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Central Administrative Tribunal, Principal Bench

Original Application No. 463 of 2004

New Delhi, this the 29th day of June, 2004

Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. R.K. Upadhyaya, Member (A)

Dr. Asit Gupta,
R/o Bungalow No. 8,
Northern Railway Officers Enclave,
S.P. Marg, New Delhi-21

....Applicant

(By Advocate: Shri K.R. Sachdeva)

Versus

Union of India,
Through the Secretary,
Ministry of Railways,
Railway Board,
New Delhi

....Respondents

(By Advocate: Shri V.S.R. Krishna)

O R D E R

By Justice V.S. Aggarwal, Chairman

The applicant is a member of the Indian Railway Traffic Service. As Chief Commercial Manager, North East Railway, Gorakhpur, he had set up a paper for selection to the post of Assistant Commercial Manager (for short 'ACM'), Group 'B' against 30% quota. The examination was to be held on 3.2.2002. The grievance of the applicant is that on 29.1.2002, he felt acute pain in the chest. He proceeded to Delhi. While leaving for Delhi, he left the key of the almirah which contained written paper in sealed cover, with his Confidential Assistant. He was directed to report to the competent authority. Applicant remained admitted in the Apollo Hospital, Delhi from 31.1.2002 to 14.2.2002. Bypass surgery was performed on 5.2.2002 on the applicant. On ¹⁸ ~~25~~.9.2003, he received a memorandum conveying "counselling" for being more careful in future.

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2. Applicant contends that he is fully eligible for being considered for empanelment to the post of General Manager (Open Line). "Counselling" is not a part of the formal reporting system but has weighed with the Selection Committee. His juniors have been empanelled. By virtue of the present application, he seeks quashing of the memorandum of 18.9.2003 with a further direction to direct the respondents that it should not be placed before the Selection Committee and there should be a review of any proceedings concerning the promotional prospects of the applicant.

3. The petition has been contested. Respondents contend that on receipt of number of complaints alleging irregularities in the written examination for selection of ACM Group 'B' in 30% quota in North Eastern Railway, Gorakhpur, the matter was investigated. Certain irregularities were noticed and the examination was cancelled. The applicant had been entrusted with responsibility of paper setting. His conduct was found wanting. The applicant was given an opportunity to submit his clarification. Thereafter 'counselling' dated 18.9.2003 was communicated. It is pleaded that action of 'counselling' is a non-penal action not arising out of a formal disciplinary proceeding and thus statutory provisions governing the disciplinary proceedings do not get attracted.

4. The impugned 'counselling' in the present case

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dated 18.9.2003 provides to us the basic dispute. It reads:

"You while working as CCM/NE Railway/Gorakhpur in the year 2002 and functioning as a Member of the Selection Committee constituted for selection to the post of ACM/Gr.B against 30% quota committed the following irregularities/misconduct:-

You prepared the manuscript of the question paper in English on 29.01.2002 for the written exam. of the above selection held on 03.02.2002 in your own handwriting and dictated it to your PA Shri B.B. Srivastava on the same day. You left for Delhi on 29th itself and got hospitalised in Apollo Hospital, New Delhi from where you instructed your PA on telephone to get the question paper(s) translated in Hindi, typed, photocopied and sealed. Accordingly, Shri Srivastava completed these jobs and in this process, the services of S/Shri Ishwar Chandra Mishra, Rajbhasha Adhikari, D.K.Srivastava, OS/Confld. R.K.Sinha, Sr. Clerk and Smt. Amina Begum, CS of CCM's Security Section were utilized. They performed these jobs over a period of 3-4 days during which you yourself were not present to personally supervise as you were admitted in the hospital at Delhi. This was admittedly an indiscreet action which provided the scope for leakage of question papers by any one of these staff. Considering the sensitive nature of the work of setting question papers for selection of Group 'B' Officers, it was expected of you to have ensured that the secrecy of the question paper was not compromised in any manner what so ever. Your action to have entrusted such a sensitive job to your staff while you yourself were away from the Hd., Qrs. cannot, therefore, be considered as discreet or responsible. You have also failed to take any other preventive action in this respect particularly when it became evident that the set question paper has been handled by a number of staff and the secrecy attached with the question paper could not be guaranteed.

While bringing out above mentioned lapses/misconduct to your notice, I hereby counsel you to be more careful in future."

5. The short question that comes up for consideration is as to whether the correct procedure has been adopted or not.

6. We do not dispute the controversy that before

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passing the impugned order which is described as 'counselling' the applicant for being careful in future, clarifications have been sought from the applicant. The applicant had answered the same. If the matter had ended here, one could conveniently state that there was substantial compliance before giving a 'counselling' of the principles of natural justice.

7. However, it has been urged that in fact the applicant is alleged to have misconducted himself. It is virtually censuring the alleged conduct of the applicant. In this regard, the principles of natural justice have been ignored. Even due regard has not been placed to the relevant rules i.e. CCS (CCA) Rules.

