

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31822
)
 RICHARD VASQUEZ RAMIREZ) **BOARD DECISION**
) (Precedential)
 From dismissal from the position)
 of Hospital Aid at the Veterans) **NO. 94-05**
 Home of California, Department of)
 Veteran Affairs) January 6, 1994

Appearances: Mark DeBoer, Attorney, California State Employees Association representing Appellant, Richard Vasquez Ramirez; Howell Y. Jackson, Attorney, Jackson, Hernandez and McConnell representing Respondent, Department of Veterans Affairs

Before Carpenter, President; Stoner, Vice President; Ward, and Villalobos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by Richard Vasquez Ramirez (Ramirez or appellant) from dismissal from the position of Hospital Aid at the Veteran's Home of California, Department of Veterans Affairs (Department). The ALJ found that appellant was guilty of inexcusable neglect of duty but reduced the penalty from dismissal to a ten (10) days' suspension.

The Board rejected the Proposed Decision of the ALJ and determined to decide the case itself, based upon the record, including the transcript, and the written and oral arguments of the parties.

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After a review of the entire record, the Board modifies the penalty imposed upon appellant to a thirty (30) days' suspension.

FACTUAL SUMMARY

Appellant has been a Hospital Aid since July 11, 1988. The Department has twice denied him merit salary adjustments primarily because of poor attendance but, prior to the dismissal, did not subject appellant to any formal adverse action.

Appellant has been repeatedly warned about his frequent absences and told that his unscheduled absences create a hardship for his co-workers. Because of his attendance record, appellant was ordered to provide a physician's verification if he wished to be approved for sick leave.³

Despite numerous warnings, appellant continued to be absent. On January 29, 1991, appellant was issued an informal reprimand regarding his frequent absences.

On October 22, 1991, appellant was given a written warning reminding him that he had failed to attend an Annual Review Class on September 17, 1991. He was also reminded that he had failed on two occasions to attend a class required for his recertification as

³Although throughout the hearing the purported purpose of the physician's verification was to support appellant's claim that he was sick, the May 20, 1991 memorandum to appellant from his supervisor describes the purpose of the verification as a statement that appellant is physically able to perform his duties. The decision in this case does not turn on this discrepancy but the Department may wish to address the function of the verification in the future.

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a Hospital Aid. He failed to attend because he was ill. Since appellant worked the night shift, the timing of these classes required schedule adjustments so that appellant would not be scheduled to work the night before the class or the night the same day as the class. Appellant was warned that failure to attend the rescheduled classes would be considered insubordination. Appellant attended both the rescheduled classes.

Appellant was absent a total of 36 days in 1990, 36 days in 1991 and 14 days in 1992. The Department dismissed appellant from his position on July 28, 1992. In the Notice of Adverse Action, numerous instances of "unapproved dock" and absence without leave (AWOL) are specified as reasons for appellant's dismissal.

Appellant was charged with being inexcusably absent without leave on a number of dates specified in the Notice of Adverse Action. Three dates, July 19, July 28 and October 25 occurred in 1990. Appellant asserted in general that he had a good reason for each absence and the Department did not challenge this assertion.

He received an informal reprimand on January 29, 1991 referencing these dates.

Ms. Dye arranged for appellant to be medically evaluated by a doctor employed by the Veteran's Home to determine if he was capable of performing his job duties. Although appellant kept his first appointment, he failed to keep two follow-up appointments scheduled January 19, 1991 and February 1, 1991. The medical

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evaluation was never completed.

Appellant was charged with being AWOL on April 28, and April 30, 1991. The Department presented no evidence, other than appellant's attendance sheet, that appellant was not sick on these dates or that he did not call in.

Shortly before appellant was due to report to work on November 1, 1991, his wife called work and reported that appellant's grandparent had died and that appellant would be out on bereavement leave. After appellant returned to work he provided evidence that he had attended a funeral on November 1, 1991 for a Frank Ruiz. However, appellant did not provide documents requested by the Department which verified his relationship with the deceased. At the hearing, appellant admitted that the deceased was not a blood relative. Appellant testified that the deceased was a close family friend that he and his brother always addressed as grandfather. Appellant worked the night before the Ruiz funeral but did not mention his plan to take the next 3 days off. At the hearing, Marjo Crowley, the timekeeper, testified that had appellant requested the time off he would have been granted it although he would not have been paid.

