CENTRAL ADMINISTRATIVE TRIBUNAL

MADRAS BENCH

OA/310/00219/2019

Dated Tuesday, the 18th day of February, Two Thousand Twenty

CORAM : HON'BLE MR. T. JACOB, Member (A)

A.Jones Wilfred Vought,
Med. Decategorised (Mail/Exp. Guard),
Madurai Division,
Southern Railway,
Madurai. ….Applicant

(By Advocate M/s. Ratio Legis)

Vs

1. Union of India, rep by the
   General Manager,
   Southern Railway,
   Park Town P.O.,
   Chennai 600003.

2. The Divisional Personnel Officer,
   Southern Railway,
   Madurai Division. ….Respondents

(By Advocate Mr. P. Srinivasan)

O R D E R
(Pronounced by Hon'ble Mr. T. Jacob, Member (A))

The applicant has filed this OA under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

> "To call for the service records of the applicant including the posting orders issued to the applicant on medical de-categorization and quash the impugned orders no. U/P.579/II/Guard/VR dated 30.08.2018 and U/P.353/OA 1618/2018 dated 21.01.2019 and to direct the respondents to relieve the applicant as deemed as retired under VRS med and to arrange to pay pension and other retirement benefits in terms of chapter 9 of Indian Railway Establishment Manual Vol I and Rule 49 of the Railway Services Pension Rules, 1993 with all the consequential benefits and to make further order/orders as this Hon'ble Tribunal may deem fit and proper and thus render justice."

2. The applicant joined the Railway Service in the year 1978 and while working as a Guard Mail/Express, he was medically incapacitated in the year 2004 to discharge the duties of the Guard and, as such, was continued in supernumerary capacity till 2012. A screening was conducted and the applicant was posted as Office Superintendent on 01.02.2012 and the same was kept in abeyance on 02.02.2012. Then the applicant sought for re-medical examination and on re-medical examination, the applicant was declared 'unfit' for Guard in the 2014. Then second screening was conducted in the year 2015 and no further postings were offered. While the applicant was in supernumerary post, 3rd screening was conducted in March 2018 and in May 2018, posting order as Office Superintendent was issued to him. The applicant submitted his voluntary retirement request on 23.05.2018 under Rule 1803 of IREC Vol. II, Rule 66 Railway Service Pension Rules 1993 and RBE 137/2016 within the stipulated time and the respondents have rejected the same on 30.08.2018 only to deny due benefits that are available to running

staff and hence OA.1618/2018 was filed and this Tribunal by order dated 10.12.2018 directed the respondents to consider the issue as per rules but the respondents have rejected representation quoting an irrelevant rule provision and hence, the present Original Application is preferred for intervention and to render justice, inter-alia, on the following grounds:-

i. In as much as the applicant, a medically incapacitated running staff, temporarily utilised in supernumerary post as Guard's supervisor and having completed 40 years of service refusing to accept his request for voluntary retirement to deny the average emoluments without reckoning with 55% pay element for the purpose of calculating pension and other retirement benefits is arbitrary and an act coupled with colourable exercise of authority which is non est in law.

ii. In so far as the Railway Board's Letter No.137/2016 extending alienable right to the applicant to submit VRS within a month of the posting on alternative employment on medical de-categorisation, the action of the respondents in denying such privilege is in gross violation of the said Railway Board letter issued under Rule 124 of the IREC Vol. I and thus the impugned rejection is to be declared null and void.

iii. The request for VRS was withheld under the pretext that a minor penalty proceedings is pending and the same was concluded with warning, the refusal to accept VRS is impermissible in law and thus the impugned orders are liable to be set aside.

iv. Assuming but not conceding that the applicant was appointed in alternative appointment on medical de-categorisation, the applicant is eligible to be extended with 55% of last drawn pay as fixation benefits for the purpose of pension benefits since he was drawing from the running category and the applicant's lien is maintained in the running category and till such time the lien suspended or acquired in another category as per the rule 242 of IREC which categorically supports the issue of the applicant which, inter-alia, states that

"Termination of Lien-

(a) Except as provided in Rule 240 and clause (b) of this Rule a Railway Servants lien on a post may in no circumstances be terminated, if the result will be to leave him without a lien upon a regular post

(b) A Railway Servants lien on a post shall stand terminated on his acquiring a lien on another post (whether under the Central Government or State Government) outside the cadre on which he is borne"

and thus as the non consideration of VRS request is indefensible.

v. The impugned order passed by the respondent quoting Rule 17 of the Pension Rules 1993 shall not apply to the applicant since the applicant has not accepted and assumed the alternative employment and to be more specific not yet superannuated and as such the impugned orders are imperfectly aimed at and with a motive to deny the legitimate benefits to the applicant hence liable to be quashed.