8. There is a clear distinction between censure and warning. The Govt. of India, Ministry of Home Affairs Office Memorandum No.39/21/56-Ests. (A) dated 13.12.1956 prescribes clearly in this regard. The same reads:

"10. Distinction between censure and warning:- An order of "censure" is formal and public act intended to convey that the person concerned has been guilty of some blameworthy act or omission for which it has been found necessary to award him a formal punishment, and nothing can amount to a "censure" unless it is intended to be such a formal punishment and imposed for "good and sufficient reason" after following the prescribed procedure. A record of the punishment so imposed is kept on the officer's confidential roll and the fact that he has been 'censured' will have its bearing on the assessment of his merit of suitability for promotion to higher posts.

There may be occasions, on the other hand, when a superior officer may find it necessary to criticize adversely the work of an officer working under him (e.g., point out negligence, carelessness, lack of thoroughness, delay, etc.) or he may call for an explanation for some act of omission or commission and taking all circumstances into consideration, it may be felt that, while the matter is not serious enough to justify the imposition of the formal punishment of 'censure', it calls for some informal action such as the communication of a written warning, admonition or reprimand. If the

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circumstances justify it, a mention may also be made of such a warning, etc., in the officers' confidential roll. However, the mere fact that it is so mentioned in the character roll does not convert the warning, etc., into 'censure'. Although such comments, remarks, warning, etc., also would have the effect of making it apparent or known to the person concerned that he has done something blameworthy and, to some extent, may also affect the assessment of his merit and suitability for promotion, they do not amount to the imposition of the penalty of 'censure' because it was not intended that any formal punishment should be inflicted.

The fact that a mere informal 'warning' cannot be equated to a formal 'censure' should not, however, be taken as tantamount to suggesting that a written warning may be freely given without caring whether or not it is really justified. It is a matter of simple natural justice that written warnings, reprimands, etc., should not be administered or placed on an officer's confidential record unless the authority doing so is satisfied that there is good and sufficient reason to do so. Paragraph 6 of the M.H.A., O.M. No.51/5/54-Ests. (A), dated the 27th January, 1955, provides detailed guidance in the matter of recording adverse remarks in confidential reports. It may be reiterated here that in the discharge of the responsible task of recording the confidential reports, every reporting officer should be conscious of the fact that it is his duty not only to make an objective assessment of his subordinates' work and qualities but also to see that he gives to his subordinates at all times the advice, guidance and assistance to correct their faults and deficiencies. If this part of the reporting officer's duty has been properly performed, there should be no difficulty about recording adverse entries because they would only refer to the defects which have persisted in spite of reporting officer's efforts to have them corrected. If after having taken such care the reporting officer finds that for the purpose of truly objective assessment mention should be made of any warning, admonition, etc., issued, especially those which have not produced the desired improvement, it is his right and duty to so mention them. In the process of bringing the defects to the notice of person concerned, where an explanation is possible, an opportunity to do so should be given. This cannot, however, be equated to the formal proceedings required to be taken under Rule 55-A (now Rule 16) of Central Civil Services (Classification, Control and Appeal) Rules, nor the warning given amounts to the imposition of a formal penalty." (emphasis added)

9. The same has further been explained in the subsequent Govt. of India, Department of Personnel and

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Administrative Reforms OM No.21011/1/81-Estt. (A) dated 5.6.1981. The relevant portion of the same is:

"19. Mention of warning/ reprimands in CRs.- Questions have been raised from time to time regarding the stage at which a mention about warnings, admonitions, reprimands, etc., administered in the course of normal day-to-day work by superior officers should be mentioned in the Confidential Report of the official to whom the warning, reprimand, etc., has been administered. As there seems to be some doubt in this regard, the position is clarified in the following paragraph:-

2. There may be occasions when a superior officer may find it necessary to criticize adversely the work of an officer working under him or he may call for an explanation for some act of omission or commission and taking all circumstances into consideration, it may be felt that while the matter is not serious enough to justify the imposition of the formal punishment of censure, it calls for some formal action such as the communication of a written warning/displeasure/reprimand. Where such a warning/displeasure/reprimand is issued, it should be placed in the personal file of the officer concerned. At the end of the year, the reporting authority, while writing the confidential report of the officer, may decide not to make a reference in the confidential report to the warning/displeasure/reprimand, if, in the opinion of that authority, the performance of the officer reported on after the issue of the warning or displeasure or reprimand, as the case may be, has improved and has been found satisfactory. If, however, the reporting authority comes to the conclusion that despite such warning/displeasure/reprimand, the officer has not improved, it may make appropriate mention of such warning/displeasure/reprimand, as the case may be, in the relevant column in Part-III of the form of confidential report relating to assessment by the reporting officer and, in that case, a copy of the warning/displeasure/reprimand referred to in the confidential report should be placed in the CR dossier as an annexure to the confidential report for the relevant period. The adverse remark should also be conveyed to the officer and his representation, if any, against the same disposed of, in accordance with the procedure laid down in the instructions issued in this regard." (emphasis added)

10. These instructions clearly show that in accordance with the principles of natural justice, written

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warning should not be placed on the officer's Confidential Report dossiers unless the authority is satisfied that there are good and sufficient reasons for doing so. In the present case, no such reasons have been recorded for placing the said 'counselling' on the Confidential Report dossiers of the applicant. Furthermore, the instructions of 1981 reproduced above prescribe that where such warning has been issued and despite that the officer has not improved, then it should be placed in the Confidential Report dossiers. In the present case, even that has not been so done or recorded that the conduct of the applicant has not improved. These facts clearly show that the said instructions have clearly been violated.