On March 18, 1992, appellant reported that he would not be at work that day because his father had been injured. Appellant was requested to provide a verification of his father's injury. When appellant failed to provide the verification, he was marked down as

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AWOL. Actually appellant's father had not been injured. His father was in a rehabilitation program in a hospital. Out of deference for his father's request that his presence in the hospital remain private, appellant did not provide the verification.

Appellant was marked as AWOL for his absence on April 8, 1992. The Department did not dispute appellant's claim that he was sick, but refused to approve the absence because appellant did not provide medical verification.

On April 10, 1992, appellant was marked AWOL for 30 minutes because he allegedly failed to call before the start of his shift to report that he would be late. Appellant's wife testified without contradiction that she called appellant's work before the start of the shift while appellant was outside trying to get his car started. The Department did not present evidence that a call from appellant's wife would not suffice as notice.

Appellant was also out sick on May 2, 3 and 6, 1992 and provided a note from his doctor. However, Ms. Dye, appellant's supervisor, would not approve the absence because appellant did not go to the doctor on the first day he was sick and the note did not provide a diagnosis. The record does not indicate that prior to this date appellant had been asked to provide a diagnosis.

On June 15, 1992, appellant was out sick but failed to provide medical verification. On June 19, 1992, appellant was 30

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minutes late for work, but no evidence was presented that he failed to inform his supervisor of his impending lateness.

Notably, appellant's supervisor testified that although she requested verification from appellant on each occasion that he claimed his absence was attributable to illness, she did not disbelieve his assertions that he was actually ill on these occasions.

On the basis of the above-described incidents, appellant was charged with incompetency, inexcusable neglect of duty, dishonesty, inexcusable absence without leave and willful disobedience in violation of Government Code § 19572, subdivisions (b), (d), (f), (j) and (o).

Evidence was also submitted that when appellant came to work, he did an excellent job of taking care of patients. He worked hard and without complaint, even though much of the work was physically difficult. Appellant appeared to be genuinely interested in the welfare of the patients and showed patience and tolerance at all times.

ISSUES

The instant case raises the following issues for our determination:

1. Whether the Department proved a pattern of absenteeism sufficient to warrant discipline?

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2. Whether the Department properly ordered a medical examination?

DISCUSSION

Absenteeism

The Department claims that dismissal is appropriate because it proved appellant used sick days in conjunction with regular days off in a pattern of absenteeism and the Department proved that appellant had suffered 26 "unapproved docks" and 8 AWOLs during 1990, 1991 and 1992 before his termination in July. In addition, the Department alleged inexcusable absence without leave on a number of specific days.

a. Absence on dates not specified in Notice of Adverse Action

The Department alleges a pattern of absenteeism which, it argues, proves that appellant was misusing sick time. However, the Notice of Adverse Action does not specify the dates on which appellant is charged with misusing sick time, nor do any attachments provide this information.

In Leah Korman, SPB Decision No. 91-04, the Board adopted the ALJ's decision dismissing the charges against Korman because the Notice of Adverse Action failed to specify the acts for which she was being punished. The decision noted that:

if appellant is not told what acts were being punished, she is hampered in her ability to prepare a defense ... and the Administrative Law Judge at hearing is unable to determine what evidence is relevant to the reasons for the adverse action. Id. at 4.

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In the present case, since the Notice of Adverse Action did not specify the dates that make up this general "pattern of absenteeism," this aspect of the Department's charge must be dismissed pursuant to Korman.

b. "Unapproved Dock"

The designations "unapproved dock" and AWOL are terms of art used by the Department to describe the circumstances of an employee's absence. At oral argument, the Department claimed that appellant's supervisor, Ms. Dye, used the designation "unapproved dock" to indicate her belief that appellant was not ill. This characterization is directly contradictory to Ms. Dye's testimony that "unapproved dock" is a designation used when an employee is legitimately sick but will not be paid because he or she has no sick leave balance.

Ms. Dye further testified that she had no reason to doubt that appellant was sick on the days he called in sick. Hence, there was no evidence that appellant was not sick the days he called in sick. Appellant was marked "unapproved dock" on June 15, 1992. However, as discussed above, the fact that appellant was marked out "unapproved dock" on this day is not by itself a cause for discipline.

Appellant was also marked unapproved dock on May 2, 3 and 6, 1992 because appellant's doctor did not indicate a diagnosis on a note provided for appellant to cover appellant's May 2, 3 and 6th

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absences. Appellant was legitimately ill. There was no previous request that appellant secure a written diagnosis from his doctor. Without indication that appellant was not sick, the time marked as unapproved dock is not, by itself, a cause for discipline.

c. AWOL

Ms. Dye testified that AWOL is generally used to designate when an employee does not report to work as scheduled and does not give prior notice of his intended his intended absence. However, the Department also uses the AWOL designation for a second category of absences. The Department uses the AWOL designation to denote when an employee fails to provide documentation required by the Department.

