

CalHR Case Number 15-C-0035
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: June 23, 2015
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 9:00 a.m. on June 11, 2015 in Corcoran, California.

The appellant was present and represented by Sean H. Bedrosian, Attorney at Law, Consultant, California Association of Psychiatric Technicians. Linda Story, Medical Employee Relations Officer, California Department of Corrections and Rehabilitation (CDCR), California Correctional Health Care Services (CCHCS), represented CDCR, Substance Abuse Treatment Facility and State Prison at Corcoran (SATF), CCHCS, respondent.

I – JURISDICTION

On March 19, 2015, CDCR, SATF, CCHCS, respondent, notified appellant he was being automatically resigned for being absent without leave (AWOL) from March 10, 2015 through March 19, 2015. Appellant filed a request for reinstatement appeal with CalHR on March 23, 2015.

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 Bargaining Unit 18 Memorandum of Understanding (BU 18 MOU) article 9.12 expands the CalHR jurisdiction to include whether: the appellant was absent for five (5) consecutive working days; the absence was without leave; and the AWOL statute was properly applied by the appointing power. The appeal complies with the procedural requirements of Government Code section 19996.2. CalHR has jurisdiction over the appeal.

II – ISSUES

The appellant argues the respondent was well aware of his health issues and his AWOL separation was arbitrary.

Respondent contends the appellant failed to return to work when released by his doctor and the AWOL separation should be sustained.

The issues to be determined are:

1. Was the appellant absent for five consecutive working days?
2. Was the appellant's absence without leave?
3. Did the appellant have a satisfactory explanation for his absence from March 10, 2015 through March 19, 2015?
4. Did the appellant have a satisfactory explanation for not obtaining leave from March 10, 2015 through March 19, 2015?
5. Is the appellant ready, able, and willing to return to work and discharge the duties of a Senior Psychiatric Technician (Safety)?
6. Did the respondent properly apply the AWOL statute, Government Code section 19996.2?

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 October 20, 2003. On July 7, 2008, he was appointed to the position of Senior Psychiatric Technician (Safety). The

position of Senior Psychiatric Technician (Safety) is the first supervisory level in the Psychiatric Technician series and supervises, trains and evaluates a group of Psychiatric Technicians (Safety). He worked an 8:00 a.m. to 4:00 p.m. shift. Friday and Saturday were his regular days off.

In July 2012, the appellant had surgery on his left knee. Later that year, his condition was exacerbated during a workplace drill and he filed a Workers' Compensation claim. The Workers' Compensation claim was denied two years later and the appellant began treatment with his primary doctor. In January 2015, his primary doctor referred him to a Pain Management Specialist. The Pain Management Specialist prescribed Vicodin and other prescription drugs to alleviate the pain.

On February 4, 2014, the appellant acknowledged receipt of a Letter of Expectation from his supervisor, Supervising Registered Nurse II. The letter detailed the expectations of staff and stated in relevant part:

“Any absences from your post for 5-consecutive days or more will require you to contact return to work (extension 7131) prior to coming back to work. Absences more *than 3-consecutive* days or on Holidays will require a physician's note.” [Emphasis in original.]

During the months of January and February 2015, the appellant called in sick approximately 10 – 15 times per month. His Family Medical Leave Act (FMLA) leave and all other leave credits were exhausted the previous Fall. When the appellant called to report his absence, he would say, “I'm not able to come into work today.” He was told his absence would be noted and he would be docked.

On March 6, 2015, the appellant went to the Pain Management Specialist because his pain medication regimen was no longer working. The Pain Management Specialist then prescribed Oxycodone. The new medication made him feel nauseous, tired and drunk and he did not feel safe driving. On Sunday, March 8, 2015, he called in sick and did not

report to work. He was not scheduled to work on Monday, March 9, 2015, due to a schedule swap with a co-worker.

On March 10, 2015, he felt nauseous and called to tell respondent he was not able to report to work. He was then read a “spiel” that his leave was not approved and he was considered AWOL. He was confused by the mention of AWOL, but did not ask any questions. The appellant’s phone records indicate he called respondent on March 11, 12, 15, 16, 17, 18, and 19, 2015. Each time he called, he was read the “spiel” that his absence was AWOL. The appellant did not contact the return to work office after he had been absent for five (5) consecutive days as required by the Letter of Expectation.

On March 16, 2015, the appellant was provided a doctor’s note from Central California Pain Management returning him to work. The appellant did not return to work on March 16, 2015 or at any other time. On March 19, 2015, the respondent invoked the AWOL statute. No doctors testified. Respondent submitted its case on the record and called no witnesses.

