

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 2557/2005**

% **Date of Decision: 23.09.2010**

HARI KISHAN DAHIYA Petitioner
Through Mr.M.K.Bhardwaj, Advocate

Versus

GOVT. OF NCT OF DELHI AND ORS. Respondents
Through None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG, J.** (ORAL)

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1. This writ petition has been filed by the petitioner who filed Original Application No. 113/2001 impugning the order of the respondents dated 14.09.1998, whereby a departmental enquiry was initiated against him as also the findings returned by the Inquiry Officer dated 27.03.1999 holding him guilty of the charges leveled against him of remaining habitually absent from duty. The petitioner also assailed the order of the respondents dated 14.09.1998 dismissing him from service as well as the order of the Appellate Authority, whereby the punishment imposed upon him was maintained.

2. Before us, the petitioner has assailed the order of the Tribunal, whereby the Tribunal upheld the punishment awarded to the petitioner and has been pleased to dismiss the original application filed by the petitioner under Section 19 of the Administrative Tribunal Act, 1985. It is submitted that the petitioner had been requesting the respondents to retire him from service on account of his continued

illness as a patient of epilepsy which is the cause of his absence but the respondents have not acceded to his request, rather they resorted to procedure as aforesaid unmindful of the physical conditions of the petitioner and thus, it is submitted that the entire process of holding an enquiry against the petitioner is vitiated. It is also submitted that it would have been proper for the respondents to have accepted his request for voluntary retirement which would have brought the lis to an end in view of the fact that he had already served the department for a period of 28 years and it was thereafter, on account of suffering from epilepsy wanted retirement from service voluntarily.

3. According to the Tribunal, to substantiate his illness, the petitioner had not submitted his medical record nor sent any information to the Inquiry Officer apprising the seriousness of his illness and request to postpone the enquiry and, therefore, orders passed by the Inquiry Officer holding him guilty of the charges after proceeding ex parte were justified. The cumulative effect of his absence which was not satisfactorily explained, the punishment awarded to him could not be faulted with.

4. To appreciate the reasoning of the Tribunal and submissions made by the petitioner, we may note that the petitioner was enrolled as a Constable on 1.11.1968. On account of suffering from epilepsy and seizures he applied for voluntary retirement since 1996 but his request was not acceded to. A departmental enquiry was ordered against the petitioner and he was proceeded against by issuance of summary of allegations where he has been alleged to have remained unauthorisedly absent for a period of six days and despite notice to undergo second medical examination to verify the genuineness of the medical record, the petitioner refused to get the CT scan done privately. It was alleged that he was again absent for a period of one hour and twenty minutes and thereafter, remained absent w.e.f. 20.04.1998. There were instance of absence from duty even earlier.

5. As stated above, the petitioner has not participated in the enquiry and thus was proceeded ex parte. Prosecution witnesses were examined and the Inquiry Officer returned a finding holding the petitioner guilty of the charges and on that basis, the Disciplinary Authority imposed punishment of dismissal and to treat the period of absence as not spent on duty.

6. It has been submitted on behalf of the petitioner that ex parte proceedings resorted to against him were in violation of Rule 18 of the Delhi Police (Punishment and Appeal) Rules, 1978 as the petitioner had neither refused nor absented without any reasonable cause from the inquiry. In fact, as he was not keeping good health and undergoing treatment in the hospital, requested the authorities to keep the enquiry in abeyance. It was also his case that he was incapacitated on account of seizures for which he was getting treatment from Government Hospital and recognized doctors under the CCS (Leave) Rules, 1972. The medical reports have also been placed before the authorities but no heed was given to it. Even though he had reported back on 17.04.1998 and had complied with the directions by reporting at RML Hospital but due to fault in the CT scan machine, he was not subjected to second medical examination. He has also given other explanations.

7. Some of the observations made in the impugned order by the Tribunal which reflects upon the medical illness of the petitioner are reproduced hereunder for the sake of reference:-

“9. On the other hand, Sh. Ram Kwar, learned counsel for respondents denied the contentions and has stated that the applicant after availing medical rest was asked to undergo second medical examination for which he was taken to RML Hospital on 30.03.1998, and was called on 31.03.1998. He was again called on 03.04.98, and on examination of his medical papers, he was advised to come on 17.04.1998 to get the CT Scan from CGHS approved clinic/ hospital, as the CT Scan machine

was out of order. Applicant at this movement showed his inclination and suggested to get his CT Scan done privately, which is reflected from RML's Memorandum dated 14.05.1998 but thereafter he has not produced the CT Scan and thereafter he absented himself. Notices have been sent on 21.04.1998, 08.05.1998 and 12.05.1998 to the applicant but he has not responded to despite services. Finding no alternative, as the applicant was adopted dilatory tactics and without any reasonable cause, failed to attend the inquiry, the same was proceeded ex-parte. Witnesses have been examined and the applicant thereafter also through several notices intimated to participate in the proceedings which even after on receipt were not complied with by the applicant, and as a result, the inquiry officer held the proceedings ex-parte and after examination of witnesses, holding the applicant guilty."

