

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWPOA No. 229 of 2019**Date of Decision: 10.09.2020**

Hemant Kumar

...Petitioner.

Vs.

State of Himachal Pradesh and another

....Respondents

Coram:**The Hon'ble Mr. Justice Ajay Mohan Goel, Judge****Whether approved for reporting?¹ Yes.**

For the petitioner:

Ms. Shalini Thakur, Advocate.

For the respondents:

Mr. Ajay Vaidya, Senior Additional
Advocate General.
(Through Video Conferencing)**Ajay Mohan Goel, Judge** (Oral):

By way of this petition, the petitioner has, *inter alia*,
prayed for the following reliefs:

“(1) A writ of certiorari may kindly be issued for quashing Annexure P-8 dated 7.8.2006, Annexure P-10 dated Oct., 2007, Annexure P-13 dated 14.8.2008 and Annexure P-15 dated 27.11.2008.

(2) A writ of mandamus may kindly be issued to the respondents to grant Extraordinary Leave to the petitioner as prayed for by him vide Annexure P-2 dated 28.5.2007.

¹ Whether the reporters of the local papers may be allowed to see the Judgment?

(3) A writ of mandamus may kindly be issued to the respondents for reinstating the petitioner in service with all consequential benefits.

Or in the alternative

A writ of mandamus may kindly be issued to the respondents to give all financial and other benefits to the petitioner for service rendered by him with the respondents w.e.f. 3.8.1989 till 2.8.2005 after setting aside the penalty of dismissal imposed upon the petitioner, in order to enable the petitioner to get his pension and other financial benefits due to him on account of service rendered and for this purpose grant extraordinary leave to the petitioner for the period required.

(4) For a writ of mandamus to the respondents to produce entire relevant record before this Hon'ble Court including the complete record of Annexure P-16 i.e., the noting sheets dealing with the case of the petitioner and other similarly situated doctors viz. Dr. Hemant Sharma."

2. Petitioner joined the Health Department as a Medical Officer in the year 1989. Finance (Regulations) Department, Government of Himachal Pradesh issued an Office Memorandum dated 22.03.2001 (Annexure P-1) on the subject: "Grant of Extraordinary Leave To The State Government Employees To Serve Outside Government". In terms of the

said Memorandum, the employees of the State Government were given an opportunity to avail Extraordinary Leave subject to maximum of five years in case they seek employment outside the Government (within the country) on the terms and conditions, as stood enumerated in the said Office Memorandum. Clause-VII of the said Memorandum, *inter alia*, provided that before allowing any employee to avail Extraordinary Leave, the concerned Administrative Secretary was to take a view as to whether the Department could spare the services of concerned employee. It further stood mentioned in this Clause that such leave shall not be allowed in case the Department feels that services of the concerned employee could not be spared in exigencies of public service.

3. Petitioner before this Court, who at the relevant time was serving as Medical Officer in MGMSC Khaneri, Rampur Bushahar, vide Annexure P-2 dated 28.05.2005, made a request to the competent authority to consider his case for grant of Extraordinary Leave for five years. This was followed by another communication dated 02.08.2005 (Annexure P-4), in which, it was stated by the petitioner that as he could not continue to serve as a Government servant in the prevailing circumstances, he was proceeding on leave w.e.f. 02.08.2005 afternoon. It was further mentioned in this communication that he presumed that as leave was under consideration for sanction, his departure be deemed to be as proceeded on Extraordinary Leave w.e.f. 02.08.2005. It was also

mentioned in this communication that in the alternative, he was requesting to allow him to proceed on premature retirement.

4. Vide Annexure P-6, dated 5th August, 2005, Principal Secretary (Health), Government of Himachal Pradesh rejected the request of the petitioner for premature retirement, in view of the fact that neither Extraordinary Leave stood granted in favour of the petitioner by the competent authority in terms of Clause-VII of Annexure P-1 nor his request for premature retirement stood accepted by the competent authority.

5. As the petitioner was willfully absenting himself from duty w.e.f. 2nd August, 2005, a Memorandum was issued to him, i.e., Memorandum dated 7th April, 2006 (Annexure P-8), vide which, he was called upon to submit his response within two days to the Article of Charges, which stood appended with this Memorandum, vide which, the petitioner was informed that an inquiry was proposed to be held against him under Rule 14 of the CCS (CCA) Rules, 1965. The Article of Charges framed against the petitioner were, *inter alia*, to the effect that while working as a Medical Officer in MGMSC Khaneri (Rampur), he willfully absented himself from duty w.e.f. 03.08.2005 without prior permission/sanction of competent authority, which amounted to unbecoming of a Government servant and was in violation of Rule 3 of the CCS (Conduct) Rules, 1964. It was further a charge against him that the petitioner while working as Medical Officer in MGMSC Khaneri

(Rampur), was indulging in private practice at Rampur, which also amounted to unbecoming of a Government servant.