IV – CREDIBILITY DETERMINATION

The ALJ 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. (Evid. Code, § 780.)

The appellant has a clear motive to fabricate and embellish the truth because he wants his job back. Moreover, his claim he did not understand the term “AWOL” and thought it meant the same as “dock” is neither plausible or believable. The appellant, a Senior Psychiatric Technician (Safety), was responsible for understanding the expectations of his position which included supervision of others. Therefore, it is not believable he was unclear that being told he was “AWOL” was no different than being told he was on “dock.”

V – ANALYSIS

Government Code section 19996.2, subdivision (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 . . . [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 Bargaining Unit 18 Memorandum of Understanding (BU 18 MOU) article 9.12 expands the CalHR jurisdiction to include whether: the appellant was absent for five (5) consecutive working days; the absence was without leave; and whether the AWOL statute was properly applied by the appointing power. The appellant must prove by a preponderance of the evidence each element of his claim. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826.)

The appellant was absent for five consecutive working days.

It is not disputed the appellant was absent for five consecutive days as he was not at work from March 10, 2015 through March 19, 2015.

The appellant’s absence was without leave.

The automatic resignation provision of the AWOL statute links “a civil service employee’s right to continued employment to the state’s legitimate expectation that the employee appear for work as scheduled.” (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102.) The appellant is not blameless in his separation from state

service. Each time he called to report his absence, he was told his absence was without leave. Despite being told he was absent without leave, he failed to request leave or report to work. These failures are fatal to his claim he was not absent without leave from respondent.

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

CalHR has long held that an illness of an employee is a satisfactory explanation for an absence from work. However, in this case, although the appellant was returned to work by his doctor on March 16, 2015, he did not report to work. He claims he did not feel safe reporting to work. The state has an interest in promptly removing from the state payroll those employees who have been absent without leave for five consecutive working days in order to make jobs available and to maximize its productive workforce. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532.) Because the appellant failed to report to work after his doctor cleared him to return to work, he does not have a satisfactory explanation for his absence.

The appellant does 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 at p. 1113: “an essential element of employment is to be on the job when one is expected to be there.” Each time the appellant called in to say he was not reporting to work, he was told he was AWOL. The appellant made no attempt to request leave, contact the return to work office or provide a doctor’s note as required in his Letter of Expectation. Therefore, the appellant does not have a satisfactory explanation for not obtaining leave.

The appellant is not ready, able, and willing to return to work.

“There is an obvious distinction between an employee who has become medically unable to perform [his] usual duties and one who has become unwilling to do so.” (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292.) The appellant was told by his doctor he could return to work on March 16, 2015, but he did not follow his doctor’s instruction indicating an unwillingness on his part to report to work. Because he has demonstrated an unwillingness to return to work, he is not ready, able, and willing to return to work.

Respondent properly applied the AWOL statute.

Appellant’s argument respondent’s action of AWOL separation was arbitrary is not supported by the evidence. The appellant was warned each time he called in to report his absence that he was absent without leave. As a Senior Psychiatric Technician (Safety), the appellant was responsible for administering the respondent’s policies, including its attendance policy. The appellant knew or should have known that an absence without leave would lead to his separation from state service.

Moreover, all due process requires is that the state give an employee prior written notice and an opportunity to respond before treating a civil service employee’s unexcused absence for five consecutive working days as an automatic resignation under statute. (*Coleman, supra*, 52 Cal.3d 1102.) The respondent properly noticed the appellant on March 19, 2015 that his absence without leave for five consecutive days had resulted in his separation from state service.

The requirements [of procedural due process in an AWOL separation], “are notice to the employee and an opportunity for the employee to respond before the separation from state service takes effect.” (*Coleman, supra*, 52 Cal.3d 1102 at p. 1122.)

Because the respondent followed the rules of procedural due process, its AWOL separation of the appellant was not arbitrary and the AWOL statute was properly applied.

VI – CONCLUSIONS OF LAW

It is not disputed the appellant was absent for five consecutive days. The appellant failed to prove by a preponderance of the evidence he had leave for his absence. The appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for his absence or for not obtaining leave. The appellant failed to prove by a preponderance of the evidence he is ready, able, and willing to return to work. The respondent properly applied the AWOL statute.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation from the position of Senior Psychiatric Technician (Safety) with the California Department of Corrections and Rehabilitation, Substance Abuse Treatment Facility and State Prison at Corcoran, California Correctional Health Care Services effective March 31, 2015 is denied.