

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH : HYDERABAD**

Original Application No. 529/2016

Date of C.A.V. : 06.07.2018

Date of Order : 16.11.2018

Between :

P.R.M. Rao, S/o Jagannadha Rao,
aged 40 years, Occ : Loco Pilot (Goods),
O/o The Chief Crew Controller,
East Coast Railway,
Waltair Division, Visakhapatnam.

... Applicant

And

1. Union of India, represented by
The General Manager,
East Coast Railway,
Chandrasekharpur, Bhubaneswar.
2. The Chief Operations Manager,
East Coast Railway,
Chandrasekharpur, Bhubaneswar.
3. The Additional Divisional Railway Manager,
Waltair Division, East Coast Railway,
Visakhapatnam.
4. The Senior Divisional Mechanical Engineer,
Waltair Division, East Coast Railway,
Visakhapatnam. ... Respondents

Counsel for the Applicant ... Mr.K.R.K.V.Prasad, Advocate

Counsel for the Respondents ... Mr.D.Madhava Reddy, S.C. for Rlys.

CORAM:

ORDER

{ As per Hon'ble Mr.Justice R.Kantha Rao, Member (Judl.) }

A disciplinary enquiry was initiated against the applicant who was a Loco Pilot (Goods) at Rayagada in Waltair Division of East Coast Railway in respect of a misconduct of unauthorized absence for a period of 245 days and for reporting sick without leave or prior permission from the department and producing a private medical certificate for a period of 82 days. The Enquiry Officer after conducting enquiry into the charges found that the certificate of sickness issued by the private medical officer for a period of 82 days was not valid as per the Rules. Further the applicant was unauthorisedly absent for 245 days without prior permission or leave and consequently held that the charge levelled against the applicant was proved. On receiving the enquiry report the Disciplinary Authority imposed a penalty of stoppage of increment for 3 years with cumulative effect by order dated 27/31.03.2015. The Enquiry Officer as well as the Disciplinary Authority found that under Rule 3.1(ii)(iii) of Railway Services (Conduct) Rules, 1966 the act committed by the applicant amounts to misconduct. The Disciplinary Authority imposed the punishment of stoppage of increment for 3 years with cumulative effect. Aggrieved by the penalty order passed by the Disciplinary Authority the applicant filed an appeal dated 30.04.2015 before the Appellate Authority for consideration, the Appellate Authority upheld the penalty order passed by the Disciplinary stating that no new points have been brought out

in the appeal. The applicant filed a revision petition on 04.08.2015 and the revision petition was also dismissed.

2. According to the applicant reporting sick frequently cannot be construed as a misconduct under disciplinary rules, there is no specific rule which states that medical certificate issued by the Railway doctor has to be produced and as his absence was not wilful or intentional, he could not be found guilty of the alleged misconduct. The other submissions made by him are that none of the authorities recorded a finding that the absence is wilful, no presenting officer has been appointed by the Enquiry Officer and also that he was not examined by the Enquiry Officer on the circumstances appeared against him after recording the entire evidence and therefore the enquiry is vitiated for nonobservance of principles of natural justice.

3. The respondents in their reply statement contended inter alia as follows :

The applicant was transferred to Rayagada as Loco Pilot (Goods) on 02.01.2013 and ever since he joined at Rayagada was irregular to his duties which is evident from the abstract muster produced by the Chief Crew Controller. The applicant had remained absent unauthorizedly for a total 245 days had reported sick on Private Medical Certificate on 09 occasions total cumulative 82 days.

4. As per para 3.1(ii)(iii) of Railway Services (Conduct) Rules, 1966 every railway servant shall at all times maintain devotion to duty and do nothing which

is unbecoming of a railway servant. A railway servant who habitually fails to perform the task assigned to him shall be deemed to be lacking in devotion to duty.

5. The applicant requested to nominate Sri N.Bhaskar Rao, Retd.SLI/VSKP as his defence counsel which was accepted by the Inquiry Officer. The defence counsel has requested for supply of some additional documents and accordingly all the relevant documents were supplied. Therefore reasonable opportunity was given to the applicant to defend the D&A proceedings. As regards the contention of the applicant that earlier charge memorandum dated 11.07.2014 was cancelled and subsequently another charge memorandum dated 18.08.2014 was issued, it is submitted by the respondents that as per the abstract muster submitted by the Chief Crew Controller, Rayagada for the period from 03.01.2013 to 27.06.2014 the earlier charge memorandum was cancelled and a new charge memorandum was issued incorporating the correct dates of unauthorized absence which is within the competence of the Disciplinary Authority. The preliminary enquiry was held on 17.10.2014 and the sitting of the Enquiry Officer was fixed on 11.11.2014, but the applicant did not attend the enquiry reporting that he became sick. Therefore according to the respondents the applicant as well as his defence counsel were absent on the date fixed for enquiry, the enquiry was proceeded. As there is no Presenting Officer on behalf of the railway administration the Enquiry Officer himself acted as Presenting Officer as there is no bar to act as Presenting Officer.