8. According to the petitioner, he applied for voluntary retirement in the year 1996 itself taking into consideration his medical condition. However, the respondents instead of heeding to his request have simply ignored the same despite production of medical documents before the authorities. Some averments made by the petitioner in his Original Application are relevant. In paragraph 4.3 and 4.5 of the Original Application, the petitioner had stated that due to ill health he could not cope up with physical strain of his job and circumstances forced him to move an application for grant of voluntary retirement on 4.9.1996 through proper channel, which was rejected by the respondents for no rhymes or reasons. Even thereafter, his health deteriorated and duration of seizure and blackouts increased. The fourth respondent instead of showing sympathy to the petitioner became savage towards him. The attitude of the fourth respondent was prejudiced and vindictive towards the petitioner as it is clearly established from the fact that an application made by the petitioner

on 13.11.1996 to get 30 days leave on the ground of marriage of his son was rejected by the said officer. He also stated that as his health started deteriorating on account of epilepsy he went to the CGHS Hospital and was diagnosed by the Doctor that he has been suffering from Epilepsy. The doctors advised him to relieve himself from mental tension before starting his treatment as his illness required complete rest. In view of the advice so given by the doctors the petitioner gave a letter dated 18.09.1997 to the respondents and requested for 60 days leave for treatment. While the petitioner was undergoing treatment for his illness in Safdarjung Hospital under the charge of Dr.D.C.Jain, Neurologist, he again gave an application for leave to the respondents but the same was not accepted by them. In these circumstances, the petitioner was unable to cope up with his sensitive duty and thus moved another application dated 9.10.1997 for voluntary retirement, which was again rejected without any cogent reasons except that the ACP after hearing the petitioner noted in his note sheet on 13.10.1997 that the petitioner should not be sent on sensitive posting and outstation duties but the fourth respondent paid no heed to the report given by the ACP and made a vindictive order smacking of prejudiced and bias. The petitioner made several oral as well as written requests to the respondents on January 1998, February 1998 and March 1998, to relieve him from duty as he was seriously ill and he showed the numbers of medical certificates as well as prescription to the respondents. In furtherance of the directions given by the fourth respondent the petitioner went to the Ram Manohar Lohia Hospital and met to the concerned doctor who examined him on 30.3.1998, 31.3.1998 and 17.4.1998. On 3.4.1998 Dr.Arun Jain examined the petitioner and advised the police officials accompanying the petitioner to get the ECG and scan of brain done of the petitioner from the private hospital. Even though the petitioner had been asking the respondents to make the necessary arrangements but the respondents took a different stand and directed the petitioner to bear the expenses himself. Thereafter, the

petitioner was kept like a prisoner in the Driver's barracks vide order dated 16.4.1998 and in fact, he was found unconscious at around 7 pm on 18.4.1998. He again made a request for voluntary retirement to get a proper medical treatment and sent a copy of the same to the Commissioner of Police. He has also given some other instances which show that since the petitioner not keeping medically well, he wanted voluntary retirement but his request was not accepted. It is true that the petitioner had been awarded censure on many occasions earlier. The factum of his medical illness and his request for voluntary retirement even though is available with the respondents, it seems that the said factor has not been taken note of by the respondents, the Inquiry Officer, the Disciplinary Authority and the Appellate Authority at all while punishing the petitioner with a punishment of dismissal.

9. It may be observed here that the Inquiry Officer was fully aware of the physical condition of the petitioner as can be inferred by a perusal of the facts narrated in page 67 of the paper book. The relevant portion is reproduced hereunder:-

