Central Administrative Tribunal
Principal Bench

OA No.437/2012

Order pronounced on: 21.10.2016

Hon'ble Mr. Justice M.S.Sullar, Member (J)
Hon'ble Mr. V. N. Gaur, Member (A)

Sh. Abhay Manglik, Executive Engineer
DCWE (E/M)
HQ CWE, Military Engineer Services
112, Taj Road, Agra Cantt.

- Applicant

(By Advocate: Sh. O.P.Kalshian)

Versus

Union of India through

1. Secretary,
   Ministry of Defence
   South Block, New Delhi-110011.

2. Secretary,
   Department of Personnel Pension &
   Pensioners Welfare,
   North Block, New Delhi-110001.

3. Secretary,
   UPSC, Dholpur House,
   Shahjahan Road, New Delhi.

4. Engineer-in-Chief,
   Integrated Headquarters of MOD (Army)
   Kashmir House,
   Rajaji Marg, New Delhi-110011.

- Respondents

(By Advocate: Sh. Rajesh Katyal)

ORDER

Hon'ble Mr. V.N.Gaur, Member (A)

The applicant has filed the present OA seeking the following relief(s):

"(a) Allow the Original Application

(b) Quash and set aside the Presidential order No. C-13011/4/D (Vig-II)/05 dated 23 March 2011. Charge Memo No. C-13011/4/D (Vig-II)/05 dated 25 April 2008 and Inquiry Proceedings.

(c) Quash and set aside the amendment to penalty order vide Presidential order No. C-13011/4/D(Vig-II)/05 dated 04 Feb 2013. Annexure A1/2.

(d) Grant financial upgradation which has been denied due to deliberate and inordinate delay of 8 years in finalisation of Disciplinary Proceedings with interest.

(e) Payment of amount with interest which is deducted against penalty order.

(f) Pass any other order which may be just and proper in the facts and circumstances of the case.

(g) Award exemplary cost in favour of the applicant and against the respondents."

2. The brief facts of the case are that the applicant was working as an Executive Engineer (EE) under respondent no.4 when he was served with a memorandum of charge alleging the following:

"That the said MES-263367 Shri Abhay Manglik, EE, while functioning as GE (I) R&D Delhi during the period from Dec 2001 to Apr 2005, concluded the following contracts, in which irregularities such as higher rates compared to similar CAs in the succeeding year, not preparing the market analysis and accepting reduction in the CA amount by the contractor after last date for receipt of the tenders were committed, in violation of Rule 30 (k) of MES Regulations:-

(a) CA No. GE/R&D-36/2003-04: The work 'Periodical Services at M'House under GE (I) R&D Delhi'.

(b) CA No. GE/R&D-95/03-04: The work 'Certain repairs of leakage seepage in toilet and roof sanitary items etc. in KWC area under GE (I) (R&D) Delhi'.

(c) CANo.GE/R&D-85/03-04:Comprehensive Maintenance of 14 Passenger Lifts.

(d) CA No. GE/R&D-105/2003-04: The work 'Maint and Operation of Pump House, DG Set, Elect Sub Stn at CFEES under GE (I) (R&D) Delhi'."

3. The applicant denied all the charges following which a departmental enquiry (DE) was conducted. The Enquiry Officer (EO) in his report dated 29.04.2009 concluded that the charges of non-preparation of market analysis, acceptance of tender with reduction from the quoted amount/deletion of certain items, and inadequate competition in tendering are proved. On a reference from the respondents, the CVC vide OM dated 08.11.2010 advised imposition of major penalty on the applicant. A copy of the enquiry report and CVC's advice were provided to the applicant for furnishing his representation. The Disciplinary Authority (DA), having considered the enquiry report and the representation submitted by the applicant, vide order dated 23.03.2011 imposed the penalty of reduction to a lower stage in the scale of pay for a period of five years with further direction that the applicant shall not earn increments of pay during the period and on expiry of this period the reduction will not have the effect of postponing the future increments of pay. The applicant has challenged the impugned order on the following grounds:

(1) Applicant had never negotiated with L-1 for reduction in the rate. The vendors had reduced their rates voluntarily.

(2) He had prepared the market analysis but the same was not found in record. He could not be held responsible

for non-maintenance of records properly by the concerned office.

(3) A new charge of 'irregularity in procurement of stores' was added by the respondents after completion of enquiry.

(4) There was an inordinate delay of about five years in initiating the case and three years in processing and finalising the same.

(5) The charges referred to the CVC at the time of seeking first stage advice were changed by the respondents without the knowledge of CVC. The charge of 'irregularity in procurement of stores' was not intimated to the applicant even while sending the report of the IO.

