

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 38184
)
 BETHI J. CARVER) **BOARD DECISION**
) (Precedential)
)
From one-step reduction in) **NO. 96-18**
salary for six months as a)
Transportation Engineer (Civil))
with the Department of)
Transportation at Oakland) December 3-4, 1996

Appearances: H. Mattson Austin, Staff Consultant, Professional Engineers in California Government, on behalf of appellant, Bethi J. Carver; Florence M. Davis, District Personnel Liaison, Department of Transportation, on behalf of respondent, Department of Transportation.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal by Bethi J. Carver (Carver or appellant) from a one-step reduction in salary for six months in the position of Transportation Engineer (Civil) with the Department of Transportation (Department or Caltrans). The Department disciplined appellant for her failure to provide documentation for 4 days of absence in August, 1995. Carver appealed. In his Proposed Decision, the Administrative Law Judge recommended that the adverse action be revoked on the ground that the Americans with Disabilities Act (ADA) required that appellant be granted a flexible schedule.

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After a review of the entire record, including the transcript, exhibits, and the written and oral arguments of the parties, the Board sustains the penalty taken against appellant for the reasons that follow.

SUMMARY OF THE FACTS¹

Appellant has been employed by the Department of Transportation since 1982. She has been a Transportation Engineer since 1989. She has no prior adverse actions.

Appellant suffered an industrial injury in September 1992 when she slipped in the Caltrans cafeteria, fell on her right leg, twisted it, and hurt her back. The injury affected her lumbar region, both ankles, and both knees. After the injury, appellant missed a great deal of work. She experienced difficulty obtaining medical treatment for her injuries. She remained in a great deal of pain throughout her convalescence. At the time of this adverse action, she had still not been released for full duty by her physicians. Appellant exhausted all of her leave benefits and had to rely on a catastrophic leave bank donated by her fellow employees to cover her absences.

Appellant's physician eventually released her to return to work three to four hours per day. Her physician requested that she be permitted to work a flexible work schedule because of her

¹The statement of facts is taken almost verbatim from the ALJ's Proposed Decision.

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injuries. When appellant informally sought such a work schedule, her supervisor denied the request. Appellant did not file a formal request for reasonable accommodation. She did seek the assistance of the Health and Safety Office, but took no further action after she learned that no one was assigned at that time to review reasonable accommodation requests.

Appellant's assigned work schedule was originally from 7:30 a.m. to 11:30 a.m. every day. This schedule was adjusted to begin at 8:30 a.m. as a result of appellant's difficulty getting to work at 7:30. Even with this change in schedule, appellant had difficulty getting to work. After appellant was successively late one and one-half hours each day, her supervisor placed her on leave control. The August 8, 1995 leave control memorandum required appellant to provide a physician's verification for any absences due to illness or be faced with disciplinary action.

On August 10, 11, 14, and 17, 1995, appellant was absent for all or part of her work shift. She failed to provide a physician's verification for any of these absences as required by the leave control memorandum. She was counted as absent without leave and her pay was docked.

At the hearing before the ALJ, appellant testified that her work injury still prevents her from working a regular work schedule. When she wakes up in the morning, she often has swelling and pain in her knees which prevents her from coming to work. She

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often has trouble getting out of bed and cannot walk. She has made several requests to work a flexible work schedule in order to accommodate her injuries, doctor's appointments, and physical therapy sessions. Her supervisor has turned down these requests. According to appellant, her supervisor becomes angry and upset whenever she has to take time off due to her injury. Appellant has continued to consult with her physician in an effort to resolve her injuries. Appellant feels that the stress of her working conditions makes her physical situation worse.

Appellant works in a section with 13 other engineers. There are a total of 45 employees in the office. Appellant's supervisors feel that they need to have her on a regular work schedule so that they can plan her assignments. They also feel that staff needs to be available at all times to respond to emergency projects. Flexible work schedules are not ordinarily allowed by Caltrans on a routine basis. According to her supervisors, appellant has only made verbal requests for a flexible work schedule but has never submitted a formal request for reasonable accommodation.

