CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.60/2002.

Thursday, this the 24th day of June 2004.

CORAM:

HON'BLE MR.K.V.SACHIDANANDAN, JUDICIAL MEMBER
HON'BLE MR.H.P.DAS, ADMINISTRATIVE MEMBER

K.J.Antony,
Kurushupurakkal House, Venduruthy,
Near Church, Katari Bagh, Kochi-4.
(Formerly working as Unskilled Labourer,
INS Garuda, Southern Naval Command,
Cochin-4.) now dismissed. Applicant

(By Advocate Shri.P.K.Ravisankar)

Vs.

1. Commodore, Commanding Officer,
INS Garuda, Kochi-4.

2. Commodore, Chief Staff Officer (P&A),
Headquarters, Southern Naval Command,
Cochin-4.

3. Flag Officer, Commanding-in-Chief,
Southern Naval Command,
Kochi-4.

4. Pokar Ram, Lt.Commander,
Naval Aircraft Yard, Kochi-4,
(Inquiring Authority).

5. Union of India represented by Secretary,
Ministry of Defence, New Delhi.

(By Advocate Shri C.Rajendran, SCGSC (R.1-3 & 5)

O R D E R

HON'BLE MR.KV.SACHIDANANDAN, JUDICIAL MEMBER

The applicant who was working as Unskilled Labourer, a civilian post, under the respondents urged that he fell ill because of hypertension and bronchial Asthma on 31.12.1999. He joined duty on 23.2.2000 and submitted a leave application along with Medical Certificate. Because of illness, financial, physical and mental problems, the applicant could not submit the leave application in advance. The Ist respondent has issued a Memorandum dated 29.5.2000(A1) proposing to hold an enquiry under

Rule 14 of the Central Civil Services (Classification, Control and Appeal ) Rules, 1965. The 4th respondent was appointed as the Enquiring Authority. It is averred in the O.A. that during enquiry the applicant was promised that if he pleads guilty a minor punishment alone will be inflicted. Accordingly the applicant pleaded guilty to all the charges. It is stated in the O.A. that the applicant pleaded guilty not voluntarily but under promise and persuasion. The 4th respondent by order dated 16.3.01 (A2) found the applicant guilty of all the charges and in furtherance of A-3 order dated 30.3.2001, a penalty of removal from service was issued by the 2nd respondent vide A-4 order dated 30.5.01. The applicant filed an Appeal (A5) before the 3rd respondent which was rejected by A-6 order dated 15.11.2001 confirming the penalty awarded to the applicant. Aggrieved by A-4 and A6 orders, the applicant has filed this O.A. seeking the following main reliefs:

a) call for the records leading to Annexures A4 and A6 and quash Annexure A4 and A6 orders;

b) direct the respondents to reinstate the applicant with full back wages and all other consequential benefits;

2. The second respondent has filed a reply statement on behalf of all the respondents in which it is contended that the applicant had availed 956 days' of extra ordinary leave without pay and allowances from the date of continuous service from October 1990 to 31st December, 1999, which was in addition to his other entitled leave. He was also imposed with two penalties for his unauthorised absence on 9th December, 1996 and Ist May, 2000 to mend his ways. He again remained absence for the period from 31st December 1999 to 22nd March 2000 without approval of the leave sanctioning authority. He did not submit any leave application during the above period as required under the leave rules. As per the existing procedure, Government servants are

required to obtain prior approval of the leave sanctioning authority for any kind of leave he/she required and he/she has to forward leave application supported by medical certificate from an Authorised Medical Attendant indicating the nature of illness which he is suffering from and the probable duration of leave required for restoration of his/her health, at an earlier date. The applicant continued to remain absent till 22nd March, 2000. He was issued with a show-cause notice by registered post on 1.2.2000 directing him to report for duty. The applicant neither reported for duty nor submitted any leave application. Therefore, Memorandum of Charges was framed against the applicant for the following misconducts:

a) Unauthorised absence from duty with effect from 31st December, 1999 to 22nd March, 2000.

b) Disobedience of lawful orders of his Superior Officer viz, Commanding Officer, INS Garuda.

c) Habitual absenteeism.

3. It is stated that the applicant failed to submit any written statement of defence against the Memorandum of charges. The departmental inquiry revealed that he was given an opportunity to defend the charges but he unequivocally admitted his guilt. Considering admittance of guilt by the applicant and available documentary evidence on record, the Inquiring Authority found that the applicant is guilty of all the charges. A copy of the inquiry proceedings was served on the applicant giving him an opportunity to make the defence statement. He did not submit any representation and after scrutiny of the report, the disciplinary authority found the applicant guilty of all the charges which resulted into imposition of a penalty of removal from service. On Appeal, the appellate authority has also examined carefully the entire evidence and found that the grounds raised in the appeal are not tenable and rejected the appeal by a reasoned

speaking order. Had he suffered from Hypertension and Bronchial Asthma' he should have intimated the same to the leave sanctioning authority with medical certificate at the earliest. He reported for duty on 23.3.2000. The reason for non-submission of leave application in time are not convincing or acceptable. The averment in the O.A. that the applicant was promised that only minor punishment could be awarded if he pleads guilty, is totally false, baseless and without any evidence. He had voluntarily pleaded guilty. Annexure R-4 will show that there was no compulsion from the respondents to plead guilty. He was offered/afforded fair and reasonable opportunity to defend his case, but he did not choose to do so.

