BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 34351
	)	
LETITIA RENEE ALLEN	)	**BOARD DECISION**
	)	(Precedential)
	)	
From 10 percent reduction in salary for 3 months as a Program Technician II (Taxpayer Services) with the Franchise Tax Board at Sacramento	)	**NO. 95-06**
	)	March 7, 1995

Appearances: Mark DeBoer, Assistant Chief Counsel, California State Employees Association on behalf of appellant, Letitia Renee Allen; Maria L. De Angelis, Tax Counsel, Franchise Tax Board on behalf of respondent, Franchise Tax Board.

Before: Lorrie Ward, President; Floss Bos, Vice President, Richard Carpenter, Alice Stoner and Alfred R. Villalobos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Letitia Renee Allen (appellant) from a ten percent reduction in salary for three months as a Program Technician II [Taxpayer Services] with the Franchise Tax Board (FTB) at Sacramento. As cause for discipline, appellant was charged with engaging in a pattern of excessive absenteeism, for being absent without approved leave on a number of occasions and for demonstrating below average production.

After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties, the Board adopts the ALJ's Proposed Decision to the extent it is consistent

with the discussion below. We specifically disavow that portion of the Proposed Decision (pp. 7-8) that discusses the Board's precedential decision R[redacted] V[redacted] R[redacted] (1994) SPB Dec. No. 94-05 for the reasons that follow.

ISSUES

The ALJ's Proposed Decision in this case was rejected to enable the Board to further clarify the following issues in light of its decision in R[redacted] V[redacted] R[redacted] (1994) SPB Dec. 94-05:

1. May an employer discipline an employee who fails to obtain proper documentation of a medically related absence;[1] and

2. Under what circumstances may an employer discipline an employee for inefficiency based on repeated absenteeism.

DISCUSSION

While the ALJ correctly cited R[redacted] for the proposition that an employer is not precluded from disciplining an employee who engages in an intractable pattern of excessive absenteeism, we believe the ALJ's reading of R[redacted] as set forth at the bottom of page 7 and top of page 8 in the attached Proposed Decision was overly broad.

Failure to Provide Documentation As Cause for Discipline

In the attached Proposed Decision, the ALJ found that:

> R[redacted] provides that an employee cannot be disciplined for failing to obtain proper documentation of a medically related absence. As stated therein, if a person does not

[1] We note that appellant was not charged with failure to obtain proper documentation of a medically-related absence, but rather failure to comply with FTB's general attendance restrictions. We raise this question only in response to the statements made in the attached Proposed Decision.

> report and the employer knows or has reason to believe that he/she is sick, the failure to report cannot be cause for discipline. If an employee fails to provide documentation in such a case, the employer's remedy is to not pay sick leave. (Proposed Decision, pp. 7-8).

A careful reading of R[redacted] reveals that its holding is tied closely to the facts of the case. In R[redacted], the employee was charged with inexcusable absence without leave (AWOL). The employee's supervisor testified that she had no doubt that R[redacted] was sick when he called in sick. Moreover, R[redacted] was notified that documentation was required if he wanted to be paid for sick leave:[2] He was not made aware that failure to provide substantiation of a medically related absence could result in cause for discipline. We noted in R[redacted] that:

> A different result might have inured if the Department proved either (1) appellant was not legitimately absent or (2) that it had notified appellant that his failure to produce a verification would result in a determination by the Department that he was not legitimately absent and that as a result, he would be subject not only to dock, but to discipline. R[redacted] at p. 11, fn. 4.

The Board did not conclude in R[redacted] that failure to produce requested documentation could never constitute cause for discipline. Rather, we found that, under the facts of that case, R[redacted] was not inexcusably absent without leave for failure to produce documentation of his medically related absence.

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[2]In T[redacted] W[redacted] (1992) SPB Dec. No. 92-03 at pages 6 and 7, we found that a "Department can . . . deny authorized leave when an employee fails to provide proof that use of sick leave is justified, under circumstances where a request for such proof is warranted."

In the case at bar, appellant was, at all relevant times, on notice that failure to abide by FTB's attendance restrictions could constitute cause for discipline. Accordingly, FTB was within its right to discipline appellant for failing to comply with the attendance restrictions on the three days in May, June and July for which appellant was charged with inexcusable absence without leave.

