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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

OA 852/2004

New Delhi this the 1st day of February, 2006

Hon'ble Mr. V.K.Majotra, Vice Chairman (A)
Hon'ble Mrs. Meera Chhibber, Member (J)

Shri Baleshwar Kumar Tyagi,
S/o Shri Sager Singh Tyagi,
Retired Assistant Engineer
Under DRM, North West Railway,
Bikaner (Rajasthan)

..Applicant

(By Advocate Shri B.S. Mainee)

VERSUS

Union of India : through

1. The Secretary,
Ministry of Railways,
Rail Bhawan, New Delhi.
2. The General Manager,
Northern Railway, New Delhi.
3. The Divisional Railway Manager,
North Western Railway,
(Previously Northern Railway),
Bikaner.

..Respondents

(By Advocate Shri R.L. Dhawan)



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ORDER

(Hon'ble Mrs. Meera Chhibber, Member (J))

By this OA, applicant has challenged the order dated 21.6.2002 whereby penalty of compulsory retirement has been imposed on him (page 15 at 17) and order dated 21.10.2003 (page 22) whereby his appeal has been rejected. It is submitted by the applicant that he was issued the chargesheet on 2.7.1997 on the following allegations:

"Shri B.K.Tyagi, while working as Asstt. Engineer (GC) Bhiwani, was transferred as Asstt. Engineer (Const.) under Chief Administrative Officer (Con.), Northern Railway, in terms of General Manager (P)'s Notice No. 940-E/14/XXXXIV/Eia dated 19th Sept, 1996, where he did not report for duty nor did he hand over charge of the post of AEN(GC)/BNW to his successor. Thereafter vide GM(P)'s Notice No. 940E/14/XXXXIV/Eia dated 16.1.1997, Shri B.K.Tyagi was posted as Asstt. Engineer-Works in Headquarters Office, where he has not reported for duty so far. Shri B. K.Tyagi, is thus absconding from duty right from 7th July, 1996 without any sanctioned leave.

Thus by his above act of omission and commission the said Shri B.K.Tyagi has failed to maintain devotion to duty and acted in a manner unbecoming of a Railway Servant thereby contravening Rule 3. 1(i),(ii) and (iii) of Railway Services (Conduct) Rules, 1966".

He was awarded punishment of withholding annual increment in the scale of Rs.2375-3730 (RPS)/7500-12000 (revised grade) for a period of one year without cumulative effect vide order dated 31.12.1997 (page 33).



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2. On 29.7.1998 another chargesheet was given to him with the following allegations:

“Shri B. K. Tyagi, the then Asstt. Engineer (Gauge Conversion), Bhiwani was held responsible for lapses of un-authorised absence from 7th July, 1996 and non compliance of the transfer orders of Administration dated 28.11.1996 and 16.6.1997 and, accordingly, he was punished with a minor penalty, vide Chief Engineer’s order dated 31.12.1997, received and acknowledged by Shri B.K.Tyagi on 9.1.1998. Shri Tyagi has still not reported for duty and has not complied with the said transfer orders even on receipt of the notice imposing punishment. Thus, he is repeating the same offence, without showing any sign or intention of improvement in his attitude. Therefore, Shri Tyagi is considered repeating the offence of unauthorized absence from duty 9.1.1998 onwards and non compliance of orders of the Administration.

Thus by the above acts of omission and commission, the said Shri B.K.Tyagi, Assistant Engineer, Northern Railway failed to maintain absolute integrity, lacked devotion to duty and behaved in a manner which is unbecoming of a railway servant and has failed to abide by the instructions issued by the administration. He has thus contravened Rule 3.1 (i), (ii) and (iii) and 26 of Railway Services(Conduct) Rules, 1966”.

