STATE OF CALIFORNIA
BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION

In the Matter of the Appeal by

[redacted]
Psychiatric Technician
For Reinstatement After Automatic Resignation
330 E. Poplar
Porterville, CA 93257

Case No. 98-L-0044

Represented by:
Ken Murch, Consultant
California Association of Psychiatric Technicians
2000 "O" Street, Ste. 250
Sacramento, CA 95814-5224

Respondent:
Department of Developmental Services
Personnel and Support Services
1600 Ninth Street
Sacramento, CA 95814

Represented by:
Mark Catrambone
Labor Relations Specialist
Department of Developmental Services
Sonoma Developmental Center
P.O. Box 1493
Eldridge, CA 95431

The attached Proposed Decision of the Hearing Officer is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED: May 29, 1998.

K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

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PROPOSED DECISION

This matter came on regularly for hearing before Mary C. Bowman, Hearing Officer, Department of Personnel Administration (DPA), at Visalia, California, at 1:00 p.m. on May 12, 1998. Appellant, [redacted] was present and represented by Ken Murch, Consultant, California Association of Psychiatric Technicians (CAPT). Respondent, Department of Developmental Services, was represented by Mark Catrambone, Labor Relations Specialist.

I

JURISDICTION

The above request (appeal) for reinstatement after automatic resignation, effective December 20, 1997,[1] complies with the procedural requirements of Government Code section 19996.2.

[1] The effective date was originally November 30, 1997. The *Coleman* Officer amended the effective date to December 20, 1997.

[redacted]

II

EMPLOYMENT HISTORY

Appellant began working for the Department of Developmental Services as a Psychiatric Technician on October 25, 1992.

III

CAUSE FOR APPEAL

Appellant requested reinstatement claiming she had a satisfactory reason for being absent and not obtaining leave.

IV

REASON FOR ABSENCE

Appellant last reported for work on November 30, 1997. She was off work on excused leave through December 20, 1997, because she reported she had carpal tunnel syndrome and anxiety-related symptoms.

The parties agreed that [redacted]. examined appellant's carpal tunnel syndrome and released her to return to work effective December 10, 1997, pending an operation to further relieve her symptoms. (The operation was to be performed after the new year.) [redacted] a psychologist, released appellant to return to work from "anxiety and carpal tunnel" effective December 12, 1997.

Appellant did not return to work as expected on December 13, 1997. She called in sick. Despite the work release forms, appellant testified she was unable to work between December 20, 1997, and January 15, 1998, the period for which she was automatically resigned. The reasons she gave were carpal tunnel, anxiety-related symptoms and depression. In support of her testimony, she placed in evidence a Claim for Non-Industrial Disability Insurance (NDI) benefits which she completed on January 9, 1998. The physician's portion was completed on January 8, 1998, by [redacted] On the claim's form, [redacted] stated appellant had "dysthymia and adjustment disorder;" and "carpal tunnel--scheduled for surgery 01-29-98." Respondent objected to the use of the form not only because it was a hearsay document, but also because [redacted] was not called and respondent was denied an opportunity to cross examine

him to determine his credentials and the validity of his diagnosis, which contradicted the form submitted by appellant from [redacted]. It is found that [redacted] was without credentials to diagnose carpal tunnel syndrome, that the document was unsupported by non-hearsay medical evidence and that it was unreliable because [redacted] was not present to be examined and cross-examined. Accordingly, its use was limited to establishing appellant's state of mind in January 1998.[2]

Also in evidence was a mini-memo appellant submitted to respondent on or about December 18, 1998. In it she stated she was requesting a leave of absence because of "increased and ongoing issues of legal, financial areas and employment, family difficulties."

Appellant did not submit any other timely documentation regarding her inability to work between December 20 and January 15, 1998. There was no doctor's testimony or other records from the time period at issue (December 20, 1997, through January 15, 1998) supporting her claim that she was still medically unable to work due to illness.

V

REASON FOR NOT OBTAINING LEAVE

Appellant testified that she submitted a written request for a leave of absence on December 18, 1998. Respondent agreed appellant submitted the request. It read in its entirety:

> "I am requesting a leave of absence. I regret the staffing problem that I may have created, or the inconvenience for my coworkers. The increased and ongoing issues of legal, financial areas and employment, family difficulties have impacted the need for my request. I have been in contact with EAC [redacted] and have initiated a request or for further meetings with [redacted] I will be more equipped to answer the question of my return after this. Thank you for the consideration of my request."