Need for Employer To Demonstrate the Impact of The Employee's Absenteeism on the Work Place

The ALJ also cited R[redacted] for the proposition that in order to charge an employee with inefficiency for excessive absenteeism, the employer must demonstrate that "the absenteeism had a substantial adverse impact on the work place." In R[redacted], the Board found:

> Disability retirement or medical termination are the preferred method of removing an employee whose injury or illness cannot be accommodated and whose absenteeism is ongoing and excessive to the extent it creates an undue hardship.
>
> If absenteeism is excessive, reasonable accommodation is not indicated and the options of medical termination or disability retirement are not appropriate or desired, the Department is not without remedy. In the context of an adverse action, excessive absence may be addressed under Government Code §19572, subdivision (c) inefficiency.
>
> Unlike most of the other causes for discipline that appear in section 19572, inefficiency does not always require a demonstration of intentional wrong doing. Bearing in mind the principles of progressive discipline, the department may discipline an employee on grounds of inefficiency when the employee's absence significantly reduces the employee's effectiveness and creates hardship for his or her supervisors or coworkers. R[redacted] at pp. 14-15. (emphasis added)

In each case, the ALJ must consider all the circumstances in determining whether the employee's absenteeism is so excessive that it compromises the employer's legitimate interest in workplace efficiency and justifies disciplining the employee for conduct that may well be non-volitional. Appellant argues that to discipline an employee who utilizes sick leave for legitimate reasons is unjust. We agree that discipline is not appropriate in cases where the absenteeism is not truly excessive or has little impact on the workplace. In R[redacted], however, the Board attempted to strike a balance that accommodates the legitimate medical needs of the employee and the needs of the employer by endorsing the use of discipline to deal with legitimately caused excessive absenteeism only when the employer can demonstrate that the absenteeism creates a reduction in the employee's effectiveness and a hardship on the employer.[3]

While the R[redacted] test of whether the employee's absenteeism "significantly reduces the employee's effectiveness and creates hardship for his or her supervisors and coworkers" may not be that different from the standard in the attached Proposed Decision

[3] Ideally, the law should provide a non-disciplinary means of removing an employee in such circumstances as the primary purpose of discipline, to effect a change in performance or behavior, is not served where the employee's absenteeism is truly non-volitional. Employers, however, are left with few options for dealing with this difficult situation-- the medical termination statute (Government Code section 19253.5) is not easily applied to situations involving intermittent, but excessive absenteeism where legitimate medical reasons for the absences vary.

requiring the employer to demonstrate "substantial adverse impact," we believe that the standard in R[redacted] gives the employer a clearer idea of the type of impact necessary to justify disciplinary action against an employee based solely on that employee's inability to work for medical reasons. In most cases of truly excessive absenteeism, an employer will not have a difficult time establishing a significant reduction in effectiveness and the creation of hardship for supervisors and coworkers.

In the instant case, the ALJ found that the Franchise Tax Board demonstrated that appellant's excessive absenteeism had a substantial adverse impact on the work place. We believe that this same evidence would support a finding that the employee's absence significantly reduced the employee's effectiveness and created hardship for his or her supervisors or coworkers.

CONCLUSION

For all of the reasons set forth above, the attached Proposed Decision of the Administrative Law Judge is adopted to the extent it is consistent with this decision. The penalty of a ten percent reduction in salary for three months is sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The ALJ's attached Proposed Decision is adopted to the extent it is consistent with this Decision;

2. The above-referenced action of the Franchise Tax Board in reducing appellant's salary as a Program Technician II (Taxpayer Services) by ten percent for three months is sustained;

3. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD*

Lorrie Ward, President
Richard Carpenter, Member
Alice Stoner, Member
Alfred R. Villalobos, Member

*Vice President Floss Bos was not present when this case was considered and therefore did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 7, 1995.

WALTER VAUGHN
Walter Vaughn, Acting Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by LETITIA RENEE ALLEN From 10 percent reduction in salary for 3 months as a Program Technician II (Taxpayer Services) with the Franchise Tax Board at Sacramento	)	Case No. 34351

PROPOSED DECISION

This matter came on regularly for hearing before Mary C. Bowman, Administrative Law Judge, State Personnel Board, on August 10, 1994, at Sacramento, California.