(6) The DA has decided the punishment by considering violation of para 3.14.1.4 of Instruction of Contract Manual, 2007 which came in force w.e.f. January 2007 while the contracts mentioned in the charge memo were accepted during the year 2003-04. Therefore, the aforesaid Manual cannot be enforced retrospectively.

(7) The respondents have not listed any document or provisions in the rules existing in 2003-04 that debar the acceptance of lowest and reasonable tender by

considering the voluntary reduction offered by the lowest tenderer.

(8) The respondents have ignored the fact that during the relevant period of acceptance there were other accepting officers under the jurisdiction of same technical authority, i.e. ADG (OF and DRDO) who accepted contracts after considering voluntary reduction under 482 contracts, some of whom have been mentioned in para 5 (G) of the OA. There are other senior officers who also accepted contracts after voluntary reduction prior to 2007. During the DE the applicant had given details of 720 contracts by various accepting officers with similar reduction.

(9) In the Presidential order the penalty has been imposed on account of 'irregularities in procurement of stores' but the charge memo was issued with alleged irregularities in acceptance of tenders in execution of work and not on procurement of stores.

(10) There is discrimination and vindictiveness on the part of the respondents because in a case of similar nature one Sh. Suresh Chander, Chief Engineer Pathankot Zone during the year 2006-09 committed misconduct of not preparing market rate analysis in 12 contracts,

accepted voluntary reduction in two contracts, violated Government Instructions, and obtained reduction by indulging in negotiation with L1 despite para 3.14.1.4 of Contract Manual-2007 being in force. However, only the penalty of displeasure was awarded to Sh. Suresh Chander.

(11) The respondents did not make any reference to the UPSC as mandated under the CCS (CCA) Rules.

4. Learned counsel for the applicant submitted that the applicant has not committed any illegality in accepting rates lower than L1 when there was no law prohibiting the same. The CVC direction envisages that the Tender Accepting Authority shall not negotiate with the lowest tenderer. In the cases mentioned in the charge sheet the reduction was provided voluntarily without being asked by the applicant. During the DE nothing has been placed on record that could prove that the applicant had entered into negotiations with L1. Further, according to the MES Manual misconduct could be established only when there is a loss to the Government. In the present case instead of loss there has been a favour given to the Government and the procedure that was brought into force in January 2007 could not be enforced in the year 2003-04 when the contracts were finalised. The applicant during the enquiry has brought on record ample number of cases

where within the same zone accepting officers had accepted voluntary reduction by L1. In other zones also senior officers had accepted similar reductions in a large number of cases but the department did not initiate action against any of those accepting officers. According to the learned counsel, it is a settled principle of law that there should be parity among the officers if the misconduct is the same. In this case for similar misconduct some of the officers have been let off by the same DA but in the instant case a major penalty was imposed on the applicant. The non-application of mind by the concerned authority is proved by the fact that the EO had proved the charge of non-preparation of market analysis, acceptance of tenders with reduction from the quoted amount and deletion of certain items and inadequate competition in tendering whereas the DA vide its order dated 23.03.2011 imposed major penalty on the basis of the conclusion that the applicant had "committed irregularities in procurement of stores". There was no such charge either in the show cause notice or in the memorandum of charges. When the applicant submitted a Revision Petition, the Revisioning Authority by Memorandum dated 04.02.2013 amended the charge to "irregularities in administration and execution of contracts" which was never the charge during the DE.

5. Learned counsel referred to the notification dated 01.09.1958 which mandated that in case of all officers except those who are exempted by that notification, the UPSC shall be consulted for imposition of the major penalty of reduction to a lower stage in the time scale of pay for a specified period. The applicant is a civil employee governed by the CCS (CCA) Rules, 1965 and, therefore, his case should have been referred to the UPSC before imposition of penalty by the respondents. Learned counsel relied on judgment of Hon'ble Supreme Court in **Indian Administrative Service (S.C.S.) Association, U.P. and others vs. Union of India and** others, (1993) 23 ATC 788 in support of his contention that once the rule mandated a consultation with UPSC, decision by the respondents without such consultation was not valid legally. During the oral arguments, learned counsel for the applicant argued only on the point of the disciplinary proceeding but did not press for the prayer pertaining to grant of financial upgradation. The learned counsel cited the following judgments on various ground taken by him:

Delay in issuing chargesheet

Comment [V1]: There are more judgments in the file

1. **R.P.Nanda vs. DDA & others of Delhi High Court**, DLT (2004) 614 (Vol CIX).

