

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH,

JAIPUR

Date of order: 05.05.2003

OA No.21/98

Upendra Khurana s/o Shri H.L.Khurana, aged 34 years r/o 109 Usha Colony, Malviya Nagar, Jaipur, Ex-Senior Clerk in the office of Dy. C.O.S., Kota.

.. Applicant

VERSUS

1. Union of India through the General Manager, Western Railway, Churchgate, Mumbai.
2. Deputy Controller of Stores, Western Railway, D.R.M.Office, Kota.
3. Chief Material Manager (M&S), Western Railway, Headquarter Office, Churchgate, Mumbai.
4. Assistant Controller of Stores/Enquiry Officer, Office of Dy.C.O.S., Western Railway, Kota.

.. Respondents

Mr. S.K.Jain, counsel for the applicant

Mr. U.D.Sharma, counsel for the respondents

CORAM:

HON'BLE MR. H.O.GUPTA, MEMBER (ADMINISTRATIVE)

HON'BLE MR. M.L.CHAUHAN, MEMBER (JUDICIAL)

O R D E R

Per Hon'ble Mr. H.O.GUPTA.

The applicant is aggrieved of the order dated 15.1.96 (Ann.A1) whereby the Disciplinary Authority has imposed a penalty of removal from service and also the order dated 31.3.97 (Ann.A2) of the Appellate Authority whereby his appeal is rejected. In relief, he has prayed for quashing the said orders and also for holding the applicant as on duty from the date he was removed with all consequential benefits relating to arrears of pay and

*D*

allowances, seniority, further promotions etc., on various grounds stated in this application.

2. The case of the applicant as made out, in brief, is that:-

2.1 He was appointed as Senior Clerk in Railways at Kota and during his appointment as Senior Clerk at Kota, he sought leave for 3 days w.e.f. 6.9.93 to 8.9.93. Thereafter, he fell sick and sought extension of leave vide letter dated 9.9.93. Vide letter dated 7.10.93. he requested for further extention of leave and vide letter dated 15.11.93 he reported to the Department that he is regaining his health but due to ailment of his wife, he cannot join duties. On 18.11.93, he sent a letter intimating the respondents about the change of his address from Jawahar Nagar to Malviya Nagar, Jaipur. Thereafter vide his telegrams dated 18.12.93, 8.1.94, 17.2.94 and 19.4.94, he sought extention of leave from the respondents. However, no letter refusing him permission was given by the Department. Therefore, he has reasons to presume that his leave has been approved and he is continuing on leave.

2.2 Vide letter dated 1.7.95 (Ann.A3) for the first time, he received a communication that some enquiry was fixed for 25.7.95. The above letter accompanied the standard form 5 and 6 relating to chargesheet dated 2-7/8-94 (Ann.A4) and also the letter dated 16.9.94 (Ann.A5) pertaining to appointment of Enquiry Officer. These letters were received by him at Malviya Nagar address and were delivered by hand to him. The chargesheet dated 2.7/8.94 was never sent to him earlier.

2.3 Vide his letter dated 5.7.95, he informed the

✓

Enquiry Officer that his wife is not keeping good health and he cannot attend the enquiry on 25.7.95. He further requested for some date in the last week of August. Thereafter, he did not receive any information about the date. The Enquiry Officer fixed the date as 11.10.95 vide his letter dated 27.9.95, but the said letter was received by him on 16.10.95 and, therefore, he could not attend the enquiry on 11.10.95. Thereafter, he waited for the letter from the Enquiry Officer and on non-receipt of any information, he sent a letter dated 8.1.96 (Ann.A7) asking the Enquiry Officer to intimate the next date of enquiry. He sent another letter dated 19.1.96 (Ann.A8) by U.P.C. In response to the above letters, the Enquiry Officer sent a letter dated 17.1.96 (Ann.A9) stating that he has already sent his report to the Disciplinary Authority. On the basis of the above enquiry report, the Disciplinary Authority imposed penalty of removal from service vide the impugned order dated 15.1.96 (Ann.A1). It may be mentioned here that with this order of penalty or prior to that, no report of Enquiry Officer was sent to the applicant by the respondents. Thereafter, he filed an appeal dated 29.2.96 (Ann.A10) but the same was rejected by the Appellate Authority vide the impugned order dated 31.3.97 (Ann.A2).

