

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B002

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INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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JOHN T. VANSWEARINGEN,

Complainant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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The hearing was held on January 16, 1996, in Denver, CO before Margot W. Jones, Administrative Law Judge. Complainant, John VanSwearingen, appeared at the hearing pro se. Respondent appeared at the hearing through Steven Chavez, Assistant Attorney General.

Complainant testified in his own behalf and called no other witnesses. Complainant did not offer exhibits into evidence at hearing.

Respondent called the following employees of the Department of Transportation (Department) to testify at hearing: Larry Warner; Stan Ihlanfeldt; and Robert Garcia. The parties stipulated to the admission of Respondent's exhibits 1-14.

MATTER APPEALED

Complainant appeals the administrative termination of his employment under Director's Procedure P7-2-5(D)(4)(b).

ISSUES

1. Whether Complainant exhausted all accrued leave and was unable to return to work.
2. Whether the Department's decision to terminate Complainant's employment under the provisions of P7-2-5(D)(4)(b) was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, John VanSwearingen (VanSwearingen), began his

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employment with the Department in March, 1991, as an engineering aide. At the time of the termination of VanSwearingen's employment on June 20, 1995, he was employed as an engineering physical science technician I.

2. During VanSwearingen's employment with the Department, from November, 1994, to January, 1995, he was considered by his supervisor, Robert Garcia, to be a good employee. Garcia held this opinion despite the fact that VanSwearingen had attendance and punctuality problems during this period.

3. The appointing authority for VanSwearingen's position was Larry Warner (Warner), the Department's region 6 director. S.G. Ihlanfeldt (Ihlanfeldt) is a construction engineer who reported to Warner and exercised supervisory authority over VanSwearingen's position. John Basner (Basner), resident engineer, reports to Ihlanfeldt and is also in Vanswearingen's line of supervision.

4. VanSwearingen was suffering from mental problems in January, 1995. On January 25, 1995, VanSwearingen was scheduled to work. He called in sick due to mental and emotional problems and he never again returned to work.

5. VanSwearingen exhausted all accrued sick and annual leave on February 23, 1995. VanSwearingen applied for short term disability leave and had not received a response to his request for this leave on February 23rd. Therefore, the appointing authority placed VanSwearingen on leave without pay from February 23, 1995, through March 21, 1995. Short term disability leave was denied on April 7, 1995. VanSwearingen also applied for worker's compensation and it was denied.

6. Warner authorized VanSwearingen to take 520 hours of leave without pay under the family medical leave act (FMLA). Vanswearingen was on leave without pay under FMLA from February 23rd to June 19, 1995.

7. During the period of Vanswearingen's absence from the work place from January 25, 1995, through June 19, 1995, the appointing authority and his representatives repeatedly requested that Vanswearingen provide a doctor's statement verifying that he was unable to work due to his illness.

8. On February 15, 1995, Basner contacted Vanswearingen by letter. Vanswearingen was advised that pursuant to the director's procedure that permits an employee to be granted FMLA leave without pay, Vanswearingen was required to provide monthly doctor's statements supporting his claim that he was unable to work.

9. Vanswearingen was seen by a psychiatrist and psychologist in

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February, 1995, at Kaiser Permanente, his health care provider. Dr. Stephen Bensen, Ph.D. and Dr. Richard Gerson, M.D. wrote to Ihlanfeldt on February 21, 1995. The doctors advised Ihlanfeldt that Vanswearingen contacted Kaiser Permanente facilities on January 26, 1995, complaining of symptoms of acute anxiety. The doctors further advised that Vanswearingen was seen by Dr. Gerson for medication evaluation on February 3rd. On that date, the doctors reported that he was prescribed psychotropic medication. The doctors reported further in their letter that Vanswearingen was seen on February 10, 1995, by Dr. Bensen and reported no improvement in his symptoms. The letter advised Ihlanfeldt that Vanswearingen remained in treatment.

10. On March 21, 1995, Ihlanfeldt wrote to Vanswearingen advising him that he was eligible for leave without pay under FMLA. Ihlanfeldt advised Vanswearingen that he would be required to provide a doctor's statement that he suffered from a serious health condition and a doctor's statement addressing the status of his medical treatment. Ihlanfeldt warned that failure to provide the required information could result in termination of leave under FMLA.

11. Having received Drs. Bensen and Gerson's letter of February 21, 1995, and concluding that the letter did not provide the information needed by the Department, Ihlanfeldt called Dr. Bensen in April, 1995, seeking additional information. Dr. Bensen did not provide the needed information by telephone.

12. Ihlanfeldt also wrote to Bensen on April 3, 1995, requesting that Bensen advise Ihlanfeldt whether Vanswearingen was mentally and physically capable of performing the duties of his position of engineering physical science technician.

13. On April 5, 1995, Carolee Nimmer, Ph.D., supervising psychologist at Kaiser Permanente, responded to Ihlanfeldt's April 3, 1995, letter. Nimmer stated that Vanswearingen's benefits at Kaiser did not cover disability evaluations. Nimmer advised Ihlanfeldt in the letter that a systematic evaluation of Vanswearingen was not conducted and therefore Kaiser was unable to give an opinion about his disability status.

14. On April 6, 1995, Ihlanfeldt advised Vanswearingen, in a letter sent to him by certified mail, that he was required to furnish medical certification verifying a serious health condition. Ihlanfeldt asked that Vanswearingen provide the information by April 14, 1995, and by May 1 and June 1, for those months. Ihlanfeldt reiterated that failure to provide the necessary information could result in termination for his leave under FMLA.

15. During this period, March through June, 1995, Vanswearingen did not obtain an evaluation from a doctor. Vanswearingen

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received limited assistance from the doctors at Kaiser who only offered clinical care. Vanswearingen decided not to independently seek additional medical care. During this period, Vanswearingen started living with an individual who he found offered him more assistance with his emotional difficulties than traditional medical care.