“Previously he availed 5 days Medical rest w.e.f. 10.11.97 to 14.11.97 and the same has been decided as commuted leave, however a letter was written to C.M.O., RML Hospital, New Delhi vide this office No.1674-76/CB-III Bn. DAP dated 24.02.98 to obtain second medical opinion about the epilepsy disease of him. On 30.03.98, he along with HC Virender (Medical Asstt.) proceeded to RML Hospital, New Delhi vide D.D. No.35 dated 30.03.98 but he was again called by C.M.O. on 31.03.98 for his second medical opinion: on 31.03.98 he along with HC Satender Singh, No.2197/DAP proceeded to RML Hospital, New Delhi vide DD No.19-A dated 31.03.98. On checking his medical treatment papers and test reports, Dr. Arun Jain of RML Hospital, New Delhi advised him to come on 03.04.98 along with

his previous test reports of safdarjung Hospital. On 03.04.98 he along with HC Ishwar Singh, 1070/DAP proceeded to RML Hospital. His second medical examination was carried out by Dr. Arun Jain at RML Hospital who advised him to come on 17.04.98 after getting the C.T.Scan report from CGHS approved Clinic/Hospital as the C.T.Scan machine of RML Hospital was out of order. As per the advise of Dr. RML Hospital C.T.Scan of him was required to be completed by a private clinic/Hospital on cash payment. As such request was made to CMO RML Hospital, New Delhi vide this office memo. No.2664/CR-III Bn.DAP dated 22.04.98 for granting permission to obtain C.T. Scan from private clinic/Hospital approved by CGHS authority so that the C.T.Scan of him could be done. But he refused to RI/III Bn.DAP to get the C.T.Scan test from his own pocket. Whereas Incharge second Medical examination of RML Hospital vide memo. No.13-9/98 RMLH (M-II)/10792, dated 14.05.98 he himself suggested that he would got his C.T. brain examination of his own privately.”

10. Similarly, in the order passed by the Disciplinary Authority, there is a mention about the medical health of the petitioner, which is reproduced hereunder:-

“Previously the ASI availed 6 days medical rest w.e.f. 10.11.97 to 15.11.97 and the same has been decided as commuted leave, however a letter was written to CMO RML Hospital New Delhi vide this Office No.1674-75/CR-III B. DAP, dated 24.03.98 to obtain second medical opinion about the epilepsy disease of the ASI. On 30.03.98 ASI Hari Kishan No.2734/D along with Hon’ble Court Virender (Medical Asstt) proceeded to RML Hospital, New Delhi vide DD No.35 dated 30.03.98 for his second medical opinion. On 31.03.98 ASI Hari

Kishan along with Hon'ble Court Satender Singh, No.2197/DAP proceeded to RML Hospital, New Delhi vide DD No.19-A dated 31.03.98. On checking his medical treatment papers and test reports, Dr. Arun Jain of RML Hospital, New Delhi advised him to come on 03.04.98 along with his previous test reports of Safdarjung Hospital. On 03.04.98 ASI Hari Kishan along with Hon'ble Court Ishwar Singh, No.1070/DAP proceeded to RML Hospital. His second medical examination was carried out by Dr. Arun Jain at RML Hospital. His second medical examination was carried out by Dr. Arun Jain at RML Hospital who advised him to come on 17.04.98 after getting the C.T. Scan report from CGHS approved clinic/hospital as the C.T. Scan machine of RML Hospital was out of order. As per the advise of Dr. RML Hospital CT Scan of the ASI was required to be completed by a private clinic/hospital on cash payment. As such request was made to CMO RML Hospital, New Delhi vide their office memo No.2664/CR-III Bn.DAP, dated 22.04.98 for granting permission to obtain CT Scan from private clinic/ hospital approved by CGHS Authority so that the C.T. Scan of the ASI could be done. But the defaulter ASI refused to RI/III Bn. DAP to get the CT Scan test from his own pocket. Whereas Incharge Second Medical examination of RML Hospital vide memo No.13-9/98 RMLH(M-II)/10792, dated 14.05.98 that the defaulter ASI himself suggested that he would get his CT Brain examination of his own privately. It looks that the defaulter ASI has misquoted/misrepresented facts to higher authorities regarding said examination due to the reasons best known to him."

11. No substantial cause has been shown by the respondents as to why the request made by the petitioner to seek voluntary retirement time and again i.e. in the year 1996, 1997 and 1998 on account of his continued illness has simply been ignored. The respondents have been proceeded departmentally against the petitioner on account of unauthorized absence simply because he did not agree to get the C.T. scan done by spending from his own pocket.

12. In the counter affidavit filed by the respondents, this has been admitted by the respondents that the petitioner had availed six days' medical rest for treatment of epilepsy disease. There is also an admission that the petitioner was examined at Ram Manohar Lohia Hospital. He went there along with HC Virender, Welfare Officer again and again. He was bearing treated at the said hospital and was asked to come repeatedly for getting himself checked and for further advice. The only point taken into consideration by the respondents to oppose the petition is that he did not go to get CT scan done at his own costs.

