

CalHR Case Number 15-L-0054
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: August 3, 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 1:00 p.m. on July 2, 2015 and at 1:00 p.m. on July 6, 2015 in Sacramento, California.

The appellant was present and represented by Michael White, Attorney, Law Offices of Michael White. Kristi Beckley, Attorney III, represented the Employment Development Department (EDD), respondent.

I – JURISDICTION

On May 1, 2015, EDD, respondent, notified appellant he was being automatically resigned for being absent without leave (AWOL) from April 27, 2015 through May 1, 2015. Appellant filed a request for reinstatement appeal with CalHR on May 4, 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 appeal complies with the procedural requirements of Government Code section 19996.2. CalHR has jurisdiction over the appeal.

II – ISSUES

The appellant contends he had a satisfactory explanation for his absence and he should be reinstated.

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

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for his absence for the period April 27, 2015 through May 1, 2015?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period April 27, 2015 through May 1, 2015?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Systems Software Specialist III (Supervisor)?

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 December 22, 1982. On July 31, 2009, he was appointed to his current classification of Systems Software Specialist III (Supervisor) with the respondent, EDD. He worked a Monday through Friday shift with office hours of 8:30 a.m. to 5:30 p.m.

The position of a Systems Software Specialist III (Supervisor), under administrative direction, acts as a supervisor on projects involving the conversion to the most complex computer configuration and/or supervises a staff of software specialists responsible for the most complex assignments. This job classification, which the appellant held for six years, required him to analyze, maintain and evaluate computer software: including, but not limited to operating systems, control systems, proprietary software packages, telecommunications software and database management software.

In January 2015, respondent's Chief, Security and Compliance, was the appellant's supervisor. The appellant managed the ITB Enterprise Storage Services Group. On January 2, 2015, appellant's supervisor terminated his existing telework (footnote 1: "An

employee who does not come into the office to work every day, but works from home or another established location for a pre-established number of days. Employee must be available and accessible by phone and email during their agreed upon scheduled core business hours as determined by their approved time base.”

(<http://www.CalHR.ca.gov/employees/Pages/telework-policy.aspx> [as of July 22, 2015].)

end of footnote) employee agreement. In the termination letter, appellant’s supervisor explained the telework termination was due to operational needs of the organization and change in workplace requirements for the appellant’s position.

In February 2015, Chief, Client Solutions, became the appellant’s new supervisor. On February 4, 2015, the appellant sent an email to his new supervisor stating, “[name redacted], If it is okay with you, I [sic] like to request vacation on March 5 & 6. Thank you, [name redacted].” Later that afternoon, appellant’s new supervisor approved his vacation request via email stating, “That works [name redacted]. Remind me to train you on setting up a workflow for approval going forward.”

On February 20, 2015, at approximately 9:00 a.m., the appellant again requested time stating, “[name redacted] If it is ok, I need to leave at 11:30am [sic] today to deal with a family emergency. I will be available on my cell. Thanks, [name redacted].” As a supervisory employee of respondent, the appellant “need not work 40 hours in each week, as long as [he] maintain a minimum average work week of 40 hours over 12 pay periods.” (EDD Personnel Management Handbook, section 3-3100.) The appellant’s time card indicates he was credited for a full 8-hour work day on February 20, 2015.

On March 12, 2015, the appellant requested a week off from work. His email stated, “[name redacted], I will be out for the week. My father need [sic] surgery again. We are meeting with the doctors this morning to discuss our options after his surgery. I am available on my cell if you need to contact me. Thanks for your understanding and support with my dad. [name redacted].” The appellant’s new supervisor responded via email, “Good luck with your Dad [name redacted], let us know if there is anything we can do to help.” The appellant followed up with an email the following day stating, “[name redacted], I will not be in today. My dad is in the hospital. Thanks, [name redacted].”

On March 18, 2015, the appellant requested another day of leave via email. The email request stated, “[name redacted], I hope it [sic] okay to take leave on Monday 3/23. I need to take my dad to several medical appointments on Monday. Thanks, [name redacted].” The appellant’s new supervisor responded, “Good luck [name redacted]. Make sure you clear your calendar.” The appellant acknowledged this approval via email stating, “Thanks [name redacted].” On March 25, 2015, the appellant advised his new supervisor he needed to leave early and added, “I will [sic] available on my cell and emails.”

On April 23, 2015, the appellant spoke with his new supervisor regarding a week-long training he wanted to attend the following week. Later that day, at approximately 2:00 p.m., appellant’s new supervisor sent an email to him asking for clarification of the training because it was not on respondent’s OTO calendar or in the appellant’s budget. The appellant responded by telling his new supervisor, “I had planned to update the OTO calendar when I received final verification for the training from New Horizons. I will updated [sic] the OTO calendar.” Two hours later, appellant’s new supervisor denied his week-long training request.