The Department charged appellant with being AWOL on July 19,
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"[I]ncidents that form the basis for informal discipline imposed on the employee, cannot [later] be used as the basis for formal adverse action, except for the limited purpose of showing that the employee has been warned or progressively disciplined with respect to a prior misconduct." Gary Blakeley (1993) SPB Dec. No. 93-20, p. 6.

Therefore, these absences cannot be considered as independent bases for the charges against appellant.

The Department provided no evidence concerning the April 28 and 30, 1991 absences or the June 19, 1992 instance when appellant was 30 minutes late, other than appellant's attendance sheet. The

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Department bears the burden of proof with respect to whether an employee's absence from work was without prior authorization. Curia v. Civil Service Commission (1981) 126 Cal. App.3d 994, 1009 (overruled on other grounds by Coleman v. Department of Personnel Administration(1991) 52 Cal.3d 1102). The Department did not proffer any evidence involving these dates other than that appellant was absent⁴. As discussed above, appellant's supervisor testified that she had no reason to believe that appellant was not legitimately sick. Therefore, these dates cannot be used as a basis for discipline.

Most of the remaining days for which appellant was charged with being absent without leave were days in the second category - days for which appellant failed to provide documentation the Department required. For example, on March 18, 1992, appellant failed to provide proof of his father's "injury"; on April 8, 1992, appellant was out sick but failed to provide medical verification. Under these facts, the failure of appellant to provide documentation does not constitute inexcusable absence without leave. There was no evidence that appellant was not legitimately absent or that he failed to report his impending absence. The denial of leave was based solely on appellant's failure to provide

⁴Appellant's supervisor was asked whether appellant called in advance of an absence and replied that sometimes he did and sometimes he didn't. This testimony cannot be used to prove that appellant's absence on specific dates was not authorized.

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supporting documentation. Appellant was notified that he must provide documentation if he wished to be paid sick leave. Since appellant had no sick leave balance on the books, his production of documentation would have resulted only in changing his timekeeping designation from AWOL to "unapproved dock". Nowhere in the many warnings given to appellant was a distinction made between "unapproved dock" and AWOL.⁵ In either case, appellant would not be paid. Thus, appellant's failure to provide documentation did not constitute cause for discipline on grounds of inexcusable absence without leave or inexcusable neglect of duties.⁶

Finally, appellant was charged with missing annual review and recertification classes on July 23, September 17, and September 24, 1991. Appellant was issued a written warning concerning this conduct. He attended the rescheduled classes. Since appellant has already been subjected to a written warning concerning this conduct, it cannot form an independent basis for adverse action. See Gary Blakeley (1993) SPB Dec. No. 93-20 at p. 6.

⁵This point of view is strengthened by the Department having charged "unauthorized docks" and AWOLs as both being causes for discipline. The Department did not appear to clearly distinguish between these categories.

⁶We note 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.

d. False Bereavement Claim

The Department did, however, prove that appellant is guilty of dishonesty, inexcusable neglect of duty and inexcusable absence without leave for dishonestly characterizing Mr. Ruiz as his grandfather for the purpose of getting paid bereavement wages. In addition, appellant knew he intended to take bereavement leave, he failed to inform his supervisor in advance of his plan. The Board can only conclude that appellant's purpose in failing to inform his supervisor was to circumvent any questions about the deceased's relationship with appellant. In addition, appellant conducted himself with a blatant disregard for both the attendance rules and the needs of his co-workers. This conduct constitutes dishonesty, and inexcusable neglect of duty. Appellant's failure to secure leave in advance renders him inexcusably absent without leave.

Referral for Medical Examination

Appellant also neglected to attend a medical evaluation scheduled to determine if appellant could perform his duties. The Administrative Law Judge found that Ms. Dye should not have ordered a medical evaluation because she already knew appellant could perform his duties -- he was performing them satisfactorily whenever he was at work. The ALJ also found that if a medical examination was to be performed, the employee should have been referred to a physician who was not employed by the state. The ALJ

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found that referral to a physician employed by the Veteran's Home was improper. We disagree with both of these findings.

a. Was a Medical Examination Proper?