The appellant, Letitia Renee Allen, was present and was represented by Iona Hughes, Labor Relations Representative for the California State Employees Association.

The respondent was represented by Maria DeAngelis, Tax Counsel for the Franchise Tax Board.

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

I

The above 10 percent reduction in salary for 3 months effective January 10, 1994, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act. The appellant waived any jurisdictional challenge pursuant to 18671.1.

II

The appellant first worked for the State in 1978 as a Office Assistant I (General), Limited Term with the Franchise Tax Board and as a Seasonal Clerk with the Department of Motor Vehicles. Effective November 14, 1988, she was appointed to the position of Tax Program Assistant with the Franchise Tax Board. Effective October 1, 1991, she was promoted to Program Technician II (Taxpayer Services).

On August 1, 1993, the appellant's salary was reduced 5 percent for 3 months for excessive absenteeism and absence without approved leave (AWOL).

III

As cause for this adverse action, the respondent charged the appellant with engaging in a pattern of excessive absenteeism, for being absent without approved leave on a number of occasions and for demonstrating below average production.

IV

The appellant works in the Information Center Section of the Franchise Tax Board. She is responsible for responding to taxpayer calls regarding State income tax questions including general questions (level 2), revenue questions (level 3) and corporation questions (level 4). (The questions are identified by levels of difficulty.) The appellant's years of service and training made her respon-sible for answering calls at all levels.

Line agents (including Program Technician II's) in the Information Center Section are expected to spend approximately 6 1/2 to 7 hours of time each day handling telephone inquiries from members of the public. Computer records and statistics are kept regarding their level of productivity in the following areas: availability, wrap-up time, idle time, average call length, and average call rate. Prompt and appropriate responses are required of the 270 line agents in the Information Center Section. Failure to provide prompt and appropriate responses generates taxpayer complaints and a number of avoidable tax errors (such as failure to remove inappropriate garnishments and liens affecting home buying and other purchases).

The productivity figures of the section are reviewed annually and used to justify further funding. Consequently, to the extent an employee is frequently absent and/or maintains substandard production, the funding for the positions is reduced accordingly and the other employees must handle an increased work load for the following fiscal year.

V

The parties stipulated to the following facts regarding the appellant's performance as a Program Technician II from May 1993 through October 1993.

For the month of May 1993, the appellant was absent for a total of 19.1 hours, which included 5.1 hours of AWOL. Her production for May demonstrated that compared with the

averages of the section, she needed to improve the following: availability, wrap-up, idle average call length and average call rate.

For June 1993, she was absent for a total of 27.7 hours which included .7 hours of AWOL. Her production continued to be below an acceptable level.

For July 1993, she was absent for 32 hours which included 8 hours on July 1, 1993, for which she was considered by the respondent to be AWOL. (The parties disagreed as to whether the absence was excused.)[4] Her production continued to be below an acceptable level.

For August 1993, she was absent for 22 hours. She continued to need improvement in availability, wrap-up, idle and average call rate.

The appellant was denied her Merit Salary Adjustment on September 23, 1993, for the stated reasons of an "unacceptable attendance pattern" which "impaired [her] overall job performance."

For the period June 1, 1993 through October 31, 1993, the appellant was absent for a total of 81.3 hours which included AWOL.

VI

ABSENCE ON JULY 1, 1993

The appellant admitted she was absent from work July 1, 1993, as charged. She disputed the respondent's claim that her absence was "unexcused". She was absent on the

[4]See discussion at Section VI below.

morning of July 1, 1993, because she went to court to observe the sentencing of her brother for a drive-by shooting. During the afternoon, she stayed home with her mother who was upset by the morning's proceedings.

The appellant did not request or receive prior approval from her supervisor(s) for her absence on July 1. She was expected to be in attendance at a five-day training class on the new Taxpayer Information (TI) computer program for Personal Income Tax (PIT) processing. (Her absence occurred on the fourth day of the training.)

