BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

[redacted]
Office Assistant (General)
For Reinstatement After Automatic Resignation
1804 Beverly Way
Sacramento, CA 95818

Case No. 98-G-0134

Represented by:
Richard A. Lewis, Attorney at Law
Law Offices of Lewis and Link
2011 "P" Street
Sacramento, CA 95814

Respondent:
Department of Health Services
Personnel Management Branch
714 "P" Street, Room 850
Sacramento, CA 95814

Represented by:
Ursula Clemons Plummer
Staff Attorney
Department of Health Services
Office of Legal Services
714 "P' Street, Room 1216
Sacramento, CA 95814

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: October 8, 1998.

K. WILLIAM CURTIS
Chief Counsel
Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Mary C. Bowman, Hearing Officer, Department of Personnel Administration (DPA) at 9:00 a.m. on October 1, 1998, at Sacramento, California.

Appellant was present and was represented Richard A. Lewis, his attorney.

Respondent, Department of Health Services (DHS), was represented by Ursula Clemons Plummer, Staff Attorney.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision.

I

JURISDICTION

Appellant automatically resigned effective close of business July 1, 1998, and filed a request (appeal) for reinstatement after automatic resignation on July 29, 1998. The appeal complies with Government Code section 19996.2.

II

WORK HISTORY

Appellant began working for DHS on October 11, 1988. At the time of his automatic resignation, he was an Office Assistant (General) assigned to the Division of Drinking Water and Environmental Management at Sacramento, California.

Appellant's duties as an Office Assistant (General) were to learn and perform a variety of general office work.

III

CAUSE FOR APPEAL

Respondent notified appellant in writing on or about July 20, 1998, that he was considered to have automatically (AWOL) resigned upon close of business on July 1, 1998, based on his unapproved absence from July 2 through July 20, 1998. Thereafter, appellant filed his request for reinstatement with DPA claiming he had a satisfactory explanation for being absent and not obtaining leave and that he was currently ready, able and willing to return to work.

IV

REASON FOR BEING ABSENT

The parties agreed appellant was medically unable to work between July 2 and July 20, 1998, due to multiple injuries he incurred when he fell down stairs in December 1997.

V

REASON FOR NOT OBTAINING LEAVE

Appellant was on approved leave for his injuries from December 1997 through June 30, 1998. Effective April 15, 1998, he was approved for catastrophic leave usage. On June 5, 1998,

the leave was extended through June 30, 1998, based on medical substantiation submitted on or about May 15, 1998.

[redacted], M.D, provided the medical substantiation. [redacted] indicated on the medical substantiation that appellant's probable duration of medical condition or need for treatment ran from December 20, 1997, to or through July 1, 1998.

Appellant did not provide his employer with current information regarding his medical condition after June 30, 1998. However, on Monday, July 6, 1998, he received a voice mail message from [redacted] of the Personnel Office asking him to call her and advise her of his current status.

Appellant returned the call the next day. [redacted] was not available. She did not call him back until Wednesday, July 8, 1998. When they finally spoke, [redacted] advised him that she needed additional medical substantiation to support his continuing absence. She said something to effect of "What's going on; we have no new meds; no NDI." (Appellant had been mailed Nonindustrial Disability Insurance (NDI) forms earlier by the Personnel Office.)

According to [redacted] appellant became very upset when she mentioned NDI. He told her that someone he knew had filed for NDI and then he was fired for filing. She reassured him that the individual had <u>not</u> been fired for filing for NDI. She also told him that he was "technically" absent without leave. Appellant "got quiet" and asked her to give him the information about NDI. She directed him to [redacted] in Payroll Services, who had asked [redacted] to call appellant in the first place.

[redacted] further testified "I said just get the medical information in. He always responded before."

Appellant followed through and called [redacted] immediately after he spoke to [redacted]. He advised her he was filing out the NDI paperwork and would see his doctor for medical substantiation.

On Sunday, July 12, 1998, his doctor examined appellant. His doctor certified appellant for NDI on July 20, 1998, based on the July 12, 1998 examination. He also released appellant to return to work on August 15, 1998. The doctor was responsible for the delay in completing the medical substantiation. Appellant called the physician's office twice requesting that the paperwork be sent out. The nurse agreed to see that the doctor completed it and got it out.

The medical substantiation was sent to EDD on or about July 20, 1998. On or about

July 23, 1998, EDD notified that the NDI was approved through August 15, 1998.

Respondent refused to retroactively approve the appellant's absence because appellant did not provide respondent with additional medical substantiation of his illness after July 1, 1998. Instead, on July 20, 1998, respondent sent appellant a notice of automatic resignation.

On July 28, 1998, appellant met with a Coleman Officer, . At that time appellant had retroactively approved NDI extending through August 15, 1998. r upheld the DHS's action anyway.

Appellant credibly testified that when he spoke with the week of July 6-10, she did not suggest any urgency for getting the additional medical substantiation to him on that day. She just told him to get it in. He reasonably believed that so long as he filled out the NDI paperwork promptly and had his physician certify his need for further time off, he would be given approval for additional leave for that period.

Appellant's beliefs were consistent with actions and testimony. She did not get back to him until the day following his return call. When they did talk she never indicated there was any intention to automatically resign him. She also did not suggest that he fax or bring in the additional documentation she requested. She just told him to get it in. She testified appellant had always cooperated in the past and she had no reason to believe he would not this time.

Appellant's immediate supervisor Environmental Program Manager, testified that he was satisfied with the documentation in the past and that he did not keep in touch personally with the appellant after March because appellant was working with the Personnel Office regarding his absence.

VI

READY, ABLE AND WILLING

The parties agreed appellant is ready, able and willing to return to work.

* * * * *

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 the Department of Personnel Administration. 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 the 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.

In this case the parties were in agreement that appellant had a satisfactory explanation as to the cause of his absence and he is currently ready, able and willing to return to work. At issue is whether appellant had a satisfactory explanation as to his failure to obtain leave.

Based on past rumors circulating in the workplace, appellant was inclined to believe that DHS fired him because he applied for NDI. Appellant did not prove that was the reason. However, respondent's motive for invoking the automatic resignation provision in this case is unclear.

Appellant provided a reasonable explanation as to why the further medical information requested regarding a longstanding injury was temporarily delayed. For the reasons set forth above, the appellant's appeal should be granted and he should be prospectively reinstated to the position of Office Assistant (General).

* * * * *

WHEREFORE IT IS DETERMINED that the appeal of [redacted] for reinstatement after automatic resignation is hereby granted; and appellant is reinstated, without back pay or benefits, to the position of Office Assistant (General) with DHS.

* * * * *

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

DATED: October 8, 1998

Mary C. Bowman

MARY C. BOWMAN
Hearing Officer
Department of Personnel Administration