Later that evening, at approximately 6:00 p.m., the appellant sent his new supervisor an email asking why his week-long training request had been denied. On Friday morning, April 24, 2015, appellant’s new supervisor explained via email that the denial of the week-long training was based on work load. He also told the appellant, “[w]e have three new work efforts that I will be reviewing with you on Monday and there is a lot of work that needs to be completed next week.”

The following day, Saturday, April 25, 2015, at 5:39 p.m., the appellant sent the following email to his new supervisor with a carbon copy to staff in the ITB Enterprise Storage Services Group. It stated:

“[name redacted],

Due to urgent personal matters, I will be out of the office next week from April 27th to May 1st. Thanks, [name redacted].”

Less than an hour later, at 6:13 p.m., appellant's new supervisor responded. His email stated in relevant part:

"[name redacted], please call my cell to discuss, Next [sic] week is an important week on several of the projects ISD needs you [sic] help with. I have or am in the process of scheduling kickoff meetings to ensure we are on the same page as our roles in these efforts."

The appellant did not call his new supervisor on his cell phone or respond in any manner.

On Saturday, April 25, 2015 at 11:55 p.m., the appellant forwarded his new supervisor's training denial email to one of his five personal email accounts, [email link redacted]. On Sunday, April 26, 2015 at 12:00 a.m., the appellant forwarded an email from his former supervisor to his personal email account [email link redacted]. Four minutes later, at 12:04 a.m. and 12:06 a.m., he forwarded two additional emails to his personal email account [email link redacted]; and at 12:07 a.m. and 12:09 a.m., he forwarded two more emails to his personal email account [email link redacted].

On Monday, April 27, 2015 at 11:08 a.m., the appellant's new supervisor sent him the following email, "[name redacted], this time [April 27, 2015 to May 1, 2015] has not been approved. Please call me on my cell." The appellant did not call or otherwise contact respondent. On Tuesday, April 28, 2015 at 12:54 p.m., appellant's new supervisor told him via email, "Just following up [name redacted], it's now been three days. I've been trying to reach you since Friday. Please call me on my cell ASAP. [Number redacted.] If I do not answer, please leave a message and let me know the best way to reach you." The appellant did not respond.

Later on Tuesday afternoon, April 28, 2015, the appellant's new supervisor told him via email that he is out of the office without management approval, specifically, "[r]eally need to call me [name redacted]!" Appellant's new supervisor also unsuccessfully attempted to contact him using emergency contact information. On Wednesday afternoon, April 29,

2015, appellant's new supervisor sent a lengthy email to him. It advised the appellant that his absences beginning on April 27, 2015 were not approved and the appellant needed to talk to him no later than May 1, 2015 or the five days would be considered DOCK. It also advised the appellant he would be considered AWOL if he did not contact respondent by Monday at 8:30 a.m.

The appellant claims he did not receive any of his new supervisor's emails sent between Saturday, April 25, 2015 and Wednesday, April 29, 2015. An email from respondent's Chief Information Officer (CIO), and another email from respondent's Information Security Office, indicated the appellant had "activesync" on his mailbox and OWA (Outlook Web Access). The CIO's email explained "activesync" allowed the appellant to set the preview for five lines and see that much of the message without opening it up and marking it as read. OWA also allows messages to be read, without actually marking it as read.

On May 1, 2015, the respondent issued its AWOL notice because the appellant had been absent without leave for five consecutive days from April 27, 2015 through May 1, 2015. The AWOL notice was sent via overnight and regular mail. On May 1, 2015, at 5:39 p.m., the appellant sent his new supervisor an email from his personal email account [email link redacted] stating in relevant part, "I will need to be out of the office for another week. We have been caring for our father for this week as his condition gets worst [sic]."

On the morning of Saturday, May 2, 2015, the appellant received the AWOL notice from respondent indicating he had been separated from his employment. A few hours later, at 2:10 p.m., the appellant went to see his doctor. The doctor provided him with an off-work order for April 30, 2015 through May 8, 2015.

On Monday, May 4, 2015, the appellant's new supervisor responded to his May 1, 2015 email. The email stated:

"[name redacted], I hope everything turns out for the best with your dad. IF [sic] there is anything I can do personally to help, let me know.

As for time off this week and going forward, please review the package that you signed for on Saturday 5/2/2015 at 8:41 [sic] for the process you need to follow going forward.”

The appellant requested a *Coleman* hearing. No doctors testified.

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 . . . (h) A statement made by him that is inconsistent with any part of his testimony at hearing . . . (i) The existence or nonexistence of any fact testified to by him.” (Evid. Code, § 780.)