On November 29, 1997, (prior to the request) appellant had met with her supervisor concerning her excessive leave usage and had been placed on formal leave restriction. According to the terms of the action plan devised at the meeting, she was no longer permitted to use any other time in lieu of sick leave, due to illness for herself or her family; and she was required to provide a physician's statement to verify any need to be off duty for herself or her family. The restrictions were imposed for a minimum of six months.

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[2] Appellant was found retroactively entitled to NDI by the Employment Development Department based solely on the certifications. Her NDI entitlement ended when she was automatically resigned.

[3] As of that date, appellant had not yet seen [redacted]

On December 16, 1997, (also prior to the request) the timekeeper for appellant's unit prepared a memorandum of her early December leave usage, which indicated she called in sick on December 2 and 16, but had not yet provided a physician's verification; that she was off work December 5, 6, 7, 8, 9, 13, 14, 15 and 16; that she was absent without approved leave on December 12 because she did not call and did not report to work. When appellant applied for leave on December 18, 1997, she presented no medical substantiation for the prior leave usage or for the requested leave.

Respondent did not approve the request for a leave of absence. Neither appellant's first-line nor her second-line supervisor communicated to appellant that the leave request had been denied. However, appellant never asked either of them whether it had been approved.

Appellant did not return to work any time after the written request was made and did not contact respondent to tell her supervisor she would not return.

VI

READY, ABLE AND WILLING

A hearing was originally scheduled for April 8, 1998. Appellant requested a continuance until after May 5, 1998, because she had surgery on her hand on January 29, 1998, and she had not received a release from her physician to resume her full duties. Respondent agreed to the continuance.

On or about May 5, 1998, appellant was examined by ., an Orthopedic Surgeon. did not release appellant to return to work as of that date. On May 8, 1998, she obtained a release slip from "a psychologic[al] standpoint" effective May 12, 1998 from

On May 11, 1998, respondent received from a physician's statement that appellant was excused from work to May 19, 1998, and was to return to office on May 19.

At the hearing appellant claimed that despite the prospective release and the need for a revisit on the date of May 19, she was already able to return to work without restriction. As substantiation, she also submitted a copy of a May 5, 1998, letter from *appearing to release her to return to work "as of 5-12-98."* However, the form was altered from earlier form, which released her May 19, 1998.

When questioned about discrepancies in the information provided respondent and the May 5, 1998, letter she submitted to the Hearing Officer, appellant admitted she had gone back to office the day before the hearing and had the nurse alter the release date on the form, to coincide with the hearing. She also admitted she had not seen and he was not in the office for the nurse to check with him when she altered the document.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE HEARING OFFICER 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 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."

Pursuant to *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 had a valid excuse for being absent, whether he/she had a valid reason for not obtaining leave and 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. 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.

Appellant failed to prove that she had a valid excuse for being absent from December 20, 1997, through January 15, 1998. Both and released her to return to work between December 10 and 12, 1997. There was no reliable medical substantiation that she was unable to work due to illness after that date, up to January 15, 1998.

Appellant similarly failed to prove that she had a valid excuse for not obtaining leave during that period. Although she submitted a written request for leave, the reasons she gave were not medical in nature. Further, she never followed up to determine if the leave was approved and

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she did not return to work. Leave for non-medical purposes is clearly discretionary. Extended leave for medical purposes must be substantiated by a doctor. In appellant's case any prospective request for medical leave required documentation, pursuant to the prior leave restriction memorandum issued her. Accordingly, respondent cannot be faulted for not approving the leave; and appellant did not meet her responsibility to determine whether her leave was approved before taking further time off work.

Because appellant failed to prove that she had a valid excuse for being absent and a valid excuse for not obtaining leave, DPA need make no determination as to whether appellant is currently ready, able and willing to return to work. However, it is clear that appellant did not have an appropriate medical release at the time of the hearing.

Accordingly, appellant's request for reinstatement is denied.

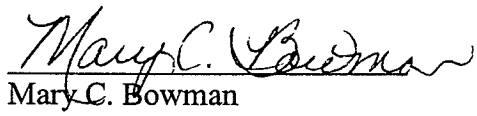
* * * * *

WHEREFORE IT IS DETERMINED that the appeal of for reinstatement after automatic resignation effective December 20, 1997, is denied.

* * * * *

The above constitutes my Proposed Decision in the above-entitled matter and I recommend its approval by the Department of Personnel Administration as its decision in the case.

DATED: May 29, 1998.



Mary C. Bowman
Hearing Officer
Department of Personnel Administration