11. Central Civil Services (Classification Control and Appeal) Rules clearly make a distinction between a recordable and non-recordable warning. Under Rule 11 of the said Rules, the censure is a minor penalty while a non-recordable warning or 'counselling' is not one of the formal penalties. If a minor penalty even has to be imposed, the required procedure in accordance with rules has to be adopted. The concerned Government servant has to be informed of the proposed action to be taken against him and about the gravity of the misconduct. A detailed procedure need not be reproduced because in the present case, the concerned Government servant has not been informed of the proposal to take action against him.

12. Reference with advantage can well be made to the Division Bench decision of the Calcutta High Court in the

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case of Nirmal Kumar Datta vs. Union of India and ors.,

1975 (2) S.L.R. 103. The said High Court held:

"Now, we may consider whether the order dated July 3, 1964 whereby a warning was given to the appellant is within the category of "Censure" which is a minor penalty. It has been held by the learned Judge that a mere warning is not a penalty so as to bring it within the meaning of "Censure". We are unable to accept this view. When a Government servant has been asked to show cause against a charge and after he submits his explanation a warning is meted out to him, we fail to understand why the warning will not amount to "Censure". The warning implies within it a blame for the appellant for the failure of the engine. In our view, this is nothing but "Censure" and is, therefore, a penalty. The respondent has also treated the warning as a penalty, for in the service book of the appellant it has been recorded under the penalty column. This penalty has also been imposed on the appellant in violation of the statutory rules and, as such, it is illegal."

13. In the cited case when the said warning was placed on the Service Book of the applicant, it was held that it amounts to censure or a penalty without following the statutory rules. Similarly in the case of K. Madhavan vs. The Commissioner of Income-Tax, Cochin and others, 1983 (1) SLR 773, though the Kerala High Court was concerned with Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, a similar finding had been arrived at. The Delhi High Court had considered the said question in the case of Nadhan Singh vs. Union of India, 1969 S.L.R. 24. It held:

"5. In such cases, I am of the opinion that it is not the form of the order or the word that is used or the nomenclature that is given that matters but really the substance of it. The Memorandum dated 14-8-1963 finds the petitioner guilty of misconduct and yet to contend that it merely administered a warning, dissociated from and unconnected with the disciplinary proceedings, initiated on 16-4-1963 is, to say the least,

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unconvincing. There are several circumstances which will indicate that the warning that was administered to the petitioner by the Memorandum dated 14-8-1968 was only a censure imposed upon the petitioner one circumstance is that the Memorandum itself does not say that the disciplinary action initiated against the petitioner under R.16 of the Rules by the notice dated 16-4-1963 was dropped or closed. The second is that in express terms the Memorandum states that the petitioner was found guilty of misconduct. The third circumstance is that the Memorandum itself states that a copy of that communication has been placed in the character roll of the petitioner. The fourth feature is that the Chairman, Central Water and Power Commission, who issued this Memorandum had described himself as the disciplinary authority also while issuing the said Memorandum indicating thereby that that Memorandum was issued by him only in his capacity as the disciplinary authority. I am also doubtful whether an informal warning can ever go with the finding of misconduct against a Government servant. Admittedly, this 'warning' was intended to be taken into consideration for assessing the official career of the petitioner and is likely to effect the same adversely since the Memorandum itself states that a copy of that communication has been placed in the character roll of the petitioner..."

14. The respondents unhesitatingly made available to us the relevant record. The impugned order clearly shows that it refers to the misconduct of the applicant. In other words, it is being treated as a misconduct. Admittedly, procedure for minor penalty has not been adopted. The Confidential Report dossiers of the applicant were perused and it shows that the said warning/counselling even has been placed in his C.R. dossiers. It is obvious, therefore, that it is being treated as a minor penalty. In that event, keeping in view the precedents referred to above, it must be taken that it was a censure awarded to the applicant for which the required procedure has not been adopted. Therefore, following the ratio deci dendi of the decision of the Delhi High Court, indeed the penalty so

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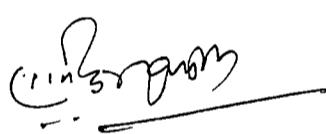
awarded which has been described as a 'counselling', cannot be sustained.

15. For these reasons, we direct:

(a) the impugned order dated 18.9.2003 is quashed;

(b) however, it is made clear that if the respondents intend to proceed departmentally, they may take the necessary action in accordance with law; and

(c) the claim of the applicant for promotion can be considered in accordance with law.


(R.K. Upadhyaya)

Member (A)


(V.S. Aggarwal)

Chairman

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