

CalHR Case Number 15-K-0023  
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: April 27, 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 11:00 a.m. on April 8, 2015 in Riverside, California.

Appellant was present and represented by Steven B. Bassoff, Consultant, Attorney at Law, California Association of Psychiatric Technicians. Christopher J. Kane, Attorney, represented the Department of State Hospitals (DSH), respondent.

### **I – JURISDICTION**

On February 5, 2015, DSH, respondent, notified appellant she was being automatically resigned for being absent without leave (AWOL) from January 25, 2015 through February 2, 2015. Appellant filed a request for reinstatement appeal with CalHR on February 23, 2015.

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 Bargaining Unit 18 Memorandum of Understanding (BU 18 MOU) article 9.12 expands the CalHR jurisdiction to include whether: 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 improperly applied the AWOL statute because she was not absent without leave for five consecutive working days.

Respondent argues appellant was absent for five consecutive working days, failed to obtain leave, is not ready, able, and willing to return to work 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 her absence from January 25, 2015 through February 2, 2015?
4. Did the appellant have a satisfactory explanation for not obtaining leave from January 25, 2015 through February 2, 2015?
5. Is the appellant ready, able, and willing to return to work and discharge the duties of a 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 her career with the State of California on May 31, 2013. On September 2, 2014, she was appointed as a Psychiatric Technician (Safety) at respondent's Patton State Hospital. She worked the 'NOC' shift from 10:45 p.m. to

6:45 a.m. on Cycle 2. Cycle 2 is one of seven cycles respondent uses to rotate staff to assure a 24-hour 7-day a week coverage at its Patton State Hospital. The appellant would work 6 days in a row, and then have 2 or 3 days off before beginning the cycle again.

In October 2014, the appellant injured her knee in a non-work related injury. This caused her to miss work. On January 25, 2015, the appellant called respondent and advised them she had a doctor's note and was sick. On January 26, 2015, she again called in sick and was told to call in again when she was ready to return to work. She did not call respondent on January 27, 28, or 29, 2015.

Respondent's Program Director, Program 5, has managed the clinical and administrative aspects of Program 5 since 2009. He is a member of respondent's policy committee and is responsible for administering various Administrative Directives. Administrative Directive 4.05 states in relevant part:

"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."

Administrative Directive 4.06 provides in relevant part:

"For an absence of more than **three** days, (**refer to applicable Bargaining Unit Contract**) Section 11 (Statement by Physician) on Form 634 must be completed on the first day back to work after sick leave absence, or a substantiation from a physician/**licensed practitioner** must be attached to the Form 634." [Emphasis in original.]

He trains his Unit Supervisors on all necessary Administrative Directives.

Another Unit Supervisor is the appellant's direct supervisor. He supervises approximately 33 employees including Registered Nurses, Senior Psychiatric Technicians and Psychiatric Technicians. He works the day shift, 8:00 a.m. to 4:30 p.m. On January 26, 2015, he learned the appellant called in sick on the January 25, 2015 'NOC' shift. On January 27, 2015, he was told she called in sick on the January 26, 2015 'NOC' shift.

The appellant's regularly scheduled days off were January 30, 31, and February 1, 2015. On January 30, 2015, appellant's supervisor called and left her a voicemail indicating he needed a doctor's note for her absences because she had been absent for three consecutive days. He based his request on the appellant's union agreement and told the appellant he needed the doctor's note "as soon as possible." The appellant did not call her supervisor on her days off of January 30, 31, or February 1, 2015. On February 2, 2015, the appellant called her supervisor and told him she would return to work on February 5, 2015.

On February 4, 2015, appellant's supervisor advised the Nursing Supervisor the appellant had not returned to work. Appellant's supervisor was not involved in initiating the AWOL separation of appellant. He was told by Human Resources to complete the appellant's time card indicating the appellant was DOCK/AWOL or LWOP from January 25, 2015 through January 29, 2015. On February 5, 2015, respondent issued its Notice of AWOL to appellant.

Appellant provided a doctor's note at her *Coleman* hearing and this evidentiary hearing. The doctor's note, dated February 13, 2015, excused her from work for the period January 25, 2015 through February 5, 2015 because she was Temporarily Totally Disabled. No doctors testified.

## **IV – ANALYSIS**

Government Code section 19996.2, subdivision (a), the AWOL statute, provides:

“[r]einstatement may be granted only if the employee makes a satisfactory explanation to 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.” The BU 18 MOU article 9.12 expands the CalHR jurisdiction to include whether: 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 appellant has the burden of proof in these matters and must prove each element by a preponderance of the evidence. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.) Additionally, “if the AWOL statute was improperly applied by the appointing power, the ALJ may order the employee reinstated and may order back pay. From any such back pay award there shall be deducted compensation that the employee earned, or reasonably could have earned, during any period of absence. There shall be no back pay for any period when the employee was not ready, able, and willing to return to work.” (BU 18 MOU, art. 9.12 F.)

### **The appellant was absent for five consecutive working days.**

It is not disputed the appellant was absent for five consecutive working days as she did not report to work on January 25, 26, 27, 28, or 29, 2015.

### **The appellant’s absence was not without leave.**

Although the appellant was absent for five consecutive working days, January 25 and 26, 2015 were not without leave. In accordance with respondent’s Administrative Directive, she called the designated Base Unit to report her absence on January 25, 2015 and again on January 26, 2015. She was told she did not need to call in again until she was

ready to return to work. The appellant's conduct complied with respondent's Administrative Directive 4.05 which states, "[e]mployees assigned to nursing services shall notify the assigned Base Unit . . . unless an off-work order for a specific time period has been issued and the supervisor has been notified of this time period."

