

CalHR Case Number 15-G-0131
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: January 28, 2016
By: Richard Gillihan

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 9:45 a.m. on January 5, 2016 in Susanville, California. The appellant was present and self-represented. Ramona Schlaugh, Employee Relations Officer, represented the California Department of Corrections and Rehabilitation (CDCR), High Desert State Prison (HDSP), respondent.

I – JURISDICTION

On September 15, 2015, CDCR, HDSP, respondent, notified appellant she was being automatically resigned for being absent without leave (AWOL) from April 28, 2015 through October 7, 2015. Appellant filed a request for reinstatement appeal with CalHR on October 22, 2015.

On October 23, 2015, the (CalHR) Statutory Appeals Unit (SAU) notified the appellant her appeal was filed 7 days late and provided her an opportunity to claim good cause for her late filed appeal. On November 5, 2015, the appellant claimed good cause for her late filed appeal and the respondent objected. Title 2, California Code of Regulations section 599.904 allows CalHR to accept a late filed appeal, if good cause is shown, the appeal is no more than 30 days late and no prejudice inured to respondent. SAU found good cause in the late filed appeal.

California Government Code section 19996.2 authorizes CalHR 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 and Title 2, California Code of Regulations section 599.904. CalHR has jurisdiction over the appeal.

II – PROCEDURAL HISTORY

A telephonic Pre-Hearing Conference was held on November 23, 2015 at 11:00 a.m. The self-represented appellant appeared. Kari Beckler, Employee Relations Officer, appeared on behalf of respondent, California Department of Corrections and Rehabilitation, High Desert State Prison. Both parties appeared telephonically but were unable to reach a settlement agreement. This evidentiary hearing followed.

On January 5, 2016 at 9:00 a.m., respondent appeared with witnesses and was ready to proceed. The appellant did not appear. The ALJ waited until 9:30 a.m. Respondent's representative, Ramona Schlaugh, Employee Relations Officer, moved to dismiss the appeal for the appellant's failure to appear. The ALJ granted the motion. As the parties were leaving the hearing room, the appellant appeared at 9:35 a.m. The hearing proceeded at 9:45 a.m.

III - ISSUES

The appellant contends she was unable to work during the AWOL period and is now ready, able, and willing to return to work.

Respondent argues the AWOL separation should be sustained because of appellant's failure to obtain leave for more than five consecutive days.

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for her absence for the period April 28, 2015 through October 7, 2015?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period April 28, 2015 through October 7, 2015?

3. Is the appellant ready, able, and willing to return to work and discharge the duties of an Office Technician (Typing)?

IV – FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The appellant began her career with the State of California on May 24, 2011. Her most recent appointment was to an Office Technician (Typing) position with the California Department of Corrections and Rehabilitation, High Desert State Prison. In March 2015, a Food Manager began supervising the appellant. She worked a Monday through Friday, 8:00 a.m. to 4:00 p.m. shift in respondent's Food Services department.

The appellant's last day at work was April 24, 2015. She understood she needed to submit a Memorandum to the Warden and to call her supervisor to request leave. There is no evidence the appellant called her supervisor and she does not recall the last time she requested leave.

On June 25, 2015 at 4:52 p.m., the appellant sent an email to her Personnel Specialist. The email did not include a doctor's note. The purpose of the appellant's email was to advise her she needed a written document that identified her last day of work and that she had not been paid since May 2015. The Personnel Specialist complied with the appellant's request, but did not approve any leave for her.

On July 22, 2015 at 4:58 p.m., appellant's Personnel Specialist advised her she needed to request a leave of absence in writing. The appellant acknowledged the email stating,

“Thank you. I will prepare one. [name redacted] [smiley face icon].”

On August 7, 2015 at 10:30 a.m., the appellant sent the following email to the Personnel Specialist and to another individual at respondent's Susanville facility.

"Ladies, I am going to Enloe for additional treatments. I am not sure of my exact date of return. At this point I am anticipating September to October 2015. I will keep you posted. [name redacted] [smiley face icon]."

She did not provide a doctor's note or a written request for a leave of absence. The appellant did not contact her supervisor or the Warden. Later that morning, her Personnel Specialist responded, "Thank you for the heads up [name redacted]. Hope you are feeling alright and done with the hard stuff! Just get yourself healthy [smiley face icon]." She did not approve any leave for the appellant.

Respondent's Return-to-Work Coordinator (RTWC) made several unsuccessful attempts to reach the appellant by telephone on June 26, 2015, and again on July 27, 2015. Each time she left a message for the appellant instructing her to contact the Return-to-Work office. On August 11, 2015, she sent a letter to the appellant which provided her several options. The appellant did not choose an option.

On August 26, 2015 at 9:52 a.m., the appellant responded with the following email to Farrah:

"[name redacted], I received your letter regarding my absence from work. I have an appointment October 5 to see if my new growths in my neck are cancerous and require surgery, if they are not I will be released for work. I have been keeping in touch with my personnel specialist. Regards, [name redacted]."

On August 28, 2015, the RTWC responded with an email to the appellant which stated in relevant part:

“I am reminding you that in the letter I sent you, dated August 11, 2015, I informed you that High Desert State Prison does not have medical verification for your current absence. Without medical verification, you can be considered absent without leave (AWOL). Employees are required to submit off work notes to substantiate their absence. You have been off of work continuously since April 28, 2015. Please provide medical verification for your current absence. Thank you.”