2. **Rajinder Singh vs. DTC & ors.**, 2012 (2) AISLJ 162

3. **Than Singh vs. U.O.I. and others** of Hon'ble High Court of Delhi in CWP no.3448/1998 decided on 19.09.2002 – ATJ 2003 (3) 42

4. **B.Loganthan vs. Union of India**, 2001 (1) ATJ 289

5. **P.K.Panda vs. Union of India and others**, (1992) ATC 792

6. **Ashok Kapoor vs. Union of India and ors.**, 2002 (3) ATJ 138

7. **State of Andhra Pradesh vs. N.Radhakishan**, JT 1998 (3) SC 123

Non-application of mind

Naginbhai Parshottambhai Patel vs. Union of India and others, [OA No.368/2012 decided on 08.08.2013 by Ahmedabad Bench of this Tribunal]

Non-speaking orders

1. **Vasudeo Vishwanath Saraf vs. New Education Institute & Ors,** 1986 AIR 2105

2. **Vivek Vikas & ors. vs. Bihar State Electricity Board & ors.**, 2014 (1) AISLJ 475

Discrimination

1. **Amitabh Thakur vs. UOI**, AISLJ 2013 (I) (CAT) 143

2. **Ravendra Mohan Dayal vs. Union of India & ors.**, 2002 (3) ATJ 449

Chargesheet not maintanable due to frequent changes in the decision of the DA regarding Article of Charges

Than Singh vs. U.O.I. and others of Hon'ble High Court of Delhi in CWP no.3448/1998 decided on 19.09.2002 – ATJ 2003 (3) 42

Executive instructions can not change the statutory regulations

Punjab Water Supply & Sewerage Board vs. Ranjodh Singh & others of Hon'ble Supreme Court in Civil Appeal no.5632/2006 decided on 06.12.2006

6. Learned counsel for the respondents denied the contentions raised by the learned counsel for the applicant and said that in a case of disciplinary proceeding the Tribunal had to confine its power of judicial Revision to see whether the DA had conducted the disciplinary proceeding in accordance with the rules and law. The Tribunal is not the appellate authority against the orders of the respondents. The applicant was given full opportunity to defend himself against the charges and it is not his case that there was any shortcoming in the procedure followed by the DE. Law is well settled that the Tribunal is not to look into the quantum of penalty, which is the prerogative of the DA. The only shortcoming alleged by the applicant in the proceedings is that the advice of UPSC has not been obtained. In this regard, learned counsel referred to the Handbook for Inquiry Officers and Disciplinary Authorities brought out by the Institute of Secretariat Training and Management on 25.09.2013 where in Clause 2 of Chapter 26 it has been clarified that disciplinary cases of the person paid from the Defence Services Estimates, including defence civilians, are outside the purview of the consultation with the UPSC. The applicant is also a civilian employee being paid from the Defence Services Estimates and, therefore, his case was covered by the aforesaid exemption. Regarding the merits of the case learned counsel submitted that the main allegation against the applicant was that he adopted the unethical practice of

negotiating with the lowest tenderer and obtained reduction in the quoted amount. He referred to para 3.14.1.4 of the Manual of Contracts which clearly prohibits this practice. This para though formed part of the manual compiled in 2007, but it existed in the form of instruction earlier also. The learned counsel relied on the judgment of Hon'ble Supreme Court in **State of U.P. & anr. vs. Man Mohan Nath Sinha & ors.,** (2009) 8 SCC 310.

7. Rejoining, the learned counsel for the applicant reiterated his arguments about the fact that the charges were not proved beyond doubt. It was based on surmises and conjectures which were not part of article of charges as the Manual of Contracts, which is the basis of initiating the DE came into force on July 2007 and the alleged incident pertains to 2003-04. Learned counsel also referred to a case of one Sh. Brahmanand, JSW (QS&C) who faced a disciplinary action on similar charges. Vide affidavit filed on 17.03.2015 the documents pertaining to that proceeding has been placed on record. He submitted that Sh. Brahmanand, JSW (QS&C) in the office of GE (I) R&D Delhi was the one who was to advise the applicant in processing the tender matters. The memorandum of charges against Sh. Brahmanand contained two articles of charge in which one article of charge was identical to that of the memorandum of charge against the

applicant. However, in his case the respondents decided to drop the disciplinary proceeding but denied parity to the applicant.

8. We have heard the learned counsel for the parties and perused the record. The main grounds of challenge of the impugned order are that

(i) There was delay in initiating departmental action against the alleged lapses on the part of the applicant which prejudiced his defence.

(ii) The respondents were required under the law to consult UPSC before imposing any penalty on the applicant.

(iii) There was no application of mind as could be seen from the different versions of charge mentioned in the Show Cause Notice, memorandum of charge and in the order of the DA.