4. The next contention putforth by the official respondents was that there was nothing vague and bereft of factual position. The show cause notice was served on the applicant on 1.2.2000 by registered post. The communications by registered post are to be treated as duly served. He never contended at the time of enquiry that he had not received the letter at the first available opportunity. Annexures R-10 and R-11 are letters empowering the Southern Naval Command to impose a penalty by a Presidential Order. The Annexure R-8 shows that the applicant has availed a total of 1038 extra ordinary leave without pay, in addition to his other entitled leave from his continuous service from 1990. The respondents contended that the O.A. has no merit and therefore to be dismissed.

5. We have heard Shri P.K.Ravisankar, learned counsel for the applicant and Shri C.Rajendren, SCGSC appearing for the respondents.

6. Learned counsel took us through various pleadings and materials placed on record. Learned counsel for the applicant submitted that the applicant could not submit the application in advance due to some personal problems but on the date of joining duty he submitted the same and hence, the absence from duty cannot be considered as unauthorised. The show cause notice alleged to have been served on the applicant by the respondents was not received by him and, therefore, he could not give explanation before inflicting the punishment of dismissal on him. The Ist respondent ought to have given the applicant an opportunity of being heard and that the denial of the same is a clear violation of principles of natural justice. Regarding Article No.II of the charges, the applicant was found guilty and the respondents imposed the punishment on the assumption that he received the said communication. The assumption was factually incorrect. The appellate authority while passing A-6 appellate order did not apply his mind. A-4 order was mechanically reproduced by him. The Ist respondent has no authority to impose the punishment and therefore, the impugned orders are to be set aside.

7. Learned counsel for the respondents, on the other hand, persuasively argued that the applicant had already availed 1038 extra ordinary leave without pay in addition to his other entitled leave from his continuous service from October 1990. He was also imposed with penalty at least twice in the past for unauthorized absence. But those punishments did not make any difference on the applicant and without any hitch, he continued

to remain absent from duty unauthorisedly for longer duration. Hence, the present penalty imposed on the applicant is proportionate to the charges leveled against him.

8. We have given due consideration to the arguments advanced by the parties. It is an admitted fact that the applicant was absent from 31.12.1999 to 22nd March 2000. In the penal period, he had not sent any application for leave in advance and submitted the same with medical certificate on the date of joining duty and he was also permitted to join duty. This is the case of the applicant that he has not received communication directing him to report for duty. Only on the assumption that he has received the communication, the enquiring authority found the applicant guilty of charges framed under Article II and imposed the punishment. Therefore, to verify the fact whether the assumption on which the punishment was based is factually correct or not, the respondents had produced service documents before us and we have perused the same. There is nothing to show that the said notice was served on the applicant nor any acknowledgement found as contended by the respondents in the reply statement. Therefore, the contention that no proper notice was issued to the applicants, stands true.

9. It is also borne out from the said service records that the applicant was a habitual absentee as on many occasions earlier ~~and~~ he had received punishments. The previous unauthorised absence were regularised by the authorities and the punishment had already suffered by the applicant. The previous punishments cannot be said to be a reason for granting punishment in this case, and if done, it will amount to double jeopardy.

10. The broad question that arises for considertion is whether major penalty of dismissal from service can be imposed on the applicant for the alleged unauthorised absence or not. The punishment was imposed invoking Rule 14 of the CCS(CCA) Rules. In an identical matter in O.A. 834/01, a co-ordinate Bench of this Tribunal, wherein the Administrative Member was a party took the view that when a major penalty under Rule 14 of the CCS(CCA) Rules is imposed, the scope of judicial scrutiny is wide open as it brings into play a host of factors impinging on the very rationale of penal action and its maintainability by propriety, proportionality and appropriateness. Recognising the distinction between an act of unauthorised nature and an act of misconduct, we hold that an act of unauthorised nature in itself would not constitute misconduct unless it is 'gross' enough and 'motivated' enough to attract such a classification. An instance of absence without prior sanction or prior intimation under certain compelling circumstances would at worst be an instance of human failure, pardonable in best of times by regularisation with displeasure and when unpardonable treated with a break in service. There is nothing 'gross' in the act of unauthorised absence as the respondents have no case that the Fireman fiddled when the ship was on fire, there is also no motive as the ground of illness has not even been questioned, far from being assailed." A case of unauthorised absence of an individual employee would be adequately coverable under FR 17-A. We are surprised that neither the disciplinary authority nor the appellate authority at no stage ever considered the evidence on record to evaluate if the penalty was proportionate to the act of negligence or irregularity, was without motive, and if the act itself was as such an act of misconduct.