3. It is stated by the applicant that he gave reply stating therein that he is sick and will report for duty as soon as he gets well (page 42). However, an enquiry was held wherein neither any Presenting Officer was present nor any document was placed or produced by the respondents nor any witness was examined and the Inquiry Officer himself acted like a Prosecutor instead of acting like a judge and put him all sorts of questions by going beyond the scope of the enquiry and referring to even the period for which he was already punished. For example, he referred

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to his absence from 2.12.1995 to 8.12.1995 (page 62) even though that was not the period covered under the present charge. Counsel for applicant thus submitted that the report given by the Inquiry Officer gets vitiated as he simply cross examined the applicant without recording his statement, which was the requirement for holding an enquiry. On the basis of this arbitrary findings recorded by the Inquiry Officer, show cause notice was given to applicant. Applicant gave his representation along with medical certificates (page 66) but ignoring everything, he was given punishment. Being aggrieved, he filed an appeal which was also rejected. While rejecting his appeal, the appellate authority had relied heavily on UPSC recommendations but those recommendations were also given to him only along with the appellate authority's order and not before that, which amounts to denial of right to defend because he could not effectively put his defence against the recommendations given by UPSC. In order to support his contention, he relied on ATJ 2005(1) 592 Lalit Kumar Vs. UOI, SLJ 1994(2) 360 & Charanjit Singh Khurana Vs. UOI and Ors. He also submitted the judgment of Hon'ble High Court of Madhya Pradesh reported in 2005(1) ATJ 147- UOI and Ors Vs. Mohd. Naseem Siddiqui and Hon'ble High Court of Guwahati reported in ATJ 2003(39) Dulal Chandra Sarma Vs. UOI & Ors to buttress his arguments



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that if a person is absent from duty due to sickness, it cannot be termed either as unauthorized absence or willful absence it may at the best be treated as absence, whereas in the applicant's case punishment was imposed for willful and unauthorized absence. He also relied on ATJ 1999 (2) 113 Balwant Singh Vs. State of Haryana and ATJ 2003(2) 44 Radhe Shyam Vs. UOI, and ATC 1991 (17) 38 – C.K.Makrana Vs. UOI to buttress his arguments that if a person is on proper sick, which is followed by railway Dr.'s certificate, it cannot be termed as unauthorized absence. In the case of applicant, admittedly he was given rest even by the railway Dr. which is reflected in the impugned order itself. Therefore, neither he could have been treated as on unauthorized absence nor could he have been imposed the punishment of compulsory retirement.

4. Respondents have opposed this OA by referring to Rule 9. Counsel for respondents submitted that in this case, since there was no Presenting officer, Inquiry Officer could have put the question to the charged officer to find out the truth which is the purpose for holding the enquiry. He specifically stated that in Rule 9 (12) of Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to 'the Rules, 1968'), the words used are, if any, meaning thereby it is not necessary that the Presenting officer must be appointed in every case and since there was no

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Presenting officer, the I.O. rightly put the question to Charged Officer. He further submitted that applicant had initially been charge sheeted for being absent from duty unauthorisedly and for not complying with the transfer orders but that punishment was not challenged by the applicant. Therefore, he had admitted that applicant was on unauthorized absence and did not obey the transfer orders passed by the respondents. Applicant never challenged that order, therefore, there was no need to further prove that aspect by producing documents again.

5. As far as the medical certificates are concerned, he relied on para 520 of IREC, Volume 1 to show that gazetted officer has to submit medical certificate from the Railway authorities only, whereas in this case applicant submitted private medical certificate and that too on 23.12.1999 while he was absent since 9.1.1998, that is, he submitted medical certificate from private Doctor only after 2 years from the date charges were levelled against him for unauthorized absence.