Under Government Code §19253.5, an employee may be required to submit to a medical evaluation to evaluate his or her capacity to perform the work of his or her position. While appellant's work performance was generally satisfactory when he came to work, his job performance was significantly affected by his chronic absences for medical reasons. Appellant's supervisor had a right to determine if appellant suffered from a medical problem which caused him to be sick much more often than the average state worker.

This view is consistent with the Americans With Disabilities Act (ADA) which allows post-employment medical examinations if the examination is shown to be job related and consistent with business necessity. See 29 C.F.R. §1630.14(c). The ADA's approach is discussed in the Equal Employment Opportunity Commission's (EEOC) Technical Assistance Manual on the Employment Provisions of the ADA. Section 6.6 of the Technical Assistance Manual explains that:

Medical examinations or inquiries may be job related and necessary . . . when an employee is having difficulty performing his or her job effectively. In such a case, a medical examination may be necessary to determine if s/he can perform essential job functions with or without an accommodation.

For Example : If an employee falls asleep on the job, has excessive absenteeism, or exhibits other performance problems, an examination may be needed to determine if the problem is caused by an underlying medical condition, and whether medical treatment is needed. If the

examination reveals an impairment that is a disability under the ADA, the employer must consider reasonable accommodations. If the impairment is not a disability, the employer is not required to make an accommodation. (emphasis added)

Thus, the purpose of the medical examination is to determine the reasons for the absenteeism. If the absenteeism is caused by an underlying medical problem which constitutes a disability under the ADA, then the Department would be required to reasonably accommodate the employee, unless to do so would create an undue hardship. 29 C.F.R. 1630.2(p)(1).⁷ If to reasonably accommodate the employee would constitute an undue hardship, then disability retirement or medical termination might be appropriate pursuant to Government Code §19253.5.

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

⁷State law also may require reasonable accommodation of an ill or injured employee even if that employee would not be considered to have a disability under the ADA.

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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.

In the instant case, referral to a medical examination was appropriate for the Department to determine which of these avenues to pursue.⁸

b. Is an Independent Physician Necessary?

Section 19253.5 does not require that the appointing power refer an employee to a physician who does not work for the state.

Although an earlier version of a Board regulation allowed an employee to select a physician from a list of three provided by the Department, SPB Rule 172.3⁹ enacted in 1967 states simply:

In accordance with Government Code section 19253.5, the appointing power may require an employee to submit to a medical examination.

Thus, there is no requirement under the Government Code or under

⁸The present case may be an example of a situation where an employee's constant absence creates hardship on his coworkers. However, inefficiency is not alleged in the Notice of Adverse Action. The Board cannot sustain discipline for conduct where the proper cause for discipline is not alleged in the Notice of Adverse Action. See Robert Boobar (1993) SPB Dec. No. 93-21; Negrete v. State Personnel Board (1989) 213 Cal. App.3d 1160.

⁹The SPB Rules are codified in Title 2 of the Code of California Regulations.

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the California Code of Regulations that the physician be independent of state service.

The ALJ may have mistakenly assumed that the provisions of section 19253.5 are superseded by the Memorandum of Agreement (MOU) between the State and the California State Employees Association which represents appellant's bargaining unit. A page from the MOU which appears in the record as Exhibit B sets out the requirements for independent medical examinations.

However, Government Code §3517.6 lists all the Government Code sections which can be superseded by an MOU if there is a conflict between the code and the MOU. Section 19253.5 is not included on this list. Therefore, section 19253.5 is not superseded and the Department need not refer appellant to an independent physician. Appellant's failure to attend the scheduled follow-up evaluation constitutes willful disobedience.

CONCLUSION

For the reasons set forth above, appellant is found guilty of inexcusable neglect of duty, inexcusable absence without leave, and dishonesty for his conduct surrounding his false bereavement claim. Appellant is also found guilty of willful disobedience for failure to attend the scheduled follow-up medical examination. The charge of incompetency is dismissed.

Given that the department has failed to prove the main charge of excessive absence against appellant, the penalty of dismissal is

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too harsh. The Board finds that a thirty (30) days' suspension without pay is more in keeping with appellant's transgressions.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of dismissal is modified to a thirty (30) days' suspension without pay.

2. The Department of Veterans Affairs shall reinstate Richard Vasquez Ramirez to the position of Hospital Aid and pay to him all back pay and benefits that would have accrued to him had he been suspended for thirty (30) days rather than dismissed.

3. This matter is hereby referred to an Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

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

*Floss Bos was not present and therefore did not participate in this decision.

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* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board