

Central Administrative Tribunal
Mumbai Bench

Mumbai this the 26th day of June, 2002. OA 386/1998

Hon'ble Mrs. Shanta Shastry, Member (Admnv)
Hon'ble Mr. Shanker Raju, Member (Judl.)

Shri N.S. Nikhare,
Dy. C.E. (S&C),
Churchgate,
Western Railway,
Mumbai-400 029.

-Applicant

(By Advocate Shri H.A. Sawant)

-Versus-

1. The General Manager,
Western Railway, HQ Office,
Churchgate, Mumbai-400 020.
2. The Union of India,
Acting through the Secretary,
Railway Board, Ministry of Railway,
Rail Bhavan, New Delhi-110001.

-Respondents

(By Advocate Shri V.S. Masurkar)

O R D E R
Mr. Shanker Raju, Member (J):

Applicant impugns disciplinary authority's order dated 26.2.96 whereby in pursuance of disciplinary proceedings a major penalty of reduction of pay from Rs.4850/- to Rs.4575/- for a period of two years with cumulative effect, has been imposed upon him as well as appellate order dated 16.5.97, upholding the punishment and also advice of the UPSC tendered to the appellate authority on 21.3.97. Applicant has sought quashing of these orders and grant of consequential benefits in consequence thereof.

2. Applicant, a Junior Grade Officer, working as Deputy Chief Engineer in the Engineering Branch was served with the memorandum for a major penalty chargesheet, on the following Articles of charges:

"Shri N.S. Nikhare while working as Sr. DEN-BPL during the period from November '87 to January '80 for the contract works of (1) Drilling of 25 Nos. 150 mm dia Bore wells between Barkheda (excluding) to Babibganj station (Excluding) and (ii)

Drilling of 40 Nos. 150 mm Dia bore wells between Nishatpura (excluding) to Vidisha station (including), committed gross misconduct as under:

ARTICLE-I :-

As a technical member of T.C. Shri Nikhare recommended the offer which was having ambiguous rates as well as not in accordance with tender schedule.

ARTICLE-II :-

Shri Nikhare as Convenor of T.C. recorded that as per G.M.'s instructions the drilling will have to be done upto a minimum of 90 meters and hence the interse position will not change at any time due to variation, whereas the depth of bore wells depend on water table which varies from placed to place and during actual execution of work the depth of bore wells varied and also were drilled to the depths lesser than 90 meters resulting change in interse position.

ARTICLE-III :-

Shri Nikhare did not ensure that the condition of drilling to a minimum depth of 90 meters, on which the tender was accepted, is incorporated in acceptance letter or in agreement.

ARTICLE-IV :-

The payment were released to the contractors without ensuring that the drilling is done upto a minimum depth of 90 meters as committed in TC minutes based on which the tender was accepted and attempted to make over payment.

Shri N.S. Nikhare by his aforesaid acts did not maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a Railway servant and thereby contravened Rule 3 (1), (i), (ii), & (iii) of Railway services (Conduct) Rules, 1966."

3. Applicant furnished the reply to the charges and thereafter the enquiry was conducted by the CVC. Enquiry Officer through his report dated 30.6.93 partly proved Article I and proved Articles II, III and IV to the extent that although applicant recommended over payments to the contractors and the communication by the Divisional Accounts Officer but the Railways has not suffered any loss on these contracts. Applicant preferred representation against the finding and by an order dated 26.2.96 disciplinary authority imposed a major penalty upon him.

4. Applicant preferred an appeal to the concerned authority as well as an additional appeal and a supplementary appeal as well. On reference to the UPSC by the President, the UPSC through their advice dated 21.3.97 upheld the punishment and accordingly the appellate order has been passed by upholding the punishment.

5. Learned counsel for the applicant has assailed the impugned punishment as well as appellate order on the following grounds:

i) According to him the impugned orders are unsustainable on the ground of bias and malafides as by an order dated 21.3.95 even before the punishment has been arrived at the disciplinary authority has pre-decided the issue by observing that a major penalty of reduction of pay by three stages for three years is to be imposed upon. This according to him is not in consonance with the principles of natural justice and fair play vitiates the enquiry.

ii) Learned counsel stated that the misconduct alleged against the applicant is not specified as misconduct in certified standing order and from the evidence recorded and material brought on record no misconduct has been found against the applicant. According to him mere error of judgment and negligence without ill motive would not constitute any misconduct. It is also stated by referring to minutes of the Chief Engineers conference and more particularly to para 5 by stating that even honest officers have been effecting their working and organised efficiency only irregularities without any malafides, punishment can be resorted to. Further referring to general condition of contract it is stated that in case of foundation work where powers of modification is

provided no variation limit shall apply. The contractor has to carry out the work on agreed rate irrespective of any variation. It is further stated that all payments due of Engineer representative certificate and on account of payments to contractor shall be without prejudice to the final amount. In this backdrop it is stated that once the amount is cleared no liability of applicant has forthcoming to be proved to warrant any punishment. It is also stated that the Chairman of the Committee has a joint and severable liability on all the members and the applicant has been singled out for ulterior motives. It is also stated that the UPSC has not applied its mind and on reference in appeal have taken an arbitrary view of the matter.