The appellant's first-line supervisor was notified of her absence by one of the trainers in the class who noticed the appellant's seat was empty, even though someone had signed in for the appellant.

When confronted by her supervisor after the incident, the appellant at first claimed she was at the training. However, after some discussion she admitted she had not been present at the training.

The appellant testified as follows. She notified one of the trainers the day before that she would be absent. She did not recall the trainer's name. She then went to the training at 8:00 a.m. and signed in. After signing in, she left. She tried unsuccessfully to contact her first-line supervisor around the noon hour on July 1 and her second-line supervisor around 1:00 p.m. She was not sure who answered the calls. It may have been someone just passing by. There was no corroborating evidence.

The appellant's testimony, on its face, was not credible. Even if true, it did not excuse her misconduct.

VII

APPELLANT'S UNACCEPTABLE PERFORMANCE (PRODUCTION)

The appellant admitted her poor production but claimed her production was affected by her asthma. The appellant referred to a 1991 letter from her treating physician indicating she had asthma. However, the letter she relied on indicated she was capable of working a 40 hour week. There was no other evidence proffered of a medical condition affecting the appellant's performance.

The appellant admitted that her performance was also affected by her lack of motivation.

The appellant's supervisor attributed her poor performance to her excessive absenteeism which often caused reassignment of her work and missed training and updates on new processes. He also attributed it to her lack of motivation to adequately perform her job.

Weighing the evidence, the appellant's poor performance was not mitigated or excused.

VIII

EXCESSIVE ABSENTEEISM

The appellant admitted her excessive absenteeism. The absenteeism was charted for her monthly and she was given monthly updates regarding her pattern of using every available hour of sick leave, and then some. Relying on G[redacted] B[redacted] (1993) SPB Dec. No. 93-20 and S[redacted] R[redacted]

(1994) SPB Dec. No. 94-09, the appellant argued that she could not be disciplined for the absenteeism because of the monthly written updates.

Relying on R V R (1994) SPB Dec. No. 94-05, she also argued that she could not be disciplined for excessive absenteeism because the absences were approved. The appellant is incorrect on both counts.

Richens, referring to B, provides in relevant part:

> B was never intended to preclude an employer from taking formal adverse action after merely documenting employee misconduct or from counseling or instructing employees as to the need for improvement. To the extent B can be construed as precluding such management actions, it is hereby expressly disapproved.

In this case, the appellant was issued monthly attendance and production updates between the first and second action. Those updates identified her deficiencies and warned her of the need to correct the deficiencies. They were not a substitute for discipline. Therefore, the respondent is not precluded from taking disciplinary action for the misconduct.

R provides that an employee cannot be disciplined for failing to obtain proper documentation of a medically related absence. As stated therein, if a person does not report and the employer knows or has reason to believe he/she is sick, the failure to report cannot be cause for discipline. If an employee fails to provide documentation in such a case, the employer's remedy is to not pay sick

leave.

R[redacted] does not preclude disciplining an employee with an intractable pattern of excessive leave usage from being disciplined for inefficiency and poor performance resulting from that absenteeism. According to R[redacted], if absenteeism is excessive and there is no demonstrated recurrent medical problem sufficient to support medical termination, demotion, or transfer or disability retirement and there is no medically demonstrated need for reasonable accommodation, the employer may charge the employee with inefficiency for the absenteeism and resulting poor work performance. (In such a case, it must be demonstrated, however, that the absenteeism had a substantial adverse impact on the work place).

The appellant was placed on attendance restriction in 1988 or 1989. She was given her first adverse action for poor attendance, absence without approved leave and poor work performance covering the period from May 7, 1992, through April 1993. This second action covers the period May 1993 through October 1993. The appellant has demonstrated a consistent intractable pattern of leave abuse which required her coworkers to take over her duties, which jeopardized the position financing in the section and which made her actual service to the public below the production standard provided by other line agents.

For the above reasons, the appellant's reliance on B[redacted], Richens, and R[redacted] is misplaced and the

arguments rejected.