The appellant had a clear motive to fabricate his testimony in order to deflect attention from the real reason he did not report to work on April 27, 2015 – he was upset. His week-long training had been denied and his anger is reflected in the email he sent questioning his new supervisor’s actions immediately after receiving denial of his training request. He was also upset because he believed he had been “stripped” of his supervisory duties stating, “I’d just sit in my office all day.” It is therefore no coincidence the appellant went AWOL April 27, 2015; he harbored a belief he was “stripped” of his supervisory duties and angry over the denial of his week-long training scheduled to begin April 27, 2015.

The appellant further damaged his credibility by denying he forwarded several work emails to his personal email account [email link redacted] around midnight on April 26, 2015. At the hearing, the appellant introduced nearly two dozen emails from respondent’s Outlook Exchange email system. However, when the respondent introduced emails from the same Outlook Exchange email system impeaching the

appellant's credibility, he claimed someone else must have sent the emails to his personal email account [email link redacted]. The appellant's testimony is not believable.

His testimony became even more incredible when for each of the impeaching and incriminating emails, he changed his testimony from an outright denial to, "I don't remember." The appellant's selective memory is suspect. He then qualified his responses with, "before you can take any action on the email server – you have to log in – the time stamp is not reliable – sometimes it is inconsistent." The appellant's non-responsive answers do nothing to bolster his credibility. The appellant's testimony his email exhibits are reliable, but the respondent's email exhibits are not, is inconsistent with known facts. There was credible testimony respondent's Outlook Exchange email system was working properly.

The appellant then blamed the emails sent to his personal email account [email link redacted] on respondent's computer by stating, "[I]'m not saying someone accessed it [my email] but this was not sent by me or at that time. I'm just saying I don't know how this email got sent on Sunday." The appellant's own documentary evidence indicates he is not telling the truth. Specifically, respondent's CIO advised appellant's new supervisor that, "[t]he last email [the appellant] sent was April 26, 2015 at 12:09 a.m."

In order to send an email, the appellant would have to log on to his computer. Because he was logged on to his computer, he would have seen the April 25, 2015 email sent by his new supervisor at 6:13 p.m. telling appellant to call him. Additionally, documentary evidence proffered by the appellant indicates he had software on his electronic state-issued equipment. The software, called "activesync," allowed him to preview the first five lines of any email without opening it or marking it as "read." The appellant's refusal to testify truthfully renders his testimony not credible.

V – ANALYSIS

The AWOL statute, Government Code section 19996.2, subdivision (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 appellant was absent for more than five consecutive working days as he was not at work from April 27, 2015 through May 1, 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 [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 respondent did not consent to a leave of absence for the appellant 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 does not have a satisfactory explanation for his absence.

CalHR has long held that an illness of an employee or family member is a satisfactory explanation for an absence from work. However, here it was unclear why the appellant did not report to work because he merely stated, “urgent personal matters.” He did not claim to be ill, he did not state his father was ill; in fact, nothing was said of an illness. It was only after the appellant was AWOL separated from state service that he used his father’s illness as the reason for his absence.

Appellant’s argument respondent knew or should have known that he was absent because of a Family Medical Leave Act (FMLA) occurrence is flawed as a matter of law.

The law protects employees under FMLA for serious health conditions. “Urgent personal matters” do not indicate a serious health condition contemplated by the FMLA. Under the FMLA, governed by the Code of Federal Regulations (C.F.R.), an employee is entitled to a total of 12 administrative workweeks of unpaid leave during any 12-month period for various medical reasons. (5 C.F.R., § 630.1203(a) (2011).) More importantly, the appellant never requested FMLA leave from respondent.

It is axiomatic if an employee does not timely provide the employer with notice of an FMLA-qualifying reason for the leave, the leave may be denied. Here, the appellant simply told his new supervisor, “[name redacted], Due to urgent personal matters, I will be out of the office next week;” he did not state the reason for his absence or in any other way clarify the need for his absence. It was only after he learned he had been AWOL separated from state service that he sought a doctor’s note for himself or indicated he was assisting his sick father.

“The employee may not subsequently assert FMLA protections for the absence.” (*Rowe v. Laidlaw Transit Inc.* (2001) 244 F.3d 1115, 1118.) The appellant introduced declarations of his mother and his physician. The declarations of the mother and doctor are hearsay offered to prove the appellant had a satisfactory explanation for his absence. “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.)