3. The respondents have filed detailed reply statement.It is submitted that had the applicant continued in the running cadre of Guard Mail/Express, he would have drawn the running allowance, which allowance is given to the running staff for their performance of duty in the running trains. Since he was medically de-categorised and absorbed in a stationary post, he is not entitled for payment of running allowance and to compensate the loss in his emoluments the enhanced fixation of 30% of pay was allowed to him. At the time of retirement the running staffs are entitled for retiral benefits at a higher rate of 55% over and above their last pay drawn. The applicant who was moved to a stationary post upon his medical unfitness is not entitled for the 55% in his retiral benefits in as much as he was given 30% higher pay from the date of his medical unfitness on 04.12.2008. Having received the higher fixation of 30% of his pay from the date of his medical de-categorisation,the applicant is not entitled for the payment of retiral benefits at a higher rate of 55% of last drawn pay which is allowed only to the running staff who are retiring from service as running staff. The applicant who is in a stationary post and enjoyed 30%

higher pay from the date of his medical de-categorisation is e-stopped from claiming the same in this OA and the OA is not maintainable and liable for dismissal. Further the applicant's supernumerary post was abolished after he was posted as Office Superintendent of Operating Branch vide Office Order No.15/2012/XII/PG/PB dated 01.02.2012. The above Office Order was kept in abeyance and he was directed for re-medical examination during the year 2014. However, the Chief Medical Superintendent advised that there is no ground for a re-examination in as much as the applicant was subjected to re-medical examination on four occasions earlier and further stated that the earlier decision of the Medical Board stands good. Screening of the medically de-categorised employees was arranged on 19.01.2015 for considering them for absorption in alternate posts. Though the name of the applicant was available in Serial No7 of the letter dated 12.01.2015, he had remained absent in the screening committee meetings held since 2012 and now requesting for arranging his settlements benefits on Voluntary Retirement in terms of the Railway Board's Circular No.137/2016. The applicant having availed the higher fixation of pay in a stationary post, is not entitled for the benefit of 55% of add on pay at the time of his retirement. The applicant is entitled to opt for settlement benefits in terms of Rule 17 of the Pension Rules which is applicable to medically de-categorised employees at the time of retirement. Hence the respondents pray for dismissal of the OA.

4. Heard the learned counsel for the respective parties and perused the pleadings and documents on record.

5. Admittedly, the applicant on being medically de-categorised on 30.11.2004, he was accommodated in a supernumerary post and on being declared fit for Class A2 with light

duties, he was restored back as Mail/Express Guard. He was again medically de-categorised on 04.12.2008 and, subsequently, accommodated in a supernumerary post pending absorption in a suitable alternative post. He was drawing the pay of Rs.19220+4200 w.e.f. 01.07.2008. He was given pay fixation benefits in terms of the Railway Board letters RBE 138/2011 dated 05.10.2011 and RBE 41/2013 dated 30.04.2013 and his pay was fixed at Rs.26250+4200 w.e.f. 04.12.2008 by adding 30% of pay element. Since he was absorbed in a stationary post from that of a running cadre post, he was given an additional pay of Rs.7030/- vide Memorandum dated 15.09.2014 and as such, he is drawing a basic pay of Rs.1,05,900/- w.e.f. 01.07.2018 by virtue of upward revision of pay vide Master Circular No,25 issued by the Railway Board.

6. Para 10.2 of the said Master Circular No.25 is extracted hereunder for easy understanding and better appreciation of facts:-

> "10.2 In the case of running staff, the last pay drawn in the parent cadre + percentage of this pay in lieu of the running allowance which is 30% at present is also protected. It is, however, subject to the condition that the employee is not entitled to a pay more than maximum of the absorbing grade though he might be drawing more pay in his parent department, if de-categorisation had arisen on account of the causes mentioned in para 3(i) and 3(ii). However, if the medical de-categorisation has arisen due to the causes mentioned in para 3(iii) , 3(iv), 3(v)and 3(vi), the pay of the de-categorised employee (in the case of running staff, pay + percentage of pay treated as emoluments in lieu of the running allowance) should be protected in the absorbing grade and if it exceeds the maximum of the absorbing grade, the difference will be allowed as personal pay to be absorbed in future increase(s) in pay."

