BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

[redacted]
Support Services Assistant
For Reinstatement After Automatic
Resignation (AWOL)

SPB Case No. D0739

Represented by:
Andre L. Rocher
Attorney at Law
5900 Sepulveda Blvd., Suite 500
Van Nuys, CA 91411

Respondent:
Department of Rehabilitation
Personnel Office
2000 Evergreen Street
Sacramento, CA 95815-3832

Represented by:
Department of Rehabilitation
Office of Legal Affairs
2000 Evergreen Street
Sacramento, CA 95815-3832

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED: February 17, 1999.

K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

STATE OF CALIFORNIA
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In the Matter of the Appeal by

Case No. D0739

[redacted]

Case Service Assistant, Department of Rehabilitation
For Reinstatement After Automatic Resignation

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Respondent:

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Represented by:

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Staff Counsel
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PROPOSED DECISION

This matter was heard before Mary C. Bowman, Administrative Law Judge, Department of Personnel Administration (DPA) at 9:00 a.m. on January 28, 1999, at Sacramento, California.

Appellant, [redacted] was represented by Andre L. Rocher, her attorney. Appellant and her attorney appeared telephonically.

Respondent, Department of Rehabilitation, was represented by Gwen Pratt Bachigaluppi, Staff Counsel.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision.

I

JURISDICTION

Appellant was automatically resigned effective December 31, 1995. She filed a request (appeal) for reinstatement after automatic resignation on January 29, 1996. The appeal complies with Government Code section 19996.2.

The matter was originally set for hearing on May 23, 1996, but was continued at the request of appellant. It was reset for August 29, 1996. Prior to August 29, 1996, the matter was taken off calendar pending settlement. On January 21, 1999, the matter was restored to the calendar at the request of appellant. The hearing was expedited because the three-year statute of limitations was set to expire on January 29, 1999.[1] The hearing was scheduled for January 28, 1999.

II

WORK HISTORY

Appellant began working for the State as a Clerk Typist II with the Department of Rehabilitation on September 20, 1972. At the time of her automatic resignation, appellant was employed as a Case Service Assistant with the Department of Rehabilitation at Pasadena.

The duties of a Case Service Assistant are to provide clerical support to professional counseling staff by performing specialized duties related to the rehabilitation process and to do other work as required.

III

CAUSE FOR APPEAL

On January 12, 1996, respondent mailed appellant a Notice of Automatic Resignation. Appellant appealed on the grounds that she had a satisfactory reason for being absent and a satisfactory explanation for not obtaining leave. Appellant did not claim that she was currently ready, able and willing to return to work.

IV

REASON FOR BEING ABSENT

Appellant did not report for work after September 11, 1995. On December 18, 1995, respondent mailed appellant a letter advising her that her absence after September 11, 1995, was unapproved because she had not requested or obtained approved leave from her supervisor. The letter advised her that the receipt of Nonindustrial Disability Insurance (NDI) benefits through the Employment Development Department did not relieve her of her obligation to keep her employer informed as to her need for leave. The letter also requested that appellant

provide respondent with a written request for leave, the dates requested, the reason for the leave and appropriate substantiation no later than January 29, 1995. The letter closed as follows:

> "If you do not notify your supervisor in writing, you will be considered absent without leave and may be subject to automatic resignation."

On or after December 23, 1995, appellant responded with a written request for leave retroactive to September 1995 through March 1996. She submitted medical substantiation from Kaiser Permanente, which indicated she was seen on November 28, 1995, and was unable to work from December 1, 1995 through January 1, 1996. It also showed a return to work date of January 1, 1996 without restrictions.

Appellant did not report to work on January 2, 1996. On that date respondent sent appellant another letter advising her that her request for leave was granted for September 11, 1995, through December 31, 1995, consistent with the medical substantiation submitted. The letter advised that the request for leave from January to March 1996 was denied because of lack of medical substantiation for that period. The letter advised her she was considered absent without approved leave as of January 2, 1996, and expected to return to work no later than January 8, 1996.

Appellant did not return to work on January 8, 1996, and did not submit any further medical substantiation prior to her automatic separation.

Appellant was automatically resigned by notice mailed January 12, 1996.