3. The respondents have contested this application. Briefly stated, they have submitted that:-

3.1 The applicant had taken 3 days leave from 6.9.93 to 8.9.93. Thereafter, he submitted an application dated 9.9.93 (Ann.R1) stating therein that he was not well and was undergoing treatment of the family Doctor. He did not indicate any specific period for extension of his leave nor he submitted any medical sick certificate but stated

B

that he would submit the same at the time of joining. It may be relevant to mention that as per rules, in case an employee is undergoing treatment from a private Doctor, he is required to submit information to the Medical Authority but he has not followed the rules.

3.2 In reply to the said application dated 9.9.93, the applicant was directed by telegram dated 21.9.93 to resume duty immediately. However, he submitted another application dated 7.10.93 (Ann.R2) stating therein that he was undergoing treatment of his family Doctor who has advised 25 days rest from now and he would submit the medical certificate at the time of joining. Thus, it is seen from the said two applications that he has absented on the pretext of undergoing treatment from his family Doctor without indicating the specific ailment and without furnishing medical certificate from the private Doctor.

3.3 It is submitted that the Assistant Controller of Stores, Tuglakabad vide his letter dated 5.10.93 (Ann.R3) informed the applicant at his Jaipur address, which was available in his service record, that the leave from 6.9.93 to 8.9.93 which was sanctioned to him has been cancelled by the Dy. Controller of Stores, Kota vide his order dated 7.9.93, being the competent authority to sanction the leave. The applicant was accordingly directed to join his duties immediately. He was also informed that any certificate obtained from a private Doctor for the aforesaid period will not be entertained. The said letter dated 5.10.93 was sent by Registered A.D. post, but it was received back undelivered with the endorsement that the addressee is not available as and when approached at his residence.

3.4 Thereafter, the applicant submitted an

1

application dated 15.11.93 (Ann.R4) stating that he has been undergoing treatment from his family Doctor and is now fit to join duty as per fit certificate, but due to sickness of his wife, he cannot join his duties for further one month and he would submit fitness certificate at the time of joining. From the above narration, it is clear that he did not want to resume his duties on the one pretext or the other and his conduct is not bonafide as he failed to disclose the ailment suffered by him and also failed to submit any medical certificate even from a private Doctor.

3.5 Vide letter dated 1.10.93 (Ann.R5), the applicant was directed to report for duty failing which disciplinary action will be taken against him. As regards the subsequent letter stated to have been sent by the applicant on 18.11.93 and various telegrams mentioned by him, it is categorically stated that neither the said letter nor any telegram was received in any office of the respondents meaning thereby that the applicant had not sent the said letter as well as the said telegrams. The applicant has also not annexed copies of the said letter and telegrams which establishes the fact that he has not sent the same and mentioned the factum of sending the same as an after thought.

3.6 It is also relevant to state that in the letter dated 15.11.93, he has not mentioned about the change of his address. He had alleged to have changed his address only 3 days thereafter i.e. on 18.11.93 which shows that no such letter was sent even on 18.11.93. The Dy. Controller of Stores vide his Registered AD letter dated 18.10.94 (Annexure-R6) informed the applicant that he was absenting since 9.9.93 even though he had given an

B

assurance that he would join duties after availing leave for 3 days and thereafter in spite of various communications sent to him, he had not resumed his duty. He should immediately report to the office. He was also informed that the procedure for obtaining sick certificate from private Doctor has been stopped and no such certificate would be accepted.

3.7 Yet another Registered AD letter dated 7.3.94 (Ann.R7) was sent to the applicant inviting attention to earlier letter dated 18.10.93 and informing that he had not complied with the said order and accordingly, he was again directed to report for duty failing which disciplinary action will be taken against him.