7. Having regard to the above facts and circumstances of the case, the short point for consideration in this OA is whether 55% of the pay element should be reckoned for computing retirement benefits for those running staff who have been medically de-

categorised and decide to take voluntary retirement instead of opting for redeployment in an alternative stationary post.

8. The Railway Board vide RBE No.137/2016 dated 29.11.2016 has dealt with the issue with reference to the Board's letter N.E(NG)1-2009/RE-3/9 dated 05.10.2011, the relevant portion of the said instructions reads as follows:-

> "2. The issue has been examined in Board's office and it is observed that the issue is governed under the provisions contained in Board's letter referred to above. To address the specific aspect brought out by Federations, it has been decided that whenever a medically de-categorised running staff governed by RS(PR)1993, who has rendered the prescribed qualifying service opts for Voluntary Retirement either on his own or within a period of one month from the date of offer of the first alternative post, his pension may be computed with addition of 55% Pay Element. This 55% benefit will be reckoned after deducting the 30% Pay Element fixation benefit if granted already as per Board's letter dated 05.10.2011 referred to above.
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> 3. In case such staff does not give option of Voluntary Retirement within the outer limit period of one month specified herein above, it will be deemed that the staff has accepted the alternative appointment offered and in this case, retirement benefits will be governed by extant instruction on the issue whenever he superannuates or opts for Voluntary Retirement thereafter.
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> 4. The period of one month to opt for Voluntary Retirement for those medically de-categorised running staff who have already been offered the alternative posts, will start from the date of issue of this letter".

9. I have considered the matter. It is seen that the respondents have applied the above instructions to the facts of the present case and found that the applicant is not entitled to the running allowance since he was medically de-categorised and absorbed in a stationary post. The enhanced fixation of pay of 30% was allowed to him with effect from the date of his medical unfitness on 04.12.2008 only to compensate the loss in his emoluments. At the

time of retirement, the running staff are entitled for retiral benefits at a higher rate of 55% over and above their last drawn pay. The applicant's application for Voluntary Retirement dated 23.05.2018 was rejected by the respondents vide order dated 30.08.2018 due to pendency of disciplinary proceedings at the relevant point of time. By Office Order No.106/2018/XII/PG dated 04.10.2018 the applicant who has been recommended for alternative employment on medical grounds was absorbed in the ministerial cadre of Operating Department in the same level having been found suitable by the Screening Committee and posted as Office Superintendent, Crew Management System, MDU. On being posted, the supernumerary post created for the purpose of claiming salary was abolished thereby the applicant cannot decline to accept the alternative employment offered to him and if he does not take up the alternative employment immediately, the payment of salary against supernumerary post would be discontinued forthwith. By order dated 22.11.2018, the disciplinary proceedings was closed by issue of warning to the applicant.

10. The grievance of the applicant is that he opted for voluntary retirement only with a view to benefiting in the matter of fixation of pension. The stand taken by the respondents to disallow enhanced pension benefits as available to running staff and at the same time also accept the notice for voluntary retirement from service when he still has about two years of residual service left was detrimental to his interests. It is alleged that the applicant was in no way responsible for the delay in the conduct of the medical re-examination or the offer of the alternative post.

11. Admittedly, this is the second round of litigation before this Tribunal. The applicant

had earlier filed OA.1618/2018 almost seeking similar reliefs, wherein this Tribunal by order dated 10.12.2018 permitted the applicant to make a comprehensive representation to the respondents and on receipt of which, the respondents were directed to consider and pass a reasoned and speaking order in accordance with law. The respondents in pursuance of the above, have passed an order dated 21.01.2019 rejecting the representation of the applicant dated 22.12.2018. The relevant portion of the said order reads as follows:-