14. The petitioner was employed in Delhi Police on 1.11.1968 and on 4.9.1996 when he made the first application for voluntary retirement, he had completed 28 years of service and thus, was entitled to seek voluntary retirement. The Government servant who completed 20 years of service is entitled to seek voluntary retirement from service as per Rule 48A of the CCS Pension Rules.

15. There is also a provision in Pension Rules i.e. Rule 38 which provides for invalid pension. Invalid pension is granted to a Government servant if a Government servant retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service. For that purpose, the Government servant is only required to submit a medical certificate. As per Rule 36, retiring pension can also be granted to a Government servant who retires or retired in accordance with provisions of Rule 48 and 48A of these Rules, Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations and to a Government servant who, on being

declared surplus, opts for voluntary retirement in accordance with the provisions of Rule 29 of these rules.

16. Rule 48-A which permits voluntary retirement on completion of 20 years' qualifying service is reproduced hereunder:-

“48-A. Retirement on completion of 20 years' qualifying service

(1) At any time after a Government servant has completed twenty years' qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is -

(i)	on assignments under the Indian Technical and Economic Cooperation (ITEC) Programme of the Ministry of External Affairs and other aid programmes,
(ii)	posted abroad in foreign based offices of the Ministries/Departments,
(iii)	on a specific contract assignment to a foreign Government,

unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority :

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) - Omitted

(3-A)	(a)	Government servant referred to in
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		sub-rule (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor ;
	(b)	on receipt of a request under clause (a), the appointing authority subject to the provisions of sub-rule (2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his

		pension before the expiry of the period of notice of three months.
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(4) Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority :

Provided that the request for withdrawal shall be made before the intended date of his retirement.

(5) The pension and ⁵[retirement gratuity] of the Government servant retiring under this rule shall be based on the emoluments as defined under [Rules 33](#) and [34](#) and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation of pay for purposes of calculating pension and gratuity.

(6) This rule shall not apply to a Government servant who -

(a)	retires under Rule 29 , or
(b)	retires from Government service for being absorbed permanently in an autonomous body of a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

EXPLANATION. - For the purpose of this rule the expression "*appointing authority*" shall mean the authority which is competent to make appointments to the service or post from which the Government servant seeks voluntary retirement."

17. A Division Bench of the Andhra Pradesh High Court in the case of General Manager, Telecom District, WG, Eluru and Ors. Vs. N.Lalithama, 2002(1)ALD553 while interpreting Rule 48 A (supra) has observed that at any time after a Government servant has completed 20 years qualifying service he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.

18. It is not in dispute that request made on behalf of the petitioner to seek voluntary retirement on various dates as referred to above

was never withdrawn. However, there is no cogent reason which is forthcoming which may justify the request for voluntary retirement made by the petitioner being denied despite the medical condition of the petitioner, which is the reason given by him for seeking voluntary retirement.

19. If a person is not well and is suffering from a disease like epilepsy to expect from him that he will perform his duties of a police man which requires alertness and physical fitness at all times will be only acting against common sense. In such a case initiating departmental enquiry against him merely on the basis of absence of six days and one hour and twenty minutes indicates victimization on the part of the respondents on account of mala fides for which specific allegations have also been made by the petitioner against the fourth respondent.

20. It is quite possible that such person may not be able to defend himself diligently in a departmental enquiry initiated against him. It has come on record that he had been requesting the enquiry officer to postpone the enquiry by keeping it at abeyance on account of his medical ill health but this has also not been found favour. The foremost thing which is strange is that once a person after 28 years of service on account of physical illness is seeking voluntary retirement for which he is entitled as per Rule 48 A to make such an application, rejecting such an application without any cogent reasons cannot be justified.

21. Taking all these facts into consideration, we are of the considered view that the order passed by the Tribunal, which is in complete ignorance of these material facts, the order passed by the Disciplinary Authority as well as the Appellate Authority cannot be sustained in the given facts of this case. However, such a person being not in a position to join duties, we do not propose to send him back to serve. We direct the respondents to accept petitioner's request for voluntary retirement from 4.9.1996 i.e. the date on which he first made the request for voluntary retirement and to retire him in

terms of Rule 48A of the CCS Pension Rules. Consequently, the respondents would also release all retiral benefits to the petitioner as may become due to him including invalid pension in terms of Rule 38 within a period of three months.

22. With these observations, the writ petition is disposed of with no orders as to costs.

MOOL CHAND GARG, J.

SEPTEMBER 23, 2010
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PRADEEP NANDRAJOG, J.