALYSIS

SICK LEAVE

Sick leave generally means, "the necessary absence from duty of an employee because of illness or injury; exposure to contagious disease; dental, eye, and other physical or medical examination or treatment by a licensed practitioner; . . . (Cal. Code Regs., tit. 2, § 599.745(a)(b)(c).) Government Code section 19859(a) provides, "each state employee is entitled to sick leave with pay, on the submission of satisfactory proof of the necessity for sick leave."

Respondent properly denied appellant's sick leave.

The Memorandum of Understanding (MOU) and respondent's sick leave policy require a physician's or licensed practitioner's verification of sick leave when the employee has a demonstrable pattern of sick leave abuse. The appellant, who was served with a Notice of Adverse Action (NOAA) for excessive absence from work, is no stranger to respondent's sick leave policy. He had a pattern of unexcused absences and was docked on several occasions in 2014 for failing to provide a doctor's note.

Conversely, when the appellant did provide a doctor's note excusing him from work, the respondent approved his sick leave. However, during the AWOL period, July 25, 2014 through July 31, 2014, the appellant never told his supervisor he was ill and

did not provide a doctor's note as required by the MOU and respondent's sick leave policy. His argument he became confused regarding whether he was required to bring a doctor's note is not believable. When asked on direct examination if he was required to bring a doctor's note to verify his sick leave, he responded unequivocally, "for me – yes."

The respondent properly denied the appellant's sick leave because the appellant, with a history of excessive absences, failed to submit satisfactory proof of the necessity for sick leave for the period of July 25, 2014 through July 31, 2014. His argument he was never given an opportunity to provide a doctor's note is without merit. The appellant could have provided the necessary documentation to verify his sick leave at his *Coleman* hearing on August 12, 2014 – he did not. The appellant had a final opportunity to provide documentation of his illness at his full evidentiary hearing – he did not.

Equally unpersuasive is his argument he had sick leave credits available and should have received sick leave pay. The appellant proffered a document indicating he had approximately 22.25 hours of sick leave credits at the beginning of July 2014. However, the mere accumulation of sick leave credits does not override the requirement he was to provide a doctor's note pursuant to the MOU and respondent's sick leave policy. Without more, the appellant is not entitled to sick leave pay because he failed to prove he was ill from July 25, 2014 through July 31, 2014.

AWOL

Government Code section 19996.2(a) states: "[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 appellant was absent for more than five consecutive days as he was not at work from July 25, 2014 through July 31, 2014.

Government Code 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 [his] absence and [his] failure to obtain leave therefor, and the department finds that [he] is ready, able, and willing to resume the discharge of the

duties of [his] position or, if not, that [he] has obtained the consent of [his] appointing power to a leave of absence to commence upon reinstatement."

The appellant has the burden of proof in these matters and must prove by a preponderance of the evidence he had a satisfactory explanation for his absence and failure to obtain leave and that he is currently ready, able, and willing to return to work. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

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

CalHR has long held that an illness of an employee or employee family member is a satisfactory explanation for an absence from work. Here however, the appellant failed to produce a doctor's note indicating he was ill and unable to work from July 25, 2014 through July 31, 2014. The appellant testified his absence was due to stress brought on by personal family matters. If these personal family matters were so debilitating, the appellant, given his history of depression, should have sought the counsel of a physician or licensed care professional. He failed to do so.

Appellant's argument respondent knew or should have known the appellant suffered from depression is not persuasive. First, he admits he never provided respondent with a doctor's note indicating he was diagnosed with depression. And second, respondent's own policy and the MOU of BU 1 clearly state, "An employee may be required to provide a physician's or licensed practitioner's verification of sick leave when, the employee has a demonstrable pattern of sick leave abuse; or the supervisor has good reason to believe the absence was for an unauthorized reason. A supervisor has good reason if a prudent person would also believe the absence was for an unauthorized reason."

Whether a particular person acted as a reasonably prudent person is ordinarily a question for the trier of fact. (*Steffen v. Refrigeration Discount Corp.* (1949) 91 Cal.App.2d 494.) In the instant case, the appellant never notified respondent he suffered from depression and never provided a physician's or licensed practitioner's verification of an illness. Because the appellant had a demonstrable pattern of sick leave abuse, it was prudent of his supervisor, to believe his absences were for an unauthorized reason. Furthermore, the appellant testified he knew the respondent

required a doctor's note and testified, "yes – for me" when asked if a doctor's note was required.

It is unclear why appellant, who suffered from a depressive disorder for more than a decade, did not seek the help of his doctor during the AWOL period. The appellant's failure to provide a doctor's note before, during or after the AWOL period, nullifies his argument the respondent did not allow him time to provide documentation of his absence. He is therefore unable to meet his burden of proof he had a satisfactory explanation for his absence.

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 on July 25, 28, 29, 30 and 31, 2014. Although he called and spoke with a supervisor each day he was absent, he was never granted leave by the respondent. Moreover, he admitted he had no approved sick leave in July 2014.

Appellant, who has a 2002 diagnosis of a depressive disorder understood to call in within 30 minutes of his start time, but for reasons unknown, chose to ignore the requirement of providing a doctor's note in order to obtain leave. By calling in each day to report his absence, he demonstrated clarity of thought, yet testified he could not function. His conduct is diametric to his explanation for not obtaining leave and is insufficient to meet his burden of proof he had a satisfactory explanation for not obtaining leave.

Appellant's readiness, willingness and ability to return to work is 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 he is asserting. (Evid. Code, § 500.) Because appellant has not proved essential elements of his claim, no purpose would be served for CalHR to determine his ability, readiness or willingness to return to work.

The appellant is not entitled to back pay.

Because the appellant was properly AWOL separated pursuant to Government Code section 19996.2, he is not entitled to back pay.

VI

CONCLUSIONS OF LAW

Appellant failed to prove by a preponderance of the evidence he was unreasonably denied sick leave or that he had a satisfactory explanation for his absence. Appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for not obtaining leave. The appellant's readiness, ability and willingness are no longer at issue. The appellant is not entitled to back pay.

* * * * *

THEREFORE, IT IS DETERMINED, the appeals for denial of sick leave and reinstatement after automatic resignation from the position of Correctional Case Records Analyst, with the California Department of Corrections and Rehabilitation, Kern Valley State Prison, effective July 24, 2014, is denied.