> "Rule 17 of the Pension Rules which deals with pensionary benefits to staff declared unfit is extracted below:-
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> 17. Pensionary benefits to staff declared unfit.' If a railway servant is unfit for his post but is retained in service in an alternative appointment under the provision of the code and subsequently becomes entitled to receive retirement gratuity or pension, he shall be given the option of accepting either of following, whichever he may, prefer:-
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> I. the gratuity or pension which he would normally be granted with reference to his total service in both the spells of his service taken together;
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> II. The sum of
> a. gratuity or pension which he would have been granted if he had been medically invalidated out of service instead of being retained in an alternative appointment at the end of the spell of his service; and
> b. the retirement gratuity or pension which he would normally have been granted for the second spell of this service rendered in the alternative appointment;
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> Provided that if total qualifying service of the railway servant in both the spells of service taken together exceeds 33 years, the qualifying service in the second spell shall be reduced by the number of years by which total qualifying service in both the spells taken together exceeds 33 years and ordinary gratuity or pension and death-cum-retirement gratuity for the second spells of service shall be calculated with reference to the reduced qualifying service so calculated.
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> You are entitled for opting for any one of the above provisions and you may express your option which is beneficial to you.

> You have prayed for your voluntary retirement with retirement benefits as per Rule 49 of the Railway Service Rules, 1993 and you may submit a fresh application for VR if you are still willing to go on VR now and you may also give your option as per Rule 17 of the Pension Rules as stated above.."

12. The fact remains that the applicant has given notice for Voluntary Retirement within one month on 23.05.2018 but the said notice was rejected by the respondents vide order dated 30.08.2018 on the ground that one SAF 11 is pending against him. The said disciplinary case ended in warning to the applicant vide order dated 22.11.2018. Further it is stated that the applicant has not accepted the alternate employment and in terms of Master Circular No.25, he is vested with a right to refuse the alternate employment.

13. The applicant has referred to Rule 66 of the Railway Services (Pension) Rules, 1993 which, inter-alia, states as follows:-

> "Retirement on completion of 30 years qualifying service.- (1) At any time after a railway servant completed thirty years qualifying service.- (a) he may retire from service; or (b) he may be required by the appointing authority to retire in the public interest, and in the case of such retirement, the railway servant shall be entitled to a retiring pension: Provided that- (i) a railway servant shall give a notice in writing to the appointing authority at least three months before the date on which he wishes to retire; and (ii) the appointing authority may also give a notice in writing to a railway servant atleast three months before the date on which he is required to retire in the public interest or three months pay and allowances in lieu of such notice. Provided further that where the railway servant giving notice under clause (i) of the first proviso is under suspension, it shall be open to the appointing authority to withhold permission to such railway servant to retire under this rule."

14. A Division Bench of the Principal Bench of this Tribunal at New Delhi has dealt with a similar issue in OA.1098/2010 dated 21.07.2010 (Ved Prakash Sharma vs. Union of India and others) wherein the applicant in that case who had not crossed 55 years of age but had completed more than 30 years qualifying service had served a notice of three

months for voluntary retirement under FR 56 (k) (1) on the respondents. However, the request for voluntary retirement was turned down due to a contemplated disciplinary case. The Tribunal after referring to the Judgement of the Hon'ble Supreme Court in the case of B.J. Shelat vs. State of Gujarat & Ors., (1978 (2) SCC 201) allowed the OA and the respondents were directed to deem the applicant retired voluntarily from service with all pensionary benefits as per rules. The relevant portion of the said order reads as follows:-

> 5. Rule 48 of the CCS (Pension) Rules ibid clearly provides, on completion of thirty years of service on notice of three months, an automatic voluntary retirement is permissible and the only impediment is that one should not be under suspension which is not in the present case. A Division Bench of the Tribunal in Thakur Ajeet Singh vs,. Union of India (2004 (1) ATJ 440 rules that three months notice under Rule 48 of the pension rules does not require any permission. Moreover, the issue has been led to rest by the Apex Court in Tek Chand vs. Dile Ram (2001 SCC (L&S) 555 by making the following observations:-
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> > "35. In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of Rules relating to seeking of voluntary retirement after notice. In first category, voluntary retirement automatically comes into force on expiry of notice period. In second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in third category, voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant Rules. In the case decided,, the relevant Rule required acceptance of notice by appointing authority and the proviso to the Rule further laid down that retirement shall come into force automatically if appointing authority did not refuse permission during the notice period. Refusal was not communicated to the respondent during the notice period and the court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntarily retired had no effect. The present case is almost

identical to the one decided by this Court in the aforesaid decision.