Because appellant failed to provide documentation for her absences as required by the August 8, 1995 leave control memorandum, the Department took this adverse action, alleging appellant's absenteeism constitutes cause for discipline under Government Code § 19572, subdivisions (c) inefficiency;

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(d) inexcusable neglect of duty; (j) inexcusable absence without leave; and (o) willful disobedience.

ISSUES

The following issues are before the Board for consideration:

1. Is it appropriate to discipline appellant for failure to provide documentation of her absences?
2. Were the department's charges proven by a preponderance of the evidence?
3. Does the Americans with Disabilities Act or any other anti-discrimination law provide a defense to the Department's charges?
4. If cause for discipline is established, what is the appropriate penalty?

DISCUSSION

Inexcusable Absence Without Leave

Understandably, appellant's supervisor wanted to get some control over the amount of work his unit could accomplish. On August 8, 1996, in an attempt to control appellant's schedule, appellant's supervisor placed her on sick leave restriction in which he required that appellant provide a doctor's note for her subsequent absences or be subjected to discipline. Appellant acknowledges that she was absent for all or part of her shifts on August 10, 11, 14 and 17, 1996 and that she failed to provide documentation.

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In T [REDACTED] W [REDACTED] (1992) SPB Dec. No. 92-03 at p.6, the Board found that, while a Department cannot force an employee to see a doctor, the Department can deny authorization for leave when a request for proof of illness is warranted and an employee refuses to provide proof that the absence is justified. As indicated in her supervisor's August 8, 1995 memo, notwithstanding a doctor's note that cleared appellant to work half-days, appellant was late one and one-half hours each day. Thus, the supervisor's request for documentation was warranted.

Appellant argues that she should not be required to present proof of her illness since the Department knew or should have known that she was disabled under the ADA. She claims, in effect, that instead of requiring substantiation, the Department should grant her a flexible schedule which would allow her to determine on a day-by-day basis when she would come in to the office.

If appellant believed that the reasonable accommodation of a flexible schedule was necessary for her continued employment and mandated by state law and the ADA, she should have documented her request for reasonable accommodation and the Department's denial of that request. She could have then filed an appeal of the denial with the State Personnel Board pursuant to Title 2 California Code of Regulation 53.2 which provides a process for tracking requests for reasonable accommodation to ensure that accommodation is both timely and appropriate. Having failed to take any steps to

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establish her entitlement to reasonable accommodation, appellant cannot now maintain that her medical condition required the Department to tolerate completely unpredictable absenteeism and to refrain from requiring documentation to substantiate the purported reasons for the absenteeism.

We note, in addition, that even assuming appellant was entitled to a flexible schedule as reasonable accommodation for her disability, the flexible schedule would not have addressed appellant's absences for her entire shift on August 10 and 17. A flexible schedule may have allowed appellant to delay her start time, but would not have any impact on appellant's obligation to provide documentation substantiating her claim that her absences should be authorized as being for illness.

Appellant argues that the Board's decision in R [REDACTED] V [REDACTED] (1994) SPB Dec. No. 94-05 supports her contention that she cannot be disciplined for her failure to provide documentation. We disagree.

In R [REDACTED], the Department disciplined the appellant for failing to provide documentation of his illness. The Board found that, under the facts of that case, R [REDACTED] could not be disciplined for his failure to produce documentation because the Department had requested that he provide documentation only if he wanted sick leave pay for the days he was absent. Id. at p. 11. Since R [REDACTED] did not have any sick leave balance and,

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consequently, would not have been paid for his absence anyway, F█████ did not provide the documentation. We noted in F█████ 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. *Id.* at p. 11, fn. 4. See also, Letitia Allen (1996) SPB Dec. No. 95-06.

This case requires a different result than F█████. Unlike F█████ where the appellant was told that his failure to document would result only in his pay being docked, in this case, appellant was specifically notified that failure to produce documentation would result in disciplinary action. Appellant's failure to produce the requested documentation rendered her inexcusably absent without leave.

We stress that the Department did not discipline appellant for her failure to come to work; rather, the Department disciplined appellant for her failure to provide documentation for her absence.

