

HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION NO. 5473 OF 2012

Date: 17.11.2015

Between :

Md.Pasha, E-304420, APSRTC, Welder,
S/o Mohd. Mhasod, 45 years, Vemulawada Depot,
r/o Jagityal, Karimnagar District.

.... Petitioner

And

The APSRTC, rep.by its Managing Director,
Musheerabad, Hyderabad and three others.

.... Respondents

This Court made the following:

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ORDER:

The petitioner joined service as Welder in the year 1989. He was working in the Korutla Depot. While so, a charge sheet was served on the petitioner alleging that he has unauthorizedly absented from duties and caused disruption of services in the third respondent- Depot. The charge sheet alleges that the petitioner was absented from duties from 2.12.2007 to 13.12.2007 without any reasonable cause and without any intimation. The disciplinary proceedings ended in imposing punishment of removal from service vide proceedings dated 19.8.2008. Appeal filed against the said order was rejected by the Appellate Authority vide order dated 20.06.2015. In the review petition filed by the petitioner, the reviewing authority modified the punishment of removal to that of reducing the pay of the petitioner to the minimum of the time scale of regular Welder only for the salary purpose. Aggrieved thereby, this Writ Petition is filed.

2. Heard the learned counsel for petitioner and the learned Standing Counsel for Respondent Corporation. With the consent of learned counsel writ petition is finally disposed of.

3. Learned counsel for the petitioner contends that the petitioner was sick from 17.11.2007 to 1.12.2007 and since he could not recoup from the ailment he applied for extension of sick leave and the same was submitted to the Assistant Engineer (Mechanical), Korutla Depot. The petitioner was under the impression that the leave was

sanctioned. On recovery from ailment, when the petitioner reported for duty on 14.12.2007, he was not admitted to duty and falsely disciplinary proceedings were initiated. According to the learned counsel for the petitioner, even assuming that there was no valid application for extension of sick leave, the absence was only for a period of 12 days and for such a short period of absence even the modified punishment is too harsh and disproportionate.

4. Learned counsel appearing for the petitioner further contends that as per the charge sheet, the petitioner was absent from 2.12.2007 to 13.12.2007, whereas while passing order of removal, the disciplinary authority also took into consideration his absence from duty on 1.8.2008 and from 5.8.2008 to 6.8.2008, that is after submission of explanation by the petitioner to the show cause notice on the findings of enquiry officer. Petitioner was not put on notice regarding the subsequent absence from duty. It is illegal to consider subsequent absence while imposing the punishment of removal from service without putting petitioner on notice. Though this contention was specifically urged and the same was also recorded, the reviewing authority has not dealt with the said contention. Learned counsel therefore, submits that the proceedings are vitiated on this ground alone.

5. Learned Standing Counsel appearing for the respondents submits that the petitioner did not submit his extension of sick leave and therefore, his absence from duty from 2.12.2007 to 13.12.2007 was unauthorized and therefore, disciplinary proceedings were validly initiated. Since the absence was un-authorized, such absence resulted in removal from service. While passing order of removal, it is permissible to take into consideration the subsequent conduct of the petitioner; that on account of the absence of the petitioner from the depot, the mechanical work in the depot affected and therefore, his absence was viewed as serious.

6. The points that arise for consideration are:

1. Whether the punishment imposed on petitioner is vitiated

on the ground of taking subsequent absence into consideration without affording further opportunity?; and

2. Whether punishment is excessive and disproportionate?;

7. POINT 1:

In paragraph 3 of the affidavit, the petitioner has specifically contended that after the initial period of sick leave, he submitted an application for extension of leave to the Assistant Engineer (Mechanical), Korutla, but the same was suppressed and that the petitioner was under the bonafide impression that his sick leave was granted. In paragraph 9 of the affidavit filed by the petitioner, it was specific contention that his subsequent absence on 1.8.2008 and from 5.8.2008 to 6.8.2008 was taken into consideration at the stage of imposing punishment and the same could not have been the basis for imposing punishment of removal. In the counter affidavit filed by the respondents there was no denial to the said contentions. The fact of subsequent absence was not part of the charge is not disputed.