11. We note that the applicant was penalised for unauthorised absence in the earlier occasions with imposition of minor penalty and in this case alone the charges were framed under Rule 14 of CCS(CCA) Rules for major penalty. Annexure to Rule 14 of CCS(CCA) Rules cover the following cases for the imposition of major penalty:

> Types of cases which may merit action for imposing one of the major penalties.
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> 1. Cases in which there is a reasonable ground cases to believe that a penal offence has been committed by a in which there is a reasonable ground by a Government servant but the evidence forthcoming is not sufficient for prosecution in a Court of Law, e.g.:
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> (a) possession of disproportionate assets.
>
> (b) obtaining or attempting to obtain illegal gratification.
>
> (c) misappropriateion of Government property, money or stores
>
> (d) obtaining or attempting to obtain any valuable thing or pecuniary advantage without consideration or for a consideraton which is not adequate.
>
> 2. Falsification of Government records.
>
> 3. Gross irregularity or negligence in the discharge of official duties with a dishonest motive.
>
> 4. Misuse of official position or power for personal gain.
>
> 5. Disclosure of secret or confidential information even though it does not fall strictly within the scope of the Official Secrets Act.
>
> 6. False claims on the Government - like T.A. claims, reimbursement claims, etc.

Would unauthorised absence constitute a punishable offence of any of the types detailed in the rules? The nearest one can come to classify it under a category it would perhaps be classed under category 3 i.e. gross irregularity or negligence in the discharge of official duties with a dishonest motive. But in the absence of

dishonest motive, this would also crumble. As a matter of fact FR17-A already provides a mode of treatment of unauthorised absence in the case of an indivdual employee. This provision also covers desertaion of the post. Under this rules such unauthorised absence should be deemed to cause an interruption or break in the service of the employee. Here too a reasonable opportunity is to be given before invoking the penal provision. In the instant case the enquiry that was conducted could be deemed to hav provided that reasonable opportunity, but for the fact that the enquiry was instituted for the imposition of a major penalty under Rule 14 of the CCS(CCA) Rules. Government of India Decision 2 below FR 17-A makes ample provision for the treatment of unauthorised absence as dies non or resulting in break in service. In the absence of a motive or background of lack of any serious breach in the discharge of official duties based on actual damage caused to the fabric of governance or accountability structure, FR 17-A, and not CCS(CCA) Rule 14, was the option that recommended itself, It is indeed unusual that all cases of unauthorised absences relating to the applicant have been treated under the CCS(CCA) Rules without ever seeking to invoke FR 17-A. Government of India Decision 5 below Rule 11 of CCS(CCA) Rule covers the position adequately.

> "(5)(iii):If a Government Servant absents himself abruptly or applies for leve which is refused in the exigencies of service and still he happens to absent himself from duty, he should be told of the consequences, viz., that the entire period of absence would be treated as unauthorised entailing loss of pay for the period in question under proviso to Fundamental Rule 17, thereby resulting in break in service. If, however, he reports for duty before or after initiation of disciplinary proceedings, he may be taken back for duty because he hs not been placed under suspension. The

disciplinary action may be concluded and the period of absence treated as unauthorised resuting in loss in pay and allowances for the period of absence under proviso to FR 17(1) and thus a break in service. The question whether the break should be condoned or not and treated as dies non should be considered only after conclusion of the disciplinary proceedings and that too after the Government servant represents in this regard".

12. Considering the entire aspects as discussed above, we are of the view that the procedure adopted under Rule 14 of CCS(CCA) Rules though not vitiated, imposing major penalty of dismissal from service for unauthorised absence was unwarranted, inappropriate, disproportionate and arbitrary. There was no reasonable ground to believe that the applicant had committed any gross irregularity or negligence in the discharge of official duties with a dishonest motive by remaining unauthorisedly absent from duty and therefore, the order of penalty of dismissal was perverse in the sense that no reasonable person would form the requisite opinion on the given material.

13. We, therefore, set aside the impugned order of dismissal and direct that the applicant be reinstated forthwith on receipt of this order and the intervening period between the date of dismissal and the date of reinstatement be treated as duty on notional basis and regularise the same. Considering the habitual absenteesm on the part of the applicant we are of the view that the applicant is not entitled to get any backwages till his reinstatement. The period of unauthorised absence may be treated as extra ordinary leave or as leave of the kind due as they deem fit under the rules governing the matter.

14. We allow the O.A.as indicated above. In the circumstance, no order as to costs.

Dated the 24th.June 2004.

H.P.DAS
ADMINISTRATIVE MEMBER

K.V.SACHIDANANDAN
JUDICIAL MEMBER

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