When the appellant called in on January 25, 2015 and January 26, 2015, she was in full compliance with respondent's call-in procedure. After her third day of absence, her supervisor called her and left her a message indicating she needed to provide a doctor's note "as soon as possible." The appellant, believing she had approved leave as long as she provided a doctor's note "as soon as possible," did not immediately provide a doctor's note to respondent.

Because the appellant followed respondent's call-in procedure and was told only to provide a doctor's note "as soon as possible," she was not absent without leave. If the respondent had reason to doubt the veracity of the appellant's claim of illness, it was incumbent upon the supervisor to immediately request a doctor's note from the appellant. He did not. Instead, he merely told her to bring the doctor's note "as soon as possible." The appellant was ready to follow her supervisor's instruction; however, she was AWOL separated before she could provide her doctor's note.

**The appellant had a satisfactory explanation for her absence.**

CalHR has long held an illness of an employee or employee family member is a satisfactory explanation for an absence from work. The appellant, who suffered a non-work related knee injury in 2014, had a doctor's note from her orthopedic surgeon. The doctor's note indicated the appellant was Temporarily Totally Disabled from January 25, 2015 through February 5, 2015.

**The appellant had a satisfactory explanation for not obtaining leave.**

The appellant understood she was required to call the Base Unit to report her absence and fully complied with respondent's directives. She further understood, and was told on January 26, 2015, she did not need to continue to call respondent on a daily basis because she had a doctor's note excusing her from work. As noted above, her supervisor told her to provide that doctor's note "as soon as possible."

Moreover, respondent's Administrative Directive 4.06 requires, "[f]or an absence of more than three days, (refer to applicable Bargaining Unit Contract) Section 11 (Statement by Physician) on **Form 634 must be completed on the first day back to work after sick leave absence, or a substantiation from a physician/licensed practitioner must be attached to the Form 634.**" [Emphasis added.] The appellant was prepared to provide her doctor's note excusing her from work on her first day back at work.

However, instead of waiting for the appellant to return to work, her supervisor, on direction from respondent's Human Resources department, changed her Form 634 to indicate she was AWOL. The inconsistent conduct by respondent provides the appellant with a satisfactory explanation for not obtaining leave.

**Appellant is ready, able, and willing to return to work.**

There is sufficient unrefuted evidence the appellant is ready, able, and willing to return to work and discharge the duties of a Psychiatric Technician (Safety).

**Respondent did not properly apply the AWOL statute.**

The MOU for the appellant's BU allows the ALJ to order an employee reinstated and may order back pay if the AWOL statute was improperly applied by the appointing power. Additionally, the Governor's veto message of October 13, 2013 indicated CalHR should,

“reinstate an employee in the limited instances when the state has improperly dismissed that employee under Government Code section 19996.2, and there are no other grounds for dismissal.”

It is not disputed the appellant was absent for five consecutive working days. She did not report to work on January 25, 26, 27, 28, or 29, 2015. However, she was told by her supervisor to provide a doctor’s note “as soon as possible.” The appellant had no reason to believe that her supervisor’s directive, “as soon as possible” meant “immediately.” The appellant acted reasonably and was prepared to provide the doctor’s note upon her return to work. She did not get that opportunity because the respondent separated her from state service before she returned to work.

Respondent’s conduct was not reasonable and was arbitrary. Conduct which lacks any reasonable basis or is without any rational support whatsoever may be considered to be arbitrary and capricious. (*Madonna v. County of San Luis Obispo* (1974) 39 Cal.App.3d 57.) Appellant’s manager and supervisor understood respondent’s Administrative Directive regarding absences. However, the supervisor failed to follow the Administrative Directive when he told the appellant to provide a note “as soon as possible,” not upon her return to work. It also encompasses conduct not supported by a fair or substantial reason. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d. 398.) Because the supervisor failed to follow respondent’s Administrative Directive, the AWOL separation is without a fair or substantial reason.

By instructing the appellant to turn in her doctor’s note “as soon as possible,” the respondent was required to honor its directive to the appellant. In other words, the respondent could not change its policy or directive without proper notice to the appellant. At a minimum, due process requires, “notice and an opportunity to be heard.” (Cal. Const., art. I, § 7.) The respondent violated the appellant’s due process right when, without notice to the appellant, it prematurely terminated her employment using the AWOL statute. Therefore, the appellant was improperly dismissed from state service under the AWOL statute.

## V – CONCLUSIONS OF LAW

Appellant was absent for more than five consecutive working days and that absence was not without leave of respondent. Appellant proved by a preponderance of the evidence she had a satisfactory explanation for her absence. Appellant proved by a preponderance of the evidence she had a satisfactory explanation for not obtaining leave. Appellant proved by a preponderance of the evidence she is ready, able, and willing to discharge the duties of a Psychiatric Technician (Safety). Appellant proved by a preponderance of the evidence the AWOL statute was improperly applied.

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**THEREFORE, IT IS DETERMINED**, the appellant's appeal for reinstatement after automatic resignation from the position of Psychiatric Technician (Safety) with respondent's Patton State Hospital effective January 24, 2015 is granted. The appellant shall be reinstated to her position as a Psychiatric Technician (Safety) within two (2) weeks of this order; respondent shall issue the appellant back pay beginning February 6, 2015 until she is reinstated to her former position.