8. In the order of the disciplinary authority dated 19.8.2008 there is no mention of giving opportunity to the petitioner on the subsequent absence. Though it is permissible for the disciplinary authority to take into consideration subsequent misconduct during the pendency of disciplinary proceedings while arriving at a decision to impose appropriate punishment, the employee is entitled to be put on notice and be afforded appropriate opportunity. It is evident from record that a show cause notice was issued on 20.5.2008 and the petitioner filed his explanation on 29.5.2008. On 6.8.2008 the Assistant Engineer (Mechanical), Korutla reported to the disciplinary authority the subsequent absence of the petitioner. It is appropriate to note that reason for absence on two occasions, first for one day and second for two days is not on record. There was no finding that such absence was unauthorised and deliberate.

9. Reading of the order of disciplinary authority would show that he based his decision to impose harsh punishment not only for the period of absence for which disciplinary action was initiated but also

the subsequent absence in two spells one on one day and second for two days for the purpose of imposing punishment of removal. It is not on record as to how the subsequent absence is viewed as grave. Subsequent absence is not the subject matter of enquiry. There was no finding on subsequent absence as wilful and unauthorised. Thus, the order of the disciplinary authority vitiates on that ground alone.

It amounts to arbitrary exercise of power. Though specific plea was taken by the petitioner in his review, the reviewing authority blissfully silent and he appears to have based his decision to restore the petitioner to service more on the exigencies of service than on the merit of the claim of petitioner. It was more of an administrative order than an order passed by reviewing authority in the hierarchy of authorities exercising quasi-judicial functions in disciplinary matters. Thus, his order is also vitiated and liable to be set aside.

10. Point No.2:

The subject of disciplinary action is on unauthorized absence of the petitioner from 2.12.2007 to 13.12.2007 that is for a period of 12 days. An absence from duty *per se* is not a grave misconduct unless it is alleged that employee was absent from duties for a very long time, without authorization, without just cause, is wilful, deliberate and is habitual, hampering the work of employer. The petitioner is a Welder and his absence was preceded by a sick leave. He claims to have submitted extension of leave. There appears to be no correspondence asking the petitioner to join duty. His contention that he has submitted extension of leave application is not denied. His sickness is not doubted. He was not subjected to medical examination. It is not the allegation that petitioner absented deliberately, that he is frequently absenting without any just cause or reason and absence was wilful. The absence in August 2008 is not declared as wilful absence by following due process. Except for the period of 12 days in December 2007 and three days in two spells in August 2008, no other unauthorized absence is shown by the respondents.

11. "Extent of penalty depends upon the nature of service, the position held by the employee, the period of absence and the cause/ explanation for the absence." (Paragraph 14, *STATE OF PUNJAB Vs P L SINGLA*- (2008) 8 SCC 469). "Unauthorized absence cannot be put in straitjacket formula for imposing punishment. It will depend upon many a factor as has been laid down in P.L.Singla" (Paragraph 27, *CHENNAI METROPOLITAN WATER SUPPLY AND SEWERAGE BOARD AND OTHERS Vs T.T.MURALI BABU*- [(2014) 4 SCC 108]. Guided by the above principles and on the analysis of the facts of the case in the earlier paragraphs, I am of the considered opinion that the punishment of removal as modified by the reviewing authority is disproportionate to the delinquency alleged against the petitioner. Points 2 is answered accordingly.

12. Having noticed that the procedure adopted by the disciplinary authority and the reviewing authority and the manner in which the orders are passed is not in accordance with law, ordinarily the matter should be remitted to the stage of passing final orders afresh by the disciplinary authority. However, the absence relates to the year 2007 and the disciplinary action resulted in imposing punishment of removal from service in the year 2008. This was modified by the Reviewing authority by the order dated 10-11-2011. Thus, at this stage, remitting the matter to the disciplinary authority to pass final orders on disciplinary action is not in the best interest of the respondent Corporation as well as the employee. The employer has to pay all the benefits till date and the employee has to face the ignominy of protracting the disciplinary action for no fault of him, that too on the allegation of absence for 12 days followed by sick leave. This case warrants giving finality to the issue of disciplinary action.

13. I am of the considered opinion that while setting aside the order of removal dated 19.8.2008 as modified by the reviewing authority vide proceedings dated 10.11.2011, to give quietus to the litigation, having regard to period of absence of 12 days, ends of justice would serve if

the punishment of withholding of one increment with cumulative effect is imposed, which shall operate from the date of the order of removal. Consequent to the modification of the punishment, all other steps be taken and completed within a period of eight weeks from the date of receipt of a copy of this order.

14. Accordingly, the Writ Petition is allowed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, pending if any, shall stand closed.

P. NAVEEN RAO, J

DATE: 17.11.2015

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