These out-of-court affidavit statements are offered to prove the appellant had a satisfactory explanation for his absence, and are therefore hearsay. The respondent made a timely hearsay objection because of its inability to cross examine either the mother or the doctor. One of the essentials of the adversarial process is the reasonable opportunity to meet and rebut evidence produced by an opponent, and the right to cross examination has frequently been referred to as another. (*Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio* (1947) 301 U.S. 292.) (*Cf. Massachusetts Bonding and Ins. Co. v. Industrial Accident Commission* (1946) 74 Cal.App.2d 911.) The affidavits

were allowed into evidence with the caution the affidavits must be supplemented by credible evidence to be afforded any evidentiary weight.

“Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Government Code section 11513(d).) The affidavits alone are not sufficient to support a finding the appellant had a satisfactory explanation for his absence. The only supplemental or explanatory evidence is from the appellant who failed to tell the truth under oath and his testimony is not credible.

Appellant argues written declarations under penalty of perjury [affidavits] are admissible in law and motion practice despite their hearsay character. However, the California Code of Civil Procedure section 2009 refers to the use of affidavits in “a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute.” None of these affidavit uses apply to the appellant’s AWOL separation.

The appellant’s testimony he became ill four days into his absence is not credible for reasons established herein. Furthermore, the doctor’s note does not excuse the appellant for three of his five days of absence, specifically April 27, 28, and 29, 2015. Because the affidavits are unsupported hearsay and FMLA leave protections may not subsequently be asserted, the appellant has failed to prove by a preponderance of the evidence he had a satisfactory explanation for his absence.

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

The appellant’s argument he requested leave is not persuasive. First, the appellant did not request leave. The appellant merely told his new supervisor he was not going to report to work stating, “[d]ue to urgent personal matters, I will be out of the office next

week from April 27th to May 1st.” A request is, “to ask for something or for permission or authority to do, see, hear, etc., something; to solicit.” (See Black’s Law Dict. (6th ed. 1990) p. 1304, col. 1.) Unlike his earlier requests for leave on February 4, 2015, February 20, 2015, March 12, 2015, March 18, 2015 and March 25, 2015, the appellant did not ask permission to be absent from work.

His previous requests for leave began, “If it is ok,” “I hope it is okay,” or “If it is okay with you.” Moreover, the appellant waited to receive written responses from his new supervisor on those five previous leave requests. Also diametric to the appellant’s previous leave requests is his failure to indicate he would be available by cell phone or computer. In his previous requests for leave, he told his new supervisor he would be available by cell phone and/or have his computer with him. Additionally, the appellant admits he knew his leave had to be approved because as a supervisor he would approve or deny leave of his employees based on operational need.

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’s right to continued employment was predicated on his compliance with his new supervisor’s request to report to work. The appellant’s leave was denied in writing and his feigned ignorance of that fact is not believable.

Specifically, less than one hour after the appellant told his new supervisor, “I will be out of the office next week” via his state-issued computer, appellant’s new supervisor responded and told him to call because, “next week is an important week.” The next work day, after appellant’s new supervisor had not heard from him, he told him via email his leave was not approved. The appellant’s denial he did not see his new supervisor’s emails is not believable, and neither is his claim he did not have access to his state-issued computer or cell phone.

The appellant is a 30+ year employee of the State of California with decades of experience in information technology, specifically software. His position required him to analyze, maintain and evaluate computer software: including, but not limited to operating systems, control systems, proprietary software packages, telecommunications software and database management software. His denial he forwarded several emails to himself is unbelievable.

First, one would have to believe the Outlook Exchange email system malfunctioned only between April 25, 2015 at 11:55 p.m. and April 26, 2015 at 12:04 a.m., 12:06 a.m., 12:07 a.m., and 12:09 a.m. The appellant's testimony was credibly contradicted by his new supervisor. His new supervisor, Chief, Client Solutions, is responsible for monitoring system failures. He credibly testified there were no failures to the Outlook Exchange email system at any time during the AWOL period in April or May 2015.

Second, one would also have to believe the appellant did not understand "activesync." "Activesync" allows an individual to preview the first five lines of the message without actually opening the email and marking it as read. The appellant had "activesync" on his electronic mailbox which allowed him to preview the first five lines of emails sent by his supervisor from April 25, 2015 through April 30, 2015.

Although the appellant denies having read any of his new supervisor's emails from April 25, 2015 through April 30, 2015, his testimony is not believable. As a Systems Software Specialist III (Supervisor), the appellant is an expert in software and has more than a working knowledge of computers and software. The appellant was warned on several occasions that his leave was not approved during the week of April 27, 2015, but refused to heed any of the warnings.

The appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for not obtaining leave.

VI – CONCLUSIONS OF LAW

The appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for his absence. The 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 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 Systems Software Specialist III (Supervisor) with the Employment Development Department effective May 1, 2015 is denied.