6. To cut short the facts, post receipt of response to said Memorandum, as the Disciplinary Authority was not satisfied with the response of the petitioner, accordingly, an Inquiry Officer was appointed, who submitted his report, which is appended with the petition as Annexure P-10, relevant portion of which is quoted hereinbelow:

"....BOTH THE ARTICLE OF CHARGES AS MENTIONED ABOVE WHICH HAVE BEEN FRAMED AGAINST THE CHARGED OFFICER Dr. Hemant Kumar MO MGMSC Khaneri, Rampur ARE TRUE AND CORRECT and I have arrived on this conclusion due to the following facts:-

Though Dr. Hemant Kumar applied for the Extra Ordinary Leave/Premature retirement on some personal (Domestic) circumstances on 28.05.2005 but without waiting for the approval/sanction of these, he proceeded on leave and submitted his departure report to the SMO I/C MGMSC Khaneri (Rampur) in anticipation of sanction of E.O.L./Premature retirement and when the CO was asked to join back after he was conveyed the rejection of his Premature retirement request he never reported back for his duties in MGMSC Khaneri (Rampur) presuming that his request for E.O.L. is still under the consideration of the Government. Thus the

CO has erred by proceeding on E.O.L. without the prior approval/sanction of the competent authority.

The charged officer himself has admitted in the statement recorded during the course of inquiry annexed at Sr. No. 2 and in the written statement submitted by the CO to the Principal Secretary (Health) H.P. on dated 15.08.2006 annexed at Sr. No. 8 that he is doing Private Practice at Rampur presuming that His E.O.L. request to the H.P. Government is under the Government consideration and it is certain to be sanctioned in his favour and in the meantime he has got every right to do Private Practice to earn his Livelihood. Also the Inquiry conducted by Dr. Rajinder Singh Bist SMO MGMSC Khaneri Rampur indicates that Dr. Hemant Kumar is doing Private practice in Deep Medical Center Rampur. Here also the Charge of indulgence in the Private Practice by the CO is proved because unless the request of grant of E.O.L. has been accorded by the competent authority the officer will be considered as on duty and not on E.O.L. and while on duty a Government Medical Officer cannot indulge in Private Practice.”

The petitioner was given an opportunity to respond to the inquiry report vide Annexure P-11 and he submitted his response vide Annexure P-12. Being dissatisfied with the response so submitted by him, the Disciplinary Authority, vide order dated 14th August, 2008 (Annexure P-13), imposed the penalty of

dismissal from service with immediate effect upon the petitioner.”

7. Petitioner was given an opportunity to respond to the inquiry report vide Annexure P-11 and he submitted his response vide Annexure P-12. Being dissatisfied with the response so submitted by him, the Disciplinary Authority vide order dated 14th August, 2008 (Annexure P-13), imposed the penalty of dismissal from service with immediate effect upon the petitioner.

8. Feeling aggrieved, he filed an appeal, which was also dismissed by the Appellate Authority vide order dated 27.11.2008 (Annexure P-15). These orders stand assailed by the petitioner before this Court.

9. Learned counsel for the petitioner argued that the disciplinary proceedings which stood initiated against the petitioner were bad in law for the reason that petitioner was ordered to be dismissed from service, purportedly on the ground that he submitted his resignation, whereas at no stage the petitioner had submitted his resignation. She further argued that the order passed by the Disciplinary Authority, vide which, the services of the petitioner stood dismissed, was a non-speaking order and so was the order vide which the Appellate Authority dismissed the appeal of the petitioner. Lastly, it was submitted by learned counsel for the petitioner that even otherwise, the punishment which has been imposed upon the petitioner is harsh and not in

proportion with the alleged mis-conduct of the petitioner. In this regard, she relied upon the judgment of Hon'ble Supreme Court in *Chairman-cum-Managing Director, Coal India Limited and another Vs. Mukul Kumar Choudhuri and others*, (2009) 15 Supreme Curt Cases 620.