(iv) There has been large number of similar cases in the department prior to 2007 but no action was taken against the concerned persons.

(v) Sh. Brahmanand, JSW (QS&C) was equally responsible for the aforesaid lapses but the case against him was dropped.

(vi) The sole basis of initiating disciplinary action is the alleged violation of para 3.14.1.4 of Manual of Contracts, 2007 but the same could not be applied to the transactions taken place in the year 2003-04.

(vii) The penalty imposed was disproportionate.

9. With regard to delay it is noted that the tendering process was related to the works pertaining to the year 2003-04. The Show Cause Notice was issued to the applicant on 15.02.2007. In the case of **B.C. Chaturvedi vs. Union of India and Ors,** 1996 AIR 484 the Hon'ble Supreme Court has held that delay by itself cannot be regarded as violative of Art 14 or 21 of the Constitution. The applicant has to establish that there was prejudice caused to him by the alleged delay, which he has not been able to do in the present case. The case law cited by the applicant on the issue of delay in issuing of charge sheet and conducting the disciplinary proceeding are not relevant in the present context.

10. Qua consultation with UPSC which according to the learned counsel for the applicant was mandatory, we agree with the argument of the learned counsel for the respondents that the rules do not envisage so in the case of a civilian employee paid from Defence Services Estimates. The Hon'ble Supreme Court judgment in **Indian Administrative Service (SCS) Association, U.P., and others** (supra) will not be of any assistance to the

applicant. It has been stressed repeatedly by the learned counsel for the applicant that the Manual of Contract 2007, which has been mentioned by the DA in the order dated 23.03.2011, could not have been applied retrospectively. However, we find that, as underlined by the learned counsel for the respondents, the Manual of Contract issued in 2007 is only a compilation of the existing orders regarding all policy matters issued till the date of compilation. Para 3.14.1.4 is actually a reiteration of para 21 of E-in-C's Branch letter no. 33416/E8 dated 27 May/26 June 1976 which stipulates as under:

> "Negotiation with Contracts: It is important to remember that no negotiation with the contractor, even if he is the lowest, tenderer are permissible. The lowest tenderer may be addressed in writing, if his tender is otherwise found acceptable, only with regard to certain clarification found necessary due to error or discrepancies discovered during the scrutiny of the tender or in respect of freak rates which are much on the higher side."

11. Thus there is no force in the contention of the applicant that no such instruction existed prior to the promulgation of Manual of Contract in January 2007. This instruction also cannot be treated as an amendment to the RMES Regulation 30 (k) as that Regulation is silent on the issue of reduction obtained from or offered by L1 vendor. There is no conflict between the two. Therefore the contention that the executive instructions cannot override the Regulations is without any basis.

12. Reference by the learned counsel for the applicant to the case of Sh. Brahmanand, JSW (QS&C) does not appear to be apt because, though the allegations against the applicant and the first article of charge against Sh. Brahmanand, JSW (QS&C) were identical, the disciplinary proceeding against Sh. Brahmanand was dropped vide order dated 14.10.2011 (Page 153 of the paper book) due to the fact that he retired on 31.07.2004. The question before the DA was whether to proceed under Rule 9 (2)(b) (ii) of CCS (Pension) Rules, 1972 against the applicant. E-in-C's Branch had pointed out that as per the provision of Rule 9 (2)(b) (ii) of CCS (Pension) Rules, 1972 the charge memo cannot be issued after 4 years after the date of event if he was served while in service. Since more than 4 years had passed when it was proposed to issue charge sheet to Sh. Brahmanand, the respondents decided to drop the disciplinary proceedings against him. Obviously that benefit is not available to the applicant.

13. The applicant had raised the ground of parity with the officers involved in hundreds of similar contracts concluded in the department. In Para 5 (G) of the OA, the applicant has quoted summary details of 482 contracts obtained under RTI showing that other Accepting Officers under the jurisdiction of the same technical authority i.e. ADG (of and DRDO) had also accepted contracts after considering voluntary reduction. In para 5 (H), he

has quoted six specific instances of Senior Engineer Officers of the Department accepting contracts after considering voluntary reduction prior to issue of Contract Manual-2007. These have not been responded to by the Counter filed by the respondents. The applicant has averred that he had submitted in the DE authenticated data in respect of 720 contracts in which various Accepting Officers had accepted voluntary reductions. However, these specific averments had not been dealt with by either the Enquiry Officer or other authorities. In the para 5.3.2 (iii) of the report, the EO has noted two such cases but did not deal with it in the final analysis. In para 4(a)(v) to 4 (a)(ix) of the Revision Petition of the applicant dated 16.05.2011, these issues were again raised. However, the Revisioning Authority in the order dated 04.02.2013 did not deal with these contentions.