iii) It is also stated that there has been no application of mind by the disciplinary authority as well as by the appellate authority despite the fact that there is no evidence a perverse finding has been recorded both by CVC as well as by the UPSC. According to him Engineering Code provides 25% variations and payment is to be given only on the work done and as no loss has been caused to the Railways applicant cannot be punished. It is denied that undue favour has been done to the contractor. As the rules were split by the contractors the same were not ambiguous.

iv) It is also stated that nowhere it has come that the interse position is changed due to non-drilling to a minimum depth of 90 meters. It is in this backdrop contended that it can vary. In a nutshell by referring to the factual matrix and documents it is contended that the decision of the applicant was correct but the evidence on record has been overlooked. As there is no loss to the Government there is neither loss to the

Govt. nor over payment and the payments made were subject to the final adjustment as per the Engineering Code and clause 46 of the General Conditions of Contract.

v) Lastly, it is contended that the punishment is not commensurate with the misconduct alleged against the applicant which has greatly prejudiced him in his promotional avenues and monetarily too.

3. Respondents, on the other hand, by referring to the order whereby the penalty was indicated through letter dated 21.3.95 contended that the penalty is different from what has been inflicted and this penalty was in pursuance of an order dated 26.5.94. It is stated that the applicant has been visited with a number of penalties which he has challenged the same in OA-642/98, 709/98 and 1096/98 and was removed while convicted in a bribe case on 18.9.98. It is stated that there is no procedural irregularity or illegality and the punishment is commensurate with the misconduct. Rather a lenient view has been taken against the applicant. It is also stated that the orders passed are reasoned and dealing with all the contentions of the applicant. It is contended by the learned counsel for the respondents Shri Masurkar that in a disciplinary proceeding quantum of evidence and its reappraisal is not permissible and the court cannot take a different view than arrived at by the respondents. The present case is not a case of no misconduct or no evidence even going by the test of a reasonable prudent man misconduct is apparent on the face of it despite no loss is caused the applicant has acted in a manner, unbecoming of a Railway servant, which has culminated into a punishment through orders which are sustainable in law and cannot be found fault with.

4. It is stated that the UPSC's advice is based on the evidence and there is no difference of opinion between the disciplinary as well as appellate authorities. Though there is no loss to the Railways recommendation of over payment to the contractor could have been avoided. It is also stated that the aforesaid over payment was awarded due to the communication sent by the DEO. The conclusion of the disciplinary authority is arrived at on the basis of evidence on record.

5. We have carefully considered the rival contentions of the parties and perused the material on record, including the departmental record produced before us. The first contention of the applicant regarding pre-determined mind of the disciplinary authority is not well founded as the punishment referred to is different from what has been arrived at in the present proceeding but pertains to an order passed on 26.5.94 in a separate proceeding.

6. As regards the discrimination is concerned, the enquiry officer has held Article-I as partly proved and Article IV to the extent that no loss is caused which has been taken note of and the disciplinary authority rather agreed with the findings of the enquiry officer in that event no disagreement can be said to have arrived at necessitating the requisite procedure to be followed.

7. In so far as the orders passed by the disciplinary authority and appellate authority are concerned, we have gone through the orders and find that the disciplinary authority on the basis of evidence recorded during the course of the enquiry while agreeing with the findings of the enquiry officer took a conscious decision by recording reasons which are based on material on record and cannot be found fault with.

8. The appellate order which is in consultation with the UPSC and does not suffer from any legal infirmity, wherein all the material has been gone into and meticulously dealt with by the appellate authroity, i.e., President, agreed with the advice of the UPSC and upheld the penalty order is reasoned keeping in view the UPSC advice and cannot be found fault with.

9. In so far as the contention that the finding of the enquiry officer is perverse based on no misconduct and no evidence is concerned, we do not find any material to sustain the same. The finding of the enquiry officer is reasoned dealing with all the defence contentions of the applicant as well as holding the charge proved on the basis of material brought on record. In order to interfere with such a finding as per the decision of the Apex Court in Kuldeep Singh v. Commissioner of Police, JT 1998 (8) SC 603 it is to be established that the case is of no evidence and the finding is perverse. Having perused the record we are of the considered view that though no loss has been caused to the Railways but in the manner in which the applicant has conducted himself is violative of their own guidelines and statutory rules. He acted in a manner unbecoming of Govt. servant.

10. As regards the contention that Finance Code and Vigilance Code as well as General conditions of contract has to vary and there is no malafide on the part of the applicant is concerned, being matters of fact interfering with the same would amount to assuming the role of an appellate authority in a judicial review which should be avoided as per the decision of the Apex Court. In our considered view, the conclusion of

the disciplinary authority is well founded and rather a lenient view has been taken against him. The proportionality of punishment has been taken care of by the authorities.

11. The contention of the applicant that the act does not amount to misconduct, cannot be countenanced. Neither any procedural rules have been violated nor the applicant has been deprived of a reasonable opportunity the action has been taken in consonance with the principles of natural justice. As such the orders arrived at and impugned do not suffer from any legal infirmity.

12. In the result and having regard to the reasons recorded above, we do not find any infirmity in the procedure followed or in the orders passed. The OA is bereft of merit and is accordingly dismissed. No costs.

S. Raju

(Shanker Raju)
Member (J)

Shanta J-

(Smt. Shanta Shastry)
Member (A)