

**Central Administrative Tribunal
Principal Bench**

OA No.1638/2018



New Delhi, this the 11th day of February, 2020

**Hon'ble Mr. Justice L. Narasimha Reddy, Chairman
Hon'ble Mr. A.K. Bishnoi, Member (A)**

Ms. Hemlata Saxena,
D/o Sh. Awadh Bihari Saxena,
R/o B 2/35A, Yamuna Vihar,
Delhi-110053.
Aged about 49 years
Group 'A' (Chief Medical Officer)

...Applicant

(By Advocate : Shri Ajesh Luthra)

Versus

Employees State Insurance Corporation,
Through its Director General,
Panchdeep Bhawan,
CIG Road,
New Delhi-110002.

...Respondents

(By Advocate : Shri Raj Gaurav for Shri Avinash Kumar)

ORDER (ORAL)

Justice L. Narasimha Reddy, Chairman :-



The applicant was holding the post of Chief Medical Officer, in the respondent Corporation, in the year 2011. She was issued a Show Cause Notice dated 29.03.2011, requiring her to explain as to why, disciplinary proceedings be not initiated against her, on account of her absence for a period of one year between April, 2010 to April, 2011. The applicant offered her explanation and not satisfied with that, the Disciplinary Authority (DA) issued a charge memo dated 24.05.2012. It was alleged that the applicant remained unauthorisedly absent between April, 2010 and April, 2011. She has also submitted her explanation to charge memo. The departmental inquiry was conducted and the Inquiry Officer (IO) held the charges as proved. A copy of the report of the IO was furnished to the applicant and on a consideration of the explanation submitted by her, the DA passed an order dated 16.10.2015, imposing the penalty of stoppage of two increments, with cumulative effect. The appeal preferred against the order of penalty was rejected on 15.03.2017. In the review, however, the



penalty was modified to the one of 'Censure', through order dated 07.06.2017.

2. The DPC for extension of the benefit of Non Functional Selection Grade (NFSG), met on 24.06.2015. Since the charge memo was issued to the applicant by that time, the sealed cover procedure was adopted. It is stated that the officers who were found fit by the DPC, were extended the benefit of NFSG w.e.f. 01.03.2012. The applicant, however, was not extended that benefit. This OA is filed challenging the order of penalty dated 16.10.2015, as modified in revision and for a direction to the respondents to extend to the applicant, the benefit of promotion to the post of Chief Medical Officer (NFSG), together with arrears.

3. The applicant contends that the charge framed against her is without any basis and except that she availed compensatory off, for working at odd hours for a long period, she did not remain absent at all. It is pleaded that the Inquiry Officer as well as the DA did not take this aspect into account and the penalty was imposed. She contends that the promotion to the post of CMO (NFSG) was to take place in the year 2012 itself,

and the mere fact that the DPC met in the year 2015, by which time, when charge memo was issued to her, cannot be a ground to deny her the promotion.



4. Respondents filed counter affidavit opposing the OA. It is stated that the applicant could have availed the benefit of any absence, only when she is authorised, and she was not entitled to remain absent for a period of one year. It is stated that the disciplinary proceedings were conducted, strictly in accordance with the prescribed procedure and the applicant was provided adequate opportunity to defend herself. They contend that though the DA imposed the penalty of withholding of two increments, with cumulative effect, in review, it was moderated substantially.

5. As regards the plea of the applicant for promotion, the respondents contend that the state of affairs, obtaining as on the date, when the DPC met, became relevant, in terms of the judgment of ***Union of India Etc. Etc. Vs. K.V. Jankiraman Etc. Etc.*** 1991 SCC (4)

109, and accordingly, sealed cover procedure was adopted. It is also stated that once the disciplinary proceedings resulted in punishment, the question of opening the sealed cover, does not arise.



6. We heard Shri Ajesh Luthra, learned counsel for applicant and Shri Raj Gaurav for Shri Avinash Kumar, learned counsel for respondents.

7. As a first step, it needs to be examined as to whether the initiation of disciplinary proceedings against the applicant and imposition of penalty are vitiated in any manner. The only charge against the applicant reads as under :-

“STATEMENT OF ARTICLE OF CHARGE
FRAMED AGAINST DR. (MRS.) HEMLATA
SAXENA, CMO, INDIRA GANDHI, E.S.I.
HOSPITAL, JHILMIL, DELHI.

Article of Charge

Dr. (Mrs.) Hemlata Saxena, while working as CMO, Indira Gandhi ESI Hospital, Jhilmil, Delhi has committed a misconduct in as much as that she had absented herself from duty unauthorizedly with effect from 28/4/2010 to 4/4/11.

By the aforesaid act, the said Dr. (Mrs.) Hemlata Saxena, exhibited lack of devotion to duty and conduct unbecoming of an employee of the Corporation and thereby violated sub rule (ii) and (iii) of Rule 3(1) of the CCS conduct Rules, 1964 which are applicable to the employees of the Corporation by virtue of Regulation 23 of ESIC (Staff and Conditions of Service) Regulations 1959, as amended.”