10. No other point was urged.

11. Learned Senior Additional Advocate General, on the other hand, defended the act of the respondent-Department by stating that the petitioner was rightly removed from service, because he did not conduct himself in a manner in which a Government employee has to. Mr. Vaidya argued that the petitioner having been appointed as a Medical Officer, was duty bound to perform his duties, yet he willfully absented himself from duty in the garb of the applications submitted by him for Extraordinary Leave, which was never accepted by the competent authority and further his request for premature retirement was also never accepted by the competent authority. He further argued that it cannot be said that the order passed by the Disciplinary Authority or the Appellate Authority are unreasonable orders, for the reason that it is not in dispute, as is clearly borne out from the report of the Inquiry Officer that the petitioner willfully absented himself from duty. As per him, the Disciplinary Authority, in these circumstance, rightly passed the order of dismissal of the petitioner from service, as it was not the case of the petitioner that the findings returned in this regard by the Inquiry Officer

were not correct, which required a detailed answer in the order which was passed by the Disciplinary Authority. On these basis, he submitted that the Disciplinary Authority and the Appellate Authority have rightly passed appropriate orders, keeping in view the conduct of the petitioner and this petition being devoid of any merit, be dismissed.

12. I have heard learned counsel for the parties and have also gone through the pleadings as well as the judgment cited by learned counsel for the petitioner.

13. At the very outset, this Court would like to observe that in exercise of its power of judicial review against the decision of the Disciplinary Authority or the Appellate Authority, as the case may be, this Court is not to act as an Appellate Authority, but primarily has to see as to whether the Disciplinary proceedings were conducted in a manner which is in consonance with the CCS(CCA) Rules, 1965 and whether the petitioner was given a fair opportunity to put forth his case or not. It is not the case of the petitioner that the disciplinary proceedings were conducted by the Inquiry Officer in violation of the provisions of CCS(CCA) Rules or that he was not heard. Further, as far as the contention of learned counsel for the petitioner that the order passed by the Disciplinary Authority or for that matter by the Appellate Authority, are non-speaking orders, this Court is of the view that keeping in view the fact that the allegation against the petitioner was of willful absence from duty, which duly stood proved from the record itself, there was no

necessity for the Disciplinary Authority or the Appellate Authority to have had passed a lengthy order, because perusal of the orders passed demonstrate that by no stretch of imagination it can be said that the orders passed by the Disciplinary Authority or the Appellate Authority, are non-speaking orders. This Court reiterates that speaking orders does not *ipso facto* means that they have to be lengthy orders also. If the order, may be brief, spells out the reasons as to why it has been passed, then it is a speaking order and it is not necessary that only lengthy order can be said to be a speaking order.

14. Coming to the facts of this case, here the petitioner happened to be a Medical Officer. In his capacity as such, he was appointed in the rural area of the State of Himachal Pradesh. It is not in dispute that there was an Office Memorandum issued by the Government of Himachal Pradesh, permitting employees of the Government of Himachal Pradesh to go on Extraordinary Leave, but an employee only had a right of being considered to be granted Extraordinary Leave in terms of Clause VII of the Memorandum. In this case, the petitioner, who happened to be a Class-I Officer and not a novice, after applying for Extraordinary Leave, mis-conducted himself by proceeding on leave without the same being sanctioned in his favour. Not only this, when in his application, he made an alternative prayer of being retired prematurely, which was rejected by the authority concerned, a prudent person would have immediately re-joined his duties, which he did not do.

This clearly proves the intent of the petitioner that he was no more interested in performing his duties as a Medical Officer. The reasons as to why he was no more interested to perform the duties of a Medical Officer, are clearly borne out from the record that he was indeed having his own private practice and, that too, when he happened to be a Government employee. This kind of conduct from a Medical Officer is least expected. The judgment relied upon by learned counsel for the petitioner with regard to proportionality of punishment that can be imposed upon a person, in my considered view, has no applicability as far as this case is concerned. Hon'ble Supreme Court in *Chairman-cum-Managing Director, Coal India Limited and another Vs. Mukul Kumar Choudhuri and others*, (2009) 15 Supreme Court Cases 620 has been pleased to hold as under:

“19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.”

No doubt, the doctrine of proportionality has to be taken into consideration while imposing punishment upon an employee in case he is found guilty of misconduct, but in my considered view, there cannot be any straitjacket formula in this regard and the proportionality will depend upon facts of each and every case. In this case, we are dealing with a Medical Officer. This Court places a Medical Officer akin to a soldier, who guards our Border. A Medical Officer cannot be equated with any other employee and the issue of willful absence from service in the case of a Medical Officer has serious and different connotations as compared to any other employee. In this view of the matter, this Court is of the view that the punishment which has been imposed upon the petitioner by the Disciplinary Authority and which has been upheld by the Appellate Authority, by no stretch of imagination, can be said to be harsh or disproportionate to the misconduct of the petitioner.

15. In view of the observations made hereinabove, as this Court finds no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

(Ajay Mohan Goel)
Judge

September 10, 2020
(bhupender)