6. Nextly it is contended that as per the extant rules the employees residing within the radius of 2 ½ kms to railway health unit should only report at railway hospital for treatment or reporting sick. But the applicant failed to comply with the said rules though he is residing within the 2 kms radius to railway hospital and it is done by him in deliberate violation of rules. Thus according to the respondents the enquiry was conducted and the order of penalty was passed strictly in accordance with D&A Rules governing the applicant. The charge was duly proved in the course of enquiry and the punishment imposed is in conformity with the proved misconduct. Contending as above the respondents sought to dismiss the OA.

7. I have heard Mr.K.R.K.V.Prasad, learned counsel for the applicant and Mr.Pavan Maitreya representing Mr.D.Madhava Reddy, learned standing counsel for the respondents.

8. The period of absence mentioned in the charge is not in dispute. It is also not in dispute that the applicant was residing within 2 kms radius to railway health unit which fact he admitted in the course of enquiry also. The extant rules provide that where a railway servant applies for medical leave, if resides within the 2 ½ kms radius to the railway health unit he has to submit a certificate issued by a doctor working in railway hospital. But in the instant case the applicant contends that no such rules were circulated to the employees. Non circulation of

the said rules remains only as a contention because in normal course the department would circulate the rules to all its employees and more over it is the duty of the every employee to know the leave rules. Therefore indisputably producing a private medical certificate for a period of 82 days leave is contrary to the extant rules governing the applicant.

9. One of the contentions advanced on behalf of the applicant is that unauthorized absence from duty is not enumerated misconduct under Railway Services (Conduct) Rules, 1966 and therefore the applicant cannot be held guilty of unauthorized absence having recourse to the general misconduct provided for under Rule 3.1(ii)(iii) of Railway Services (Conduct) Rules, 1966.

10. In support of the contention learned counsel for the applicant relied on ***B.Vani Kumari Vs. Union of India and others 2004 (1) ALD 819***. In the said case the petitioner was a member of a committee for preparing the panel of promotees from Group – D to clerical cadre. She along with other two members of the committee committed certain mistakes which resulted in irregular empanelment of two ineligible SC candidates against UR posts in selection depriving two eligible UR candidates. The question before the Division bench of the Hon'ble High Court of A.P. was that whether the act committed by the petitioner therein warranting initiation of disciplinary proceedings against the petitioner. The Division Bench upon referring to various judgements of the Hon'ble Supreme Court took the view that the act of the petitioner therein does

not amount to misconduct warranting initiation of disciplinary proceedings, more particularly in view of the fact that the said conduct was not an enumerated misconduct under the conduct rules.

11. In the case before the Division Bench of the Hon'ble High Court the misconduct alleged was incorrect empanelment, whereas in the instant case the misconduct alleged is unauthorized absence for considerable length of time in various spells. The conduct here is a specific one and the department alleged that as the applicant who is a Loco Pilot was transferred to Rayagada, he remained unauthorizedly absent from duties. Therefore by no stretch of imagination it can be said that unauthorized absence is not a misconduct. Even though a particular misconduct has not been specifically enumerated in the disciplinary rules governing the employee, disciplinary action can be taken against the employee, for such misconduct if the act committed by him is specific in character and it relates to his discharge of duties.

12. In this context it could be relevant to refer the following judgements of the Apex Court :

AIR 1992 SC 2188 State of Punjab and others Vs. Ram Singh, Ex. Constable,

wherein the Hon'ble Supreme Court held as follows :

"The word misconduct is though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty. It may involve moral turpitude, it must be improper or wrong behavior, unlawful behavior, wilful in character, forbidden act, a transgression of established and definite rule of action or Code of

Conduct but not mere error of judgment, carelessness or negligence in performance of duty, the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and its requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.