6. As far as the report of UPSC is concerned, counsel for respondents submitted that Full Bench judgment of this Tribunal had already held in the case of Chiranjilal Vs. UOI reported in Administrative Tribunal Full Bench judgments 1997-2001 53 that consultation with UPSC is a part of 2nd stage and by that time disciplinary authority makes up his mind as to





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what penalty is to be imposed, therefore, it is not necessary to give UPSC's advice as it would negate the effect of 42 amendment in the Constitution. He thus submitted that the judgment given by Division Bench in the case of Chiranjit Singh Khurana as relied upon by learned counsel for applicant is not a good law any longer. He relied on 2005(1) SLJ 48 judgment given by the Hon'ble Supreme Court in the case of DTC Vs Sardar Singh to show that even for unauthorized absence from service, the punishment of compulsory retirement could be given. Moreover certificate given by railway Dr. only stated that his health is such that he needs rest. Therefore, it does not show that applicant was indeed sick or was unable to attend the office. In any case, even if he was sick, he ought to have intimated to the department about his sickness and such leave cannot be availed without being sanctioned by the competent authority. Counsel for respondents also submitted that this is a gross case of negligence because applicant was given minor punishment initially for being on unauthorized absence and for not obeying the orders of transfer but in spite of it he remained on continuous unauthorized absence even thereafter for a period of two years. Thus he has rightly been given the punishment of compulsory retirement, which calls for no interference. The OA may, therefore, be dismissed.



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7. We have heard both the counsel and perused the pleadings as well. It is correct that earlier also applicant was charge sheeted in 1997 for not reporting for duty and for absconding from duty right from 7.7.1996 without any sanctioned leave. It is also correct that applicant was given punishment for these charges in the order dated 31.12.1997 (page 33) and that was not challenged by the applicant. The 2nd charge sheet dated 29.7.1998 was though in continuation of the earlier charge sheet because even after having received the penalty order dated 31.12.1997 (acknowledged by applicant on 9.1.1998) applicant had still not reported for duty nor he complied with the transfer orders it would definitely be a serious matter as it would show applicant had no intention of improving his attitude but merely chargesheeting a person is not sufficient. It goes without saying that since he was alleged to be absent even after 9.1.1998 unauthorisedly this charge was required to be proved in the enquiry by following due process of law. The Inquiry Officer was required to look into his unauthorized absence from 9.1.1998 onwards. However, perusal of Enquiry Officer's report shows that Enquiry Officer had in fact enlarged the scope of enquiry by putting questions to the applicant even for that period which was not part of the charge. For example on page 63, Inquiry Officer referred to his absence from duty from 2.12.1995 to 8.12.1995 by referring to some folder which



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was neither produced nor was referred to as relied upon documents in the charge sheet. Similarly he further referred to his absence from 7.7.1996 to 23.7.1996 even though charge in the Memo dated 29.7.1998 was for the period from 9.1.1998 onwards. There was no charge that applicant is a habitual absentee. The charge was for repeating absence even after earlier punishment given to him vide order dated 31.12.1997, therefore, there was no reason /justification for the enquiry officer to put questions with regard to his absence from duty from 2.12.1995 to 8.12.1995.

8. Apart from it, it is also seen that Enquiry Officer acted more like a Prosecutor rather than the Enquiry officer because he put all the leading questions and tried to prove the questions with an intention to fix the applicant as guilty even for the period that was not the subject matter of the charge against the applicant. The Inquiry Officer did not even record any statement in chief of the delinquent. We are, therefore, satisfied that the way the Enquiry Officer has conducted this enquiry it is not in accordance with rules. It is settled law that if past record of delinquent is bad and department feels delinquent is an incorrigible person then that has to be imputed as a specific charge otherwise past record cannot be referred to in the inquiry as that would be going outside the scope of inquiry. It is correct that under Rule 9 (12) of the Rules, 1968, the words used are the requiring authority, shall

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require the Presenting Officer, if any, to produce the evidence by which he proposes to prove the articles of charge which means it is not necessary for the disciplinary authority to appoint a Presenting Officer in each and every enquiry and merely because Presenting Officer has not been appointed it will not vitiate the enquiry. But the question is, whether the enquiry officer, who is in the position of a judge can act as Presenting Officer. This very issue came up for consideration before the Hon'ble High Court of Madhya Pradesh in the case of UOI Vs. Mohd Naseem Siddiqui reported in 2005 ATJ (1) 147. After dealing with the rival contentions, it was held that Inquiry Officer with a view to arrive at the truth or to obtain clarifications can put questions to the prosecution witnesses as also the defence witnesses but if the Inquiry Officer conducts regular examination-in-chief by leading the prosecution witnesses though the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers or cross examines the defence witnesses, or puts suggestive questions to establish the prosecution case against the employee, the inquiry officer acts as prosecutor which would vitiate the inquiry.