3.8 Thereafter a memorandum of chargesheet, under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968, was issued on 2.8.94 and sent by Registered AD post on the address recorded in his service-record. However, the said memorandum was received back undelivered on 13.8.94 with the endorsement that the addressee is not available on various dates mentioned, which may be perused from Ann.R8. Another attempt was made to serve the said memorandum of chargesheet vide letter dated 24.8.94 which was also received back undelivered on 5.9.94 with the endorsement that the addressee was not available on the various dates. Yet another attempt was made to send the above memorandum vide letter dated 1/4.7.95 (Ann.R9) issued by the Enquiry Officer through a special messenger who located the applicant at his Malviya Nagar residence and served the said letter alongwith memorandum of chargesheet. It was also mentioned in the said letter that the enquiry was fixed on 25.7.95 and he was directed to appear before the Enquiry Officer alongwith his Defence Assistant failing which the enquiry will be proceeded in

D

his absence and the report will be submitted to the Disciplinary Authority. From this fact, it is abundantly clear that in spite of many communications sent to him, he deliberately avoided to resume duty and no application has been submitted by him even upto 5.7.95. when the chargesheet was served on him and he deliberately avoided receipt of the letters from the Department by deliberately not intimating change of his address which shows that the applicant was not interested in performing duties at all.

3.9 The enquiry was fixed on 25.7.95. The applicant anticipated that his wife would be sick on that date resulted in non appearance in the enquiry. He had taken his wife's future possible sickness as a pretext for not appearing in the enquiry on 25.7.95, vide his application dated 5.7.95 i.e. 20 days before the date fixed in the enquiry. Therefore, it shows the conduct of the applicant that he avoided the enquiry and present himself in the office under any pretext. On receipt of letter dated 5.7.95 from the applicant, the Enquiry Officer vide his letter dated 17.7.95 (Ann.R10) sent by Registered AD post directed the applicant to make appearance in the enquiry on 25.7.95 failing which the enquiry will be concluded and the report will be submitted to the Disciplinary Authority. However, the applicant did not bother to attend the enquiry on the said date nor submitted any application to the department to adjourn the enquiry. However, the Enquiry Officer considered it proper to give one more opportunity, sent a letter dated 27.9.95 (Ann.R11) by Registered AD post informing him to appear in the enquiry on 11.10.95 clearly indicating that this was the last opportunity given to him and in case he did not appear in the enquiry, the enquiry will be finalised and the report

D

will be submitted to the Disciplinary Authority for which the applicant alone will be responsible. The applicant admits that he received the said letter of 27.9.95 only on 16.10.95 without substantiating this position. It is, therefore, assumed that he had received the said letter dated 27.9.95 well before 11.10.95 but with a view to avoid the enquiry he has deliberately mentioned the date of receipt as 16.10.95. About the delayed receipt of the letter, he was required to sent an application to the Enquiry Officer praying for another date. The silence of the applicant from 16.10.95 to 8.1.96 clearly shows his malafide intention to avoid the enquiry. Even in the letter dated 8.1.96 sent by him to the Enquiry Officer, he did not mention that he was waitig for further communication from the Enquiry Officer about intimation of the date fixed in the enquiry. He has simply requested in the said application that the next date of enquiry may be fixed and intimated to him so that he may appear in the enquiry. He has not explained his silence from 16.10.95 to 8.1.96 as to why he had sent the said application after a period of about 2½ months.

3.10. It is submitted that since the applicant neither appeared before the Enquiry Officer on 11.10.95 nor submitted any application, the Enquiry Officer, in the meantime, had finalised the report on 8.11.95 and submitted the same to the Disciplinary Authority who vide his letter dated 11.11.95 (Ann.R12) sent a copy of the enquiry report to the applicant by Registered AD post advising him to submit his representation within 15 days failing which final decision will be taken. However, the said Registered letter was received back undelivered with the endorsement that the addressee was not available. Thereafter the said

D

letter was sent through a special messenger but since the applicant was not found there on 13.11.95 as well as on 14.11.95, the said letter was received by the land-lady of the applicant with the assurance that she will deliver the same to the applicant, copy of the note recorded by the special messenger dated 15.11.95 is annexed at Ann.R13.