16. On May 5, 1995, when Vanswearingen had not obtained a medical evaluation, an appointment was made for him to see a physician. There was a miscommunication about the location of the appointment and Vanswearingen failed to appear.

17. Warner wanted a medical evaluation, since Vanswearingen's FMLA leave ended on June 19, 1995. On June 2, 1995, Warner arranged for Vanswearingen to be medically evaluated on June 6, 1995, at the Department's expense with Dr. Hoffman. Thereafter, Dr. Hoffman provided a report to the Department in which he advised that Vanswearingen was able to return to work.

18. Following receipt of Dr. Hoffman's report, on June 12, 1995, Warner advised Vanswearingen that he had three options. Warner told Vanswearingen that he could return to work on June 20, 1995, he could resign from his position and be placed on the reemployment list or, if Vanswearingen failed to elect one of the first two options, Warner would terminate his employment with the Department.

19. On June 19, 1995, Warner spoke to Vanswearingen by telephone. Vanswearingen advised Warner that he could not return to work because he had not recovered from his illness. Vanswearingen took no further action to obtain a statement from a doctor verifying his inability to return to work.

20. On June 20, 1995, Warner decided to terminate Vanswearingen's employment. Warner advised Vanswearingen in a letter of that date that his employment was terminated under director's procedure 7-2-5. Warner concluded that since Vanswearingen exhausted accrued leave, had used all leave without pay under FMLA and had failed to provide a doctor's statement that he was unable to return to work, his employment should be terminated. Warner further concluded that he should terminate Vanswearingen's employment because the only doctor's statement available to him was from Dr. Hoffman, dated June 6, 1995. That report, indicated that Vanswearingen could return to work.

DISCUSSION

Complainant contends that his employment was improperly terminated because the Department failed to get an evaluation of his condition from an impartial source. He contends that since he worked with the Department since 1991 and performed his duties

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competently, he should not have been terminated when he fell on hard times as the result of an emotional and mental problem. At hearing, Complainant contended that he is now prepared to return to work and should be permitted to do so.

Respondent contends that it gave Complainant every opportunity to recover from his problem and to return to work. Respondent contends that it was not required to, but did, give Complainant leave without pay from February 23, 1995, to March 21, 1995, when he exhausted all sick and annual leave and his applications for short term disability leave and worker's compensation were pending. Respondent further contends that even without the required doctor's certification of a serious health condition, Complainant was permitted to take 520 hours of FMLA leave without pay, from March 21, 1995, to June 19, 1995.

Respondent contends that despite its efforts to accommodate Complainant, he failed to provide the required doctor's certification on a monthly basis. Respondent argues that Complainant's contention that Dr. Hoffman provided his evaluation at the request of the Department, and therefore the evaluation should not be relied upon, is without merit.

Director's Procedure 7-2-5(D), provide:

P7-2-5 **Granting of Sick Leave.** Paid sick leave shall be granted to an employee for his/her medical examination and treatment (including dental, optical, auditory, mental, alcoholism and drug addiction treatments), conditions of pregnancy causing physical inability to work, illness, or injury not covered by injury leave. The employee may use up to 520 hours of accrued sick leave in a fiscal year for the medical examination or treatment, illness, or injury of an immediate family member as defined in P7-2-5(A). The appointing authority shall require a statement from a physician from any employee who is absent from work for four or more consecutive regularly scheduled full working days. Failure on the part of the employee to provide such a statement confirming the employee's or immediate family member's illness or injury shall result in denial of the use of sick leave.

. . .

- (D) When an employee has exhausted all accrued sick leave and is still unable to return to work, the appointing authority:
- (4) Except as provided in P7-2-5(B)(6), if the employee is unable to return to work after all accrued leave is used, the appointing authority may:

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- (a) granted the employee leave without pay in accordance with P7-4-4; or
- (b) request the resignation of or terminate the employee. Certified employees who are terminated shall be placed upon a departmental reemployment list upon recovery. The employee must not have worked for any other employer performing the same or comparable work during the recovery period. The employee must notify the agency within 90 days of recovery as verified by a physician's statement in order to be placed on a reemployment list.

Respondent's actions, taken under Director's Procedure P7-2-5, terminating Complainant's employment cannot be found to be arbitrary, capricious or contrary to rule or law. The evidence presented at hearing established that Complainant was absent from the workplace from January 25, 1995, to June 19, 1995. The evidence further established that during this period Complainant was permitted to exhaust all accrued leave, was placed on leave without pay and was placed on FMLA leave without pay. During the six month period the Complainant was off work, he failed to provide a doctor's statement which addressed his medical condition.

Warner decided to terminate Complainant's employment only after Complainant had been given every opportunity provided under the rules to retain his employment. At hearing, Complainant presented no evidence from which it could be concluded that Respondent acted improperly in June, 1995, terminating his employment.

CONCLUSIONS OF LAW

1. The evidence presented at hearing established that Complainant was absent from work from January 25, 1995, to June 19, 1995, and that during this period he exhaust all accrued leave, leave without pay and FMLA leave without pay.
2. Respondent's action in terminating Complainant's employment under Director's Procedure, P7-2-5(D)(4)(b), was neither arbitrary, capricious or contrary to rule or law.

ORDER

The action of the Respondent is affirmed. Complainant's appeal is

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dismissed with prejudice.

Dated this ____ day
of January, 1996,
at Denver, Colorado

Margot W. Jones
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the ___ day of January, 1996, I placed a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

John Vanswearingen
11746 W. Chantage Dr., #7
Morrison, CO 80465

and in the interagency mail, addressed as follows:

Steven A. Chavez
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203