The appellant did not provide any medical verification. But sent the following email to her an hour later:

“[name redacted],
I am on State Disability [sic] can't you use that as verification of my illnesses we are working on. [sic] I have three major medical issues I am dealing with. I have brought proof of the cancer surgery what would you like more?
I am seeing a Neurologists [sic] for the Empty Sella Syndrome and a Hematologist for the Microcytic Anemia, etc.
Please let me know were [sic] to go from here keeping in mind my HIPPA [sic] rights.
Regards, [name redacted]. [smiley face icon].”

Later that afternoon, the RTWC sent the appellant another email advising her that State Disability is a wage supplement and she was still required to submit off-work notes. Specifically, she told the appellant:

“Medical verification states the beginning and possible return date for an employee that is on letterhead and signed by a physician. It does not give any diagnosis. If an employee is off past the possible return date, then medical verification is required again with a new possible return to work date. The note must contain specific dates of absences.”

The appellant responded with another email to her at 3:00 p.m. stating:

“[name redacted],

Thank you for your response, I will schedule an appointment with one of my healthcare providers to obtain a note. I was anticipating returning November (ish). The Neurologist says he might be able to help me with the insidious unresolved issues.

I am always home unless I am at Davis, I spend a lot of my day sleeping. If you need to call me please feel free to do so.

Thanks, [name redacted]. [smiley face icon].”

The appellant never provided a doctor’s note or any medical verification. Two weeks later, on September 11, 2015, she sent the RTWC another email:

“Good afternoon [name redacted],

I just seen [sic] my local provider because my soonest appointment with my specialist is in mid October , [sic] I am having new scans to verify that my cancer is no longer active in my vocal cords or in my parathyroid. If the scans come out okay I will be able to return to work by November 1 st. I can send you what she gave me but I do not know if this is sufficient for you. So please let me know, again, I anticipate retuning [sic] November 1 if there is no ACTIVE CANCER. [Emphasis in original.]

Kindest regards,

[name redacted].”

The appellant did not provide a doctor’s note to the RTWC in September 2015 or at any other time.

On October 6, 2015, the appellant sent an email to various individuals at respondent’s facility. The email stated she had attached a request for leave from her position due to health issues, but there was no attachment. On October 7, 2015, respondent AWOL separated the appellant. The appellant offered a letter purporting to be a doctor’s note into

evidence. The letter was undated, handwritten with an illegible signature, and the appellant did not recall when she received the letter. No doctors testified.

V – ANALYSIS

Generally referred to as the AWOL statute, 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.” It is not disputed appellant was absent for more than five consecutive days as she was not at work from April 28, 2015 through October 7, 2015.

Government Code section 19996.2, subdivision (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] 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 *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the court concluded the employee’s unapproved absence is deemed an abandonment of employment or a constructive resignation and that the state employer need not attempt to locate an AWOL employee and prove the employee intended to abandon her position. Thus, the appellant’s argument the respondent should have attempted to locate her when she did not report to work is without merit.

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

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

CalHR has long held that an illness of an employee or employee family member is a satisfactory explanation for an absence from work. However, despite her claims she was ill with several ailments, the appellant never produced a valid off-work order prepared by a doctor. The only note the appellant provided was an undated handwritten letter with an illegible signature. The respondent objected to the note on the basis of authenticity.

“Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (Evid. Code, § 1400.) Moreover, “[a]uthentication of a writing is required before it may be received in evidence.” (Evid. Code, § 1401.) The appellant was unable to provide the authentication required by law because the letter was undated, contained an illegible signature and she did not recall when it was written.

Assuming arguendo the appellant was able to authenticate the letter, the letter did not provide the appellant with a satisfactory explanation for her absence. The letter merely stated the appellant, “is under the care of several specialist [sic] after diagnosis, surgery and radiation therapy for thyroid cancer . . . she and her specialists feel she will likely be able to return to work on or before November 1, 2015.” The unauthenticated letter does not excuse the appellant from work during the AWOL period of April 28, 2015 through October 7, 2015.

Moreover, because the letter is undated, it is unclear what period of time the appellant could not report to work. Furthermore, the appellant never provided the respondent any medical verification for her absences from April 28, 2015 through October 7, 2015; therefore she is unable to meet her burden of proof she had a satisfactory explanation for her absence.

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

“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.” (*Coleman, supra*, 52 Cal.3d at p. 1122.) It is not disputed the appellant did not report to work from April 28, 2015 through October 7, 2015. Although she acknowledged she was required to contact her supervisor to obtain leave, she could not recall the last time she spoke with her supervisor or requested leave.

Additionally, after being told repeatedly she needed to provide a doctor’s note indicating, “the beginning and possible return date . . . on letterhead . . . signed by a physician . . . must contain specific dates of absences,” she promised to obtain the required doctor’s note. As noted above, the appellant never provided the respondent with a doctor’s note indicating she was unable to report to work. If the appellant was so ill she could not report to work, it was incumbent upon her to obtain leave and provide an off-work order from her doctor.

Furthermore, 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. To permit employees to remain away from work without leave would seriously impede the function of an agency.” The appellant failed to report to work for over five months. She never requested leave from her supervisor, the Warden or anyone else with authority to grant her leave and is therefore unable to prove she obtained leave.

Appellant's readiness, ability, and willingness to return to work 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.) Because the appellant failed to meet her burden of proof on two of the three required elements essential to her claim for relief, no purpose would be served in determining her readiness, ability, and willingness to return to work.

VI – CONCLUSIONS OF LAW

The appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for her absence. The appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for not obtaining leave. The appellant's readiness, ability, and willingness to return to work are no longer at issue.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation from the position of Office Technician (Typing) with the Department of Corrections and Rehabilitation, High Desert State Prison effective October 1, 2015 is denied.