8. The applicant did not dispute that she remained absent for a period of one year. However, the explanation offered by her, was that she discharged duties during odd hours for a long time and there exists a practice of availing the compensatory off. Assuming that such a practice exists, it is only on being authorised by the Competent Authority, that an employee can remain absent. He or she does not have the liberty to remain absent unauthorisedly. The Inquiry Officer considered all the issues and recorded his finding to the effect that the charge framed against the applicant is proved. Though the Disciplinary Authority imposed the penalty of stoppage of two increments, that was moderated to the least possible extent, by the Revisionary Authority, to the one of 'Censure'. The applicant is not able to point out any serious legal or factual defect in the disciplinary proceedings. We are not inclined to interfere with the charge memo or the penalty imposed against the applicant.

9. Now, comes the question of promotion of the applicant to the post of Chief Medical Officer (NFSG). The DPC met on 24.06.2015, and the applicant was issued a charge memo, by that time. Obviously, for that reason,

the respondents adopted the sealed cover procedure, in accordance with the observations of the Hon'ble Supreme Court in **K.V. Jankiraman's** case and the OM issued by the DOP&T dated 14.09.1992.



10. The applicant contends that the vacancy is of the year 2012 and since no disciplinary proceedings were pending against her, by that time, there was no necessity or basis, to adopt the sealed cover procedure at all, much less, to deny her the promotion. Reliance is placed upon the judgments of Hon'ble Supreme Court in **K.V. Jankiraman's case** and **Bank of India and Anr. Vs. Degala Suryanarayana** Civil Appeal No.3053-54 of 1997 and judgments of Hon'ble High Court of Delhi in **Union of India Vs. Mahavir Prasad** WP(C) No.4682/2013 and **Union of India Vs. B.S. Bholan** WP(C) No.4684/2011.

11. The judgment in **K.V. Jankiraman's** case is a fairly well known precedent. A Full Bench of this Tribunal examined the question as to whether the pendency of the disciplinary proceedings is a bar for consideration of the employee for promotion. In the concluding portion of the judgment, it observed as under :-

“(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before,”



12. Dealing with the plea that there is an apparent inconsistency, between the directions mentioned above, the Hon'ble Supreme Court held in **K.V. Jankiraman** that there is no inconsistency as such, and the sealed cover procedure can be adopted, in case an employee (i) was under suspension; or (ii) was facing disciplinary proceedings, or (iii) figured as accused in criminal proceedings. Nowhere in the judgment, it was mentioned that factors referred to above, must exist as on the date on which the vacancy arose and not the date on which the DPC met. On the other hand, it was held in para 17 of the judgment, as under:-

“17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench-has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc.



cannot be withheld merely because some disciplinary/ criminal proceedings are pending against the employee. To deny the said benefit they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."

The words "at the relevant time" assume significance.

Reference is to the time, when the DPC met.

13. In para 2 of the OM dated 14.09.1992, which is issued in the light of the said judgment, it is mentioned as under :-

"2. At the time of consideration of the cases of Government servant for promotion details of Government servant in the consideration zone for promotion falling under the following category should be specifically brought to the notice of the Departmental Promotion Committee.

- i) Government servants under suspension
- ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and
- iii) Government servants in respect of whom prosecution for criminal charge is pending."

14. From the above, it becomes clear that the state of affairs, obtaining as on the date of the meeting of the DPC, need to be taken into account.



15. In **Degala Suryanarayana's** case the facts are somewhat typical. The criminal proceedings were initiated against an employee before 1985. The DPC met at a time when the criminal proceedings were pending and accordingly the sealed cover procedure was adopted. The case ended in acquittal. Therefore, occasion arose for opening of the sealed cover. However, the departmental proceedings were initiated on the very allegation, by issuing the charge sheet dated 03.12.1991. The result of the consideration of the DPC was sought to be denied, on account of the subsequent initiation of the disciplinary proceedings. The Hon'ble Supreme Court did not approve of that. The situation in this case is substantially different.

16. In **Mahavir Prasad's** case, the Hon'ble High Court relied upon the judgment of the Hon'ble Supreme Court in **Delhi Jal Board Vs. Mahnder Singh** (2000) 7 SCC 2010. In that case, the Hon'ble Supreme Court held that if the sealed cover was adopted in respect of an employee,



and by the time occasion arose for opening thereof, another charge memo is issued, the benefit of promotion on the basis of the result contained in the sealed cover cannot be denied. The facts of the present case are not akin to those in that precedent.

17. In **B.S. Bholo's** case, the Hon'ble High Court expressed the view that factors mentioned in **Jankiraman's** case as well as OM dated 14.09.1992, must exist, as on the date of vacancy and not the date on which the DPC met. We find that the situation does not fit into the law, declared by the Hon'ble Supreme Court. When the Tribunal faces a precedent from the High Court, which is at variance with an authoritative pronouncement of the Supreme Court, it has no choice except to follow the law laid down by the Supreme Court.

18. We do not find any merit in the OA and the same is accordingly, dismissed.

There shall be no orders as to costs.

(A.K. Bishnoi)
Member (A)

(Justice L. Narasimha Reddy)
Chairman

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