If appellant believed her supervisor's action requiring her to submit documentation somehow violated her right to reasonable accommodation, she could have submitted the documentation and sought to establish her right to reasonable accommodation through appropriate channels. Instead, appellant simply failed to provide the documentation. We find that the Department proved by a

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preponderance of evidence that appellant was inexcusably absent without leave pursuant to Government Code § 19572, subdivision (j).

Other Causes for Discipline

The Department also charged appellant with inefficiency, inexcusable neglect of duty, and willful disobedience pursuant to Government Code § 19572, subdivisions (c), (d) and (o). Given that the Notice of Adverse Action charged only that appellant failed to secure doctors' notes to document her absences, none of these additional causes for discipline are supported by the facts in this case.

Inefficiency generally refers to an employee's continuous failure to meet a level of productivity set by other employees in the same or similar position or to produce an intended result with a minimum of waste, expense or unnecessary effort. E. [REDACTED] E. [REDACTED] (1993) SPB Dec. No. 93-21 at p. 10. Appellant's failure to document her absences does not qualify as a failure to meet a level of productivity or to produce an intended result with a minimum of waste, expense or unnecessary effort. The charge of inefficiency is dismissed.

Willful disobedience requires that one knowingly and intentionally violate a direct command or prohibition. E. [REDACTED] I. H. [REDACTED] (1993) SPB Dec. No. 93-22, p.6.; Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770, 775. Of course, the command or prohibition must be an order the supervisor has the right to give

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and expect to be obeyed. R [REDACTED] S [REDACTED] (1995) SPB Dec. No. 95-02, p. 10. As noted above, the Board has found that while a Department can deny authorized leave for an employee absence, it cannot compel the employee to see a doctor. See W [REDACTED], SPB Dec. No. 92-03 at p.6. Appellant was not willfully disobedient when she refused to provide a doctor's note.

Neither has the Department proven that appellant inexcusably neglected any duty under the facts of this case. The Board has previously defined inexcusable neglect of duty as "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." W [REDACTED] M [REDACTED], Jr., (1994) SPB Dec. No. 94-26, p. 8. If a Department cannot discipline an employee on grounds of inexcusable neglect of duty for failing to go to the doctor whenever the employee is ill, then the Department cannot discipline an employee for failing to produce documentation of a doctor's visit. The charge of inexcusable neglect of duty is dismissed accordingly.

Penalty

Among the factors the Board considers in determining whether a "just and proper" penalty was imposed are:

[T]he extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 218].

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The harm to the public service in this case is significant. As we noted in Frances P. Gonzales (1993) SPB Dec. No. 93-13 at pp. 3 and 4:

"The parties to an employment relationship rely upon the precept that the employer is obligated to pay agreed upon wages and benefits and the employee is obligated to perform his or her work in a satisfactory manner. Dependable attendance is one element of satisfactory work. The employee who does not report to work in a timely manner is not performing satisfactory work in that he or she is failing to meet one of the primary responsibilities as an employee. Employers have the right to expect their employees to report for work on the day and at the time agreed, and may discipline employees for their failure to meet that expectation." (citations omitted).

Caltrans has a right to know when employees will come to work. When an employee does not come to work, Caltrans has a right to request documentation supporting the employee's excuse for his or her absence as a condition for granting leave. If an employee cannot meet the employer's expectations, the employee may request reasonable accommodation. If the employer denies reasonable accommodation, the employee has the right to appeal that denial, not ignore the employer's requirements.

The circumstances surrounding appellant's misconduct include the fact that appellant was advised she needed to provide documentation for her absences and told that her failure to provide documentation would lead to disciplinary action. The one-step reduction in salary taken against appellant sends a message to

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appellant that she cannot simply ignore her obligation to substantiate her reasons for her absenteeism.

CONCLUSION

For all of the foregoing reasons, the one-step reduction in salary for six months is sustained.

ORDER

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

1. The above-referenced adverse action of a one-step reduction in salary for 6 months taken against Bethi J. Carver is sustained;

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

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 3-4, 1996.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board