3.11 It is further relevant to submit that on receipt of the letter dated 8.1.96, which was received by the Enquiry Officer on 17.1.96, the Enquiry Officer vide his letter dated 17.1.96 informed the applicant that he was given various opportunities for hearing but he ignored the same and did not appear in the office and with the result he has submitted the enquiry report to the Disciplinary Authority.

3.12 Since the applicant did not submit any written statement of defence or any application indicating the said omission (failure to mention the list of documents and list of witnesses), such failure would not have caused any prejudice to the applicant.

4. In rejoinder, the applicant has controverted various contentions of the respondents and have also filed Ann.A11 to Ann.A18 containing copies of the telegrams, letter dated 18.11.93 to ACOS under UPC and copy of the envelop dated 6.10.95.

5. Heard the learned counsel for the parties and perused the record.

5.1 During the course of arguments, the learned counsel for the applicant submitted that he will limit his contention to the following:-

5.1.1 From the chargesheet it would be seen that the

D

only article of charge relates to his unauthorise absence from 6.9.93 till date. It further states that in spite of letters being sent to him, the applicant has not attended his duty. His contention is that the applicant was granted leave from 6.9.93 to 8.9.93 which was later on cancelled and the applicant, as per submissions of the respondents, was informed vide their letter dated 1.10.93 (Ann.R5). Further that in their letter dated 18.10.93 annexed by the respondents at Ann.R6, they themselves have stated that the applicant was unauthorisedly absent from 9.9.93. Therefore, the charge of being absent unauthorisedly from 6.9.93 is itself incorrect and, therefore, cannot sustain. He further submitted that as is evident from the chargesheet on record, there is neither a list of documents nor any list of witnesses through whom the article of charge is sustained, is mentioned nor annexed with the chargesheet. Therefore, the charge that in spite of letters having been sent, the applicant did not report for duty cannot sustain without any supporting documents, moreso when they are not proved during the said alleged ex-parte enquiry.

The contention of the learned counsel for the respondents is that such errors or omissions have not prejudiced the applicant. We have considered the submissions of the learned counsel for the applicant as also the submissions of the respondents, we are of the view that part of the charge relating to being absent unauthorisedly w.e.f. 9.9.93 still remains valid.

5.1.2. The second contention of the learned counsel for the applicant is that without serving the chargesheet and waiting for written statement of defence from the applicant, the Disciplinary Authority has appointed the Enquiry Officer. He further submitted that it is the

*D*

Enquiry Officer, who has sent a copy of the chargesheet alongwith notice for appearing before him for enquiry. He also submitted that ordering of the enquiry without serving the chargesheet and seeking for the written statement of defence, is gross violation of the rules to the prejudice to the applicant, since the applicant is deprived of the opportunity of making written statement of defence for consideration by the Disciplinary Authority. In support, he further submitted that it is apparent from the reply of the respondents and the record that there was no proper communication to the applicant. The applicant had changed his residence and informed the respondents vide his letter dated 18.11.93 (Ann.A17) about his new address. The repondents had sent the chargesheet dated 2.8.94 on the address as per the service record which came back undelivered. The chargesheet was never issued to him before ordering enquiry which is in violation of the principles of natural justice. He further submitted that as per laid down law, mere sending a Registered AD letter and when the letter is returned back by the Post Office stating that the person is not available at this address, would not mean proper communication in such cases as per laid down law. The learned counsel for the respondents submitted that they never received the letter informing the change in his address.

We have considered the submissions of the rival parties. We are of the view that the enquiry was ordered without proper service of chargesheet and without waiting for the statement of defence.

5.1.3 The third contention of the learned counsel for the applicant is that ex-parte enquiry is liable to be quashed alongwith punishment order on the ground that the

D

Enquiry Officer has violated Sub-rule 11 of Rule 9 by not giving any notice to the applicant to appear before him by giving 10 days clear notice and also specifically mentioning that on failure to attend the enquiry, an ex parte enquiry would be conducted. Such notice was never sent to the applicant and on this account alone the proceedings are vitiated. We find force in this contention of the learned counsel for the applicant.