The Constable Gunman in this case after having heavy drink, was seen roaming in the market with service revolver, while he was on duty. When he was sent to the doctor for medical examination he abused the medical officer on duty which shows his depravity or delinquency due to his drinking habit. Held, the conduct of constable would constitute gravest misconduct warranting dismissal from service. The authorities, therefore, were justified in imposing the penalty of dismissal"

AIR 1982 SC 854 Robert D'Souza Vs. The Executive Engineer, Southern Railway and another, wherein the Hon'ble Supreme Court held as follows :

"Once it is held that by operation of statutory rule in the Manual, the appellant had acquired a status of temporary railway servant and assuming, as contended by Mr. Francis, that the termination of service in the circumstances alleged does not constitute retrenchment stricto sensu, would the termination be still valid ? The answer is an emphatic no. On the admission of the Railway administration, service was terminated on account of absence during the period appellant was on fast. Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and inquiry or at any rate without complying with the minimum principal of natural justice. Further, Rule 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. Accordingly, the same conclusion would be reached even while accepting for the purpose of the facts of

this case simultaneously rejecting it in law that the termination does not constitute retrenchment yet nonetheless it would be void and inoperative."

13. In view of the above judgements it is no longer open for the applicant to contend that his unauthorized absence since not enumerated in the disciplinary rules cannot be construed as a misconduct to enable the department to initiate disciplinary action against him.

14. Nextly it is contended on behalf of the applicant that no finding was recorded by the Inquiry Officer that the absence of the applicant is wilful and therefore merely because the applicant was absent for some days it cannot be construed as a misconduct enabling the department to initiate disciplinary action. In support of the said contention, learned counsel appearing for the applicant relied on judgement in the case of ***Krishnakant B. Parmar Vs. Union of India and another AIR 2012 SC (Supp) 42***, wherein the Hon'ble Supremme Court held as follows :

"For sustaining the allegation of unauthorized absence it must be proved that unauthorized absence was wilful. If the absence was due to compelling circumstances under which it is not possible to report for or perform duty, such absence cannot be held to be wilful and employee guilty of misconduct."

15. The decision was rendered with reference to a different set of facts. In the instant case the applicant was not able to show the circumstances which

prevented him from attending the duty. Without prior permission or leave he absented himself from duties and ultimately produced a medical certificate issued by a private doctor for part of the period. Producing private medical certificate is obviously contrary to the extant rules. The unauthorized absence need not be positively proved by the department, it can also be inferred from the circumstances of the case. In the instant case the version of the department is that as the applicant was transferred to Rayagada he became absent unauthorizedly for a considerable length of period. When the rules mandate production of a certificate issued by a doctor working in the hospital of a railway health unit it has to be necessarily complied with by the employee.

16. Therefore, in the instant case having regard to the aforementioned facts and circumstances the absence of the applicant is unauthorized in respect of which a disciplinary action can be initiated against him. Some other contentions such as the applicant was not examined after the evidence was over in the enquiry with reference to the incriminating material and defence assistant was not provided by the Enquiry Officer, I would like to state that unless prejudice is shown to have been caused the said aspects would not vitiate the enquiry. More over it is stated by the respondents that a defence assistant was provided to the applicant but both of them did not attend the enquiry. No material has been placed on record by the applicant showing that the defence assistant was not provided.

17. Even in the order in **W.P.No.26790 of 2016 The Union of India Vs. A.R.Rakesh and another** relied on by the learned counsel appearing for the applicant, the Division Bench of the Hon'ble High Court of A.P. observed as follows :

"Very true, sometimes, it may not be really necessary that a Presenting Officer should be appointed. Dependent upon the sensitivity of the subject and the nature of inquiry and the seriousness of the issues involved, the disciplinary authority may consider not appointing a Presenting Officer at all, in case he decides that it would not be advisable for a 3rd party other than the inquiring authority and the disciplinary authority to have knowledge of the various aspects of the matter at issue. It all depends upon the facts and circumstances of each case and the sensitivities and sensibilities involved in the matter."

18. Therefore, even according to the judgement relied on by the learned counsel appearing for the applicant it is not at all mandatory to appoint the Presenting Officer in each and every case.

19. In the instant case the charge is very simple. The absence is admitted and the fact whether the absence is unauthorized has to be gathered from the circumstances of the case. Having regard to the facts and circumstances of the case, certainly the absence of the applicant is unauthorized and the department rightly initiated disciplinary action against him. There is enough evidence for the

Enquiry Officer to find him guilty. The penalty order which is confirmed by the Appellate and Revisionary authorities is not disproportionate to the proved misconduct requiring interference by the Tribunal.

20. For the aforementioned reasons the OA is dismissed. There shall be no order as to costs.

*(JUSTICE R.KANTHA RAO)
MEMBER (JUDL.)*

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