Appellant did not return to her physician until January 29, 1996, which was after her automatic resignation. On January 29, 1996, she received a revised medical substantiation indicating she was seen on January 29, 1996, and was unable to return to work before March 31, 1996. It also stated she would be reevaluated prior to March 31, 1996.

At the hearing appellant testified she did not return to work after January 1, 1996, because she did not feel well. As evidence that she was unable to work, she presented the medical substantiation slip obtained January 29, 1996. It was potentially unreliable because appellant obtained it after the fact for use at a hearing. Appellant did not call her physician to testify; and respondent had no opportunity to cross examine him regarding the slip. The slip was uncorroborated hearsay.[2]

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[1] See DPA Rule 599.906

[2] DPA Government Code section 11513 (d) provides as follows: "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 action." Respondent timely objected.

V

REASON FOR NOT OBTAINING LEAVE

Appellant testified that she did not obtain timely medical substantiation for her absence after January 1, 1996, because her doctor was on vacation. She also stated she did not get the January 2, 1996, letter from respondent advising her she needed to submit additional medical substantiation even though it was mailed to her address.

Appellant's supervisors testified that they did not hear from appellant any time between January 2 and January 12, 1996, the date of the automatic resignation.

Appellant's testimony was not credible. Appellant is a member of Kaiser Permanente Medical Group, which has numerous physicians on staff. It must be presumed medical care does not cease when a single physician is on vacation. Further, respondent presented a proof of service that the letter of January 2, 1996, was mailed to appellant's correct address (which is still her current address). Also, appellant was advised in the earlier (December 18, 1995) letter of the need for adequate medical substantiation and that failure to provided it could result in automatic resignation.

VI

READY, ABLE AND WILLING

Appellant testified that she has not had any current medical treatment. She also testified that she is not ready to return to work. She said, "I think I need medical treatment."

Respondent has not consented to place appellant on a medical leave of absence upon reinstatement since she has provided no current medical substantiation for the need.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Code section 19996.2 provides an automatically separated employee with the right to file a request for reinstatement with the DPA. Section 19996.2 also provides:

> "Reinstatement may be granted only if the employee makes a satisfactory explanation to the department [DPA] as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or 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 held that an employee terminated under the automatic resignation provision of section 19996.2, has a right to a hearing to examine whether he/she is ready, able, and willing to return to work. DPA is *not* charged with examining whether the appointing power acted properly with regards to the actual termination.[3] Further, appellant has the burden of proof in these matters and must prove by a preponderance of the evidence that he/she had a valid excuse for his/her absence and failure to obtain leave and that he/she is currently able to return to work or that the employer had consented to a leave of absence.

In this case appellant did not present evidence sufficient to establish the nature of her medical condition between January 8 and 12, 1996. The only evidence presented was a doctor's slip, which is uncorroborated hearsay and which cannot be relied on (standing alone) to prove or disprove her medical condition at that time.

Appellant did not present a reasonable explanation for her failure to provide respondent with timely medical substantiation to support her leave request for January through March. It reasonably can be concluded that she knew the leave request would be denied because she did not substantiate it with a medical slip from her physician. Respondent had advised her of that fact in the December 18, 1995, letter; and the substantiation she provided released her to return to work after January 1, 1996. Also, appellant made no efforts to speak with her supervisor and explain that she was not returning to work even though the physician had released her.

Appellant did not present evidence to establish she is currently ready, willing and able to return to work. Appellant testified she is not currently ready or able.

Accordingly, it is found that appellant should not be manditorily reinstated to the position of Case Service Assistant.

* * * * *

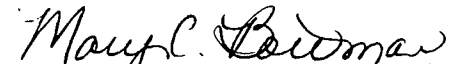
WHEREFORE IT IS DETERMINED that the appeal of for reinstatement after automatic resignation from the position of Case Service Assistant with the Department of Rehabilitation effective December 31, 1995, is denied.

* * * * *

[3] An employee seeking to challenge the actual termination must go forward with a timely writ before the court.

The above constitutes my Proposed Decision in the above-entitled matter. I recommend its adoption by the DPA as its decision in the case.

DATED: February 17, 1999



MARY C. BOWMAN
Administrative Law Judge
Department of Personnel Administration