9. In the instant case, it is seen that no Presenting officer was appointed by the railways nor there was any witnesses cited by railways nor any document was produced by the railways, the only thing done in the enquiry

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was questions put by the Inquiry officer to the delinquent. It goes without saying that questions put by the Inquiry Officer were like regular examination which were leading in nature and were suggestive for proving the charge against the delinquent. Therefore, we would agree with the counsel for applicant that this kind of enquiry cannot be sustained in law. The above said judgment of the Hon'ble High Court of Madhya Pradesh clinches the issue. Moreover, perusal of the office file also shows, that no statement was recorded of Shri B.K.Tyagi but the Inquiry Officer straightaway started putting questions to the applicant, which procedure is unknown to the service jurisprudence. Thus, we are convinced that not only the procedure adopted by the Inquiry officer was wrong but he even enlarged the scope of enquiry by referring to the period which were not subject matter of the charge framed against the applicant. The law is well settled that an enquiry is conducted to prove the charges framed against the delinquent. If there are some other incriminating evidence available against the delinquent officer on other points that cannot be looked into, unless it is made specifically a part of the charge. In this case, since Inquiry Officer had traversed even to the period of 1995 whereas the charge of unauthorized absence was from 9.1.1998 onwards. We have no doubt in our mind that the findings given by the Inquiry Officer gets vitiated on this ground alone.



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Since the penalty order is based on the findings given by the Inquiry Officer, naturally that punishment as well as appellate order also cannot be sustained in law. Accordingly, findings submitted by the Inquiry Officer, the penalty order and the appellate order are quashed and set aside. Since we find enquiry itself has not been conducted properly, we are not dealing with other points raised by applicant. They are left open to be considered by the respondents at appropriate stage. Hon'ble Supreme Court has repeatedly held that if an inquiry is found to be irregular which goes to the root of the matter, courts should not quash the orders and give all consequential benefits but matter should be remitted back to the authorities to start the enquiry from that stage where irregularity has been committed 1996(9) SCC 322 State of Punjab Vs. Dr. Harbhajan Singh Greasy. We, therefore, remit the matter back to the authorities to start the inquiry from the state of recording statement of the delinquent as to how he would like to defend himself against the charges leveled against him. If need be, the Inquiry Officer can put some questions to the delinquent to elicit the truth but within the parameters and scope of inquiry.

10. The authority shall then pass final orders after receiving the representation of applicant. The applicant may formally reinstate the applicant for limited purpose of completing the enquiry by putting him under

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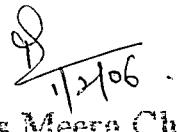


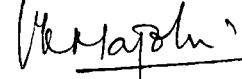
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deemed suspension. Of course intervening period shall be decided by the authorities on conclusion of inquiry. Applicant would not be entitled to any back wages. We are supported in this view of ours by Hon'ble Supreme Court in the case of 2004(7) SCC 581 NTC Ltd. Vs. Anjan Ka Saha.

11. Respondents are directed to complete the enquiry within a period of 3 months from the date of receipt of a copy of this order and applicant is also directed to cooperate with the enquiry. It would be open to respondents to proceed ex-parte against the applicant in case he does not cooperate with the Inquiry Officer or they may seek extension of time in case applicant does not cooperate or due to some other valid explanation. The Inquiry Officer may conduct enquiry on day today basis so that it is completed within the stipulated period. It goes without saying that before passing the final order, respondents shall consider all the submissions made by the applicant in his representation in accordance with law.

12. With the above directions, this OA stands disposed of. No order as to costs.


(Mrs. Meera Chhibber)
Member (J)


(V.K. Majotra)
Vice Chairman (A)

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