5.1.4 The fourth contention of the learned counsel for the applicant is that the enquiry report as admitted by the respondents was not served on the applicant but was handed over to the land lady. The land lady never gave the copy of the enquiry report and if it was so, he would not have sent the letter dated 8.1.96 to the respondents seeking for the next date of enquiry. He further submitted that without giving opportunity of representing on the enquiry report, the Disciplinary Authority imposed the said penalty. Since the enquiry report was never received by him, imposing of the penalty without hearing on the enquiry report, is in violation of the principles of natural justice. We also find force in the contention of the learned counsel for the applicant.

5.1.5 On the other hand, the main contention of the learned counsel for the respondents is that as is evident from their reply, the applicant has been avoiding service of various letters. Further, he has been absenting without any permission, in spite of letters given to him. He also submitted that under no stretch of imagination, absence for such a long period from duty on account of his illness or his wife's illness without submission of medical certificate even from a private Doctor, establishes that he was intentionally not joining the duty on the pretext

of his sickness or his wife's sickness. Certain omissions or errors on the part of the respondents could not have prejudiced the applicant as it is established on the face of record that the applicant was not joining the duties in spite of sending letters to join immediately, on one pretext or the other. The applicant has been absenting for a long period for no valid reason.

5.1.6 The last contention of the learned counsel for the applicant is that even presuming, but not admitting, that the applicant remained absent from duty and did not produce medical certificates alongwith his applications seeking extension, this case would be a case of overstaya since he went to his home with prior sanction of 3 days leave. It cannot be said to be wilful absence from duty as the applicant had sent letters for seeking extension for his own and his wife's sickness. Further, he was never punished in the past on any such account, moreso the article of charge does not mention about his past conduct of being habitual offender on this account. In fact, it is the first incident. Therefore, the punishment of removal from service is grossly disproportionate to the misconduct, if any. He further submitted that the applicant has long years of service since he was only of about 32 years of age at the time of punishment.

6. We have considered the submissions of the parties and gone through the material on record. It is established that the applicant has been absenting w.e.f. 9.9.93 without following rules/instructions and also without proper reason for the whole period of absence. There is nothing on record that he ever submitted medical certificates. However, the applicant went to his home with

D

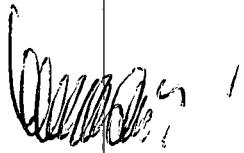
prior sanction of 3 days' leave. Cancellation of leave later on and informing the applicant after a month is of no consequence. Therefore, it is a case of overstayal without proper sanction. Since the respondents have not followed the rules/procedure in conducting the enquiry, normally in such cases the punishment order is required to be quashed with liberty to the respondents to conduct fresh enquiry from the stage of service of chargesheet to the applicant, but keeping in view the fact that it is over 8 years when the chargesheet was issued and over 7 years when the penalty order for removing him from service was issued, conducting fresh enquiry may neither be in the interest of the applicant nor in the interest of the department. Moreso, when it is established that the applicant has been absenting for quite some time without proper reasons and has failed to submit medical certificate alongwith extension application. Keeping in view the nature of misconduct and the fact that it is a case of overstayal as also the fact that there is no charge on the applicant of being habitual offender, we are of the firm view that the penalty of removal from service is grossly excessive.

7. In view of above discussions, this OA is disposed of with the direction to the applicant to file a revision petition to the Revising Authority within 3 weeks from today alongwith a copy of this order, with copy to respondent No.3 for information, and by speed post to avoid delay. In that event, the respondents are directed to ensure that the Revising Authority passes appropriate order on the quantum of penalty, lower than the penalty of dismissal, removal or compulsory retirement and within 6

✓

: 15 :

weeks from the date of receipt of the revision petition. No order as to costs.

  
(M.L.CHAUHAN)

Member (J)

  
(H.O.GUPTA)

Member (A)