14. It is trite that the Appellate or Revisioning Authority has to deal with all the contentions raised in the representation of the employee which is a statutory requirement under CCS (CCA) Rules. The Courts have held that wherever the authority discharging the function as a quasi-judicial authority it is necessary that orders in such proceedings are issued by recording of reasons in support of the decision as it ensures that the decision is reached according to law and is not a result of caprice, whim or fancy or reached on ground of policy or expediency. The

necessity to record reasons is greater if the order is subject to appeal. (**Mahavir Prasad vs. State of U.P** (AIR 1970 SC 1302). In **Roop Singh Negi vs. Punjab National Bank & Ors** Civil Appeal No. 7431 OF 2008, the Hon'ble Supreme Court has held that as the orders passed by the disciplinary authority as also the appellate authority have severe civil consequences appropriate reasons should have been assigned in those orders. In the present OA, the order of the DA dated 23.03.2011 imposing major penalty on the applicant does not comment at all on the contention of the applicant in his representation that the evidence produced by the Charged Officer was not considered during the enquiry. The Revisioning Authority also did not touch upon the points raised in the petition of the applicant.

15. There is, also, substance in the allegation made by the applicant that there was no application of mind on the part of the respondents in dealing with his case. The Show Cause Notice dated 15.02.2007 refers to "irregularities in execution of the contracts" which pertained to accepting rates in 2003-04 higher than the ones in 2004-05. In the statement of articles of charge the irregularities have been expanded to "higher rates compared to CAs in the succeeding year, not preparing the market analysis and accepting reduction in CA amount by the contractor after the last date for receipt of the tenders". In the order passed by the

DA it had been stated that President had come to the conclusion that applicant had committed "irregularities in the procurement of stores". The Revisioning Authority after considering the Revision Petition modified the charge. The order notes that the no new material or evidence which could not be produced or were not available at the time of passing earlier order and which has the effect of changing the nature of the case, had been brought out by the charged officer in the Review application. But the authority on the basis of the same material decided to modify the charge itself from "EE has committed irregularities in procurement of stores" to "EE has committed irregularities in administration and execution of contracts mentioned in the charge". It is apparent that the respondents have been changing their minds from the stage of Show Cause Notice to final order passed on the Revision petition. It is a clear case of non-application of mind in considering the replies submitted by the applicant at the stages of the Show Cause Notice, the report of the EO and Revision. The orders passed by the authorities create an impression as if the authorities are trying to fit the "charges" to the penalty already decided to be imposed on the applicant.

16. The applicant was confronted with a situation where he did not know the exact charge levelled against him. It was a clear denial of opportunity of defence and violation of the principles of

natural justice. Besides the shifting stand of the respondents regarding the charge, in the articles of charge the words used are "irregularities such as". This is again a vague phrase taking shelter of which some new allegations can always be added. This is another indicator of the vagueness of charge and non-application of mind by the DA.

17. In the case of **Than Singh** (supra) the Hon'ble Delhi High Court has held that:

> "It is now a well-settled principle of law that validity of a charge-sheet can be questioned on a limited ground. It is also well-settled that normally the court or the Tribunal does not interfere at the stage of show-cause. However, once the disciplinary proceedings are over, there does not exist any bar in the way of delinquent officer to raise all contentions including ones relating to invalidity of the charge-sheet. The grounds upon which the correctness or otherwise of the charge-sheet can be questioned are:
>
> (i) If it is not in conformity with law.
>
> (ii) If it discloses bias or pre-judgment of the guilt of the charged employee.
>
> (iii) There is non-application of mind in issuing the charge-sheet.
>
> (iv) If it does not disclose any misconduct.
>
> (v) If it is vague.
>
> (vi) If it is based on stale allegations.
>
> (vii) If it is issued mala fide."

The charges against the applicant in this case suffer from non-application of mind and vagueness.

18. We are, therefore, of the view that in background of the discussion in the preceding paras the impugned orders passed by the DA and Revisioning Authority cannot be sustained.

19. The orders of the Disciplinary Authority dated 04.02.2013, Revisioning Authority dated 23.03.2011 and 4.02.2013 and the charge memo dated 25.04.2008 are, therefore, quashed and set aside. The applicant shall be entitled to all consequential benefits including financial upgradation and arrears. The orders shall be complied with within a period of three months from the date of receiving a copy of this order. No costs.

(V.N.Gaur)
Member (A)

(Justice M.S. Sullar)
Member (J)

'sd'

October, 2016