36. This Court in B.J. Shelat v. State of Gujarat & Ors. [(1978) 2 SCC 201] while dealing with a case of voluntary retirement, referring to Bombay Civil Service Rules, Rule 161(2)(ii) proviso and Rule 56(k) of the Fundamental Rules, in similar situation, held that a positive action by the appointing authority was required and it was open to the appointing authority to withhold permission indicating the same and communicating its intention to the Government servant withholding permission for voluntary retirement and that no action can be taken once the Government servant has effectively retired. Paras 9 and 10 of the said judgment read thus :

"9. Mr. Patel next referred us to the meaning of the word 'withhold' in Webster's Third New International Dictionary which is given as 'hold back' and submitted that the permission should be deemed to have been withheld if it is not communicated. We are not able to read the meaning of the word 'withhold' as indicating that in the absence of a communication, it must be understood as the permission having been withheld.

10. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants. Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. Fundamental Rule 56(j) is similar to Rule 161(aa)(1) of the Bombay Civil Services Rules conferring an absolute right on the appropriate authority to retire a Government servant by giving not less than three months' notice. Under Fundamental Rule 56(k), the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate authority. on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this Clause. Thus, under the Fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso where under the appropriate authority may withhold permission to a Government servant under suspension who seeks to retire under this Clause. Thus, under the Fundamental Rules issued by the Government of India

> also the right of the Government servant to retire is not an absolute right buy is subject to the proviso whereunder the appropriate authority may withhold permission to a Government servant under suspension. On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds specified in the proviso. In this decision, effect of Rule 56(k) of Fundamental Rules is also considered which answers the argument of the learned counsel for the respondents on this aspect. It may also be noticed that under Rule 48A in Government of India's decision giving instructions to regulate voluntary retirement it is stated, "Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice unless the competent authority issues an order to the contrary before the expiry of the period of service."
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> 37. If we accept the argument of the learned senior Counsel for the respondent, even if the refusal of voluntary retirement is not communicated within the period specified in the notice, the voluntary retirement cannot be effective unless it is accepted by the appointing authority, no meaning and effect can be given to the proviso to Sub-rule (2) to Rule 48A. It is cardinal rule of construction that no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute or a Rule.
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> 6. In the light of the above, as the applicant has served a proper notice under Rule 48 of the Pension Rules and being eligible on 17.07.2009, the same attains finality and does not require any permission and as the applicant was not under suspension, he is deemed to have retired on 18.10.2009. Rejecting this request on account of disciplinary case is not in accordance with the rules."

In the instant case, the applicant submitted his application for voluntary retirement on 23.05.2018 during which period a minor penalty proceeding was pending which ended in warning. He was not under suspension during the said period. The Hon'ble Supreme Court has held that the request of an employee who has applied for voluntary retirement cannot

be rejected on the ground that a minor penalty proceeding is pending.

15. The respondents have rejected the claim of the applicant for voluntary retirement on the ground of pendency of minor penalty proceedings which admittedly ended in warning. The respondents have erred in rejecting the application of the applicant for voluntary retirement merely on the ground of pendency of minor penalty proceedings. The applicant having completed 40 years of qualifying service has submitted his voluntary retirement request on 23.05.2018 under Rule 1803 of IREC Vol. II, Rule 66 Railway Service Pension Rules 1993 and RBE 137/2016 within the stipulated time and denying such privilege is in gross violation of the Railway Board letter issued under Rule 124 of the IREC Vol. I. The applicant had opted for voluntary retirement with a view to benefiting from the relevant provisions which provides for 55% of pay to be added to the basic pay for the purpose of calculating pension which is not available to non-running staff. On 27.02.2019, this Tribunal had passed an interim order staying the operation of the posting order dated 10.05.2018 and the applicant is under the shadow of the interim order and is on the verge of retirement.

16. In the conspectus of the above facts and circumstances of the case and the decisions of the Hon'ble Supreme Court (supra), I do not find any merit in the argument of the respondents to deny the request of the applicant to go on voluntary retirement. The applicant has made out a case for interference. The impugned orders of the respondents in No.U/P.579/II/Guard/VR dated 30.08.2018 and U/P.353/OA 1618/2018 dated 21.01.2019 are hereby set aside and quashed. The respondents are directed to process the claim of the applicant for voluntary retirement in terms of Rule 1803 of IREC Vol. II, Rule 66 Railway

Service Pension Rules 1993 and RBE No.137/2016 and pass suitable order within a period of three months from the date of receipt of a copy of this order.

17. The OA is allowed to the extent indicated above. No costs.

(T. Jacob)
Member (A)
.02.2020

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