IX

OTHER MOTIONS AND CLAIMS

The appellant's counsel claimed that the respondent acted prematurely in bring the adverse action of 10 percent reduction in salary so soon after the 5 percent reduction in salary and that the appellant should have been given more time to correct her alleged misconduct. The record shows that the first action covered the time period May 1992 through April 1993; and the second action covered the period May 1993 through October 1993. It also shows that the appellant was on attendance restriction for a number of years prior to either action, had received numerous warnings regarding her need to correct her misconduct, after which she continued in an intractable pattern of absenteeism and low productivity. There is no merit to appellant's claim.

* * * * *

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

The appellant is charged with inefficiency based on her pattern of excessive absenteeism abuse and her low productivity. She is also charged with being inexcusably absent without leave for the following: 5.1 hours in May, .7 hours in June, 8 hours in July.

Inefficiency under Government code section 19572, subdivision (c) generally connotes a continuous failure by

an employee to meet a level of productivity set by other employees in the same or similar position or an employee's failure to produce an intended result with a minimum of waste, expense or unnecessary effort. See Sweeney v. State Personnel Board (1966) 245 Cal. App. 2d 246 (inefficiency found when witnesses testified that others doing same work did more than appellant in the same amount of time); Bodenschatz v. State Personnel Board (1971) 15 Cal. App.3d 775 (inefficiency found when court compared statistical data of appellant's productivity with other officers performing like duties). See also the Board's decisions in the matters of Robert Boobar (1993) SPB Dec. No. 93-21, Ruth M. Houseman (1993) SPB Dec. No. 93-33 and Fortunato Jose (1993) SPB Dec. No. 93-34.

Inefficiency, as discussed at Section VIII above, also is demonstrated when an employee is excessively absent and such absence adversely affects the functioning of the work place.

In this case the appellant's misconduct in consistently failing to meet production as well as her pattern of excessive absenteeism constituted cause for discipline as inefficiency, pursuant to subsection (c) of Government Code section 19572.

Inexcusable absence without leave refers, in this case, to leave which was taken without prior approval and includes appellant's absence on July 1, 1993. The appellant admitted she was absent without approved leave on all dates

charged with the exception of July 1, 1993. The facts demonstrated that the appellant was, in fact, absent from training on that date and did not obtain leave prior to her absence. The absence was not medical in nature, nor were the circumstances of a nature as to demonstrate an emergency variation from her attendance restrictions. Those restrictions required pre-approval by the supervisor and the appellant was aware of the requirement. It is, therefore, determined that the AWOL's charged were proved and served as cause for discipline as inexcusable absence without leave, pursuant to subsection (j) of Government Code section 19572.

When performing its constitutional responsibility to "review disciplinary actions" [Cal.Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." The factors to be weighed in determining a "just and proper" penalty are set forth in Skelly v. State Personnel Board (1975) 15 Cal.3d 194, as follows:

> . . . [W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, 'harm to the public service.' (Citations.) Other relevant factors include circumstances surrounding the misconduct and the likelihood of its recurrence. (Citation.) (Skelly at 217-218.)

In this case the appellant's failure to be present at work and failure to perform her job in an efficient manner

directly and adversely impacted the delivery of customer service to California taxpayers. Among the adverse impacts noted were that other line agents were required to assume a larger share of the calls each day, some of her work was reassigned to others, and taxpayers were not as timely served.

The circumstances surrounding her misconduct were such that she was aware of the negative impact of her misconduct, she was continually warned and discouraged from engaging in such misconduct and yet she failed to attempt to cure it. Her testimony regarding the July 1, 1993, incident, in and of itself, demonstrated her lack of concern for or motivation to consider the responsibilities and duties she had assumed as a public servant.

A strong likelihood of recurrence is demonstrated if a progressively severe level of discipline is not imposed. The appellant has been on attendance restriction for a number of years; she was formally disciplined last year for the same misconduct; her Merit Salary Adjustment has been denied; she has been formally and informally counseled--all to no avail.

For the above reasons, the penalty of 10 percent reduction in salary for 3 months should be sustained.

* * * * *

WHEREFORE IT IS DETERMINED that the 10 percent reduction in salary for 3 months taken by respondent against Letitia Renee Allen effective January 10, 1994, is hereby

sustained without modification.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: August 31, 1994.

MARY C. BOWMAN
Mary C. Bowman, Administrative Law Judge, State Personnel Board