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JUDGMENT SHEET
LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

W.P No.6339/2022

Muhammad Shafique
Versus
Director General, Punjab Emergency Service, Lahore etc.

J U D G M E N T

Date of Hearing	22.02.2024
Petitioner By:	Mr. Shakeel Javed Chaudhary, Advocate
Respondents By:	Sahibzada Muhammad Saleem, Assistant Advocate General along with Abdul Jabbar, ALO in the office of respondent No.1.

Anwaar Hussain J. This constitutional petition is directed against order dated 06.02.2014, by virtue of which the petitioner, Ex-Fire Rescuer, Punjab Emergency Service (Rescue 1122), Lahore was removed from the service on account of absence from duty as well as order dated 01.03.2022 passed by respondent No.1/the appellate authority, maintaining the impugned order of removal. Prayer has been made that the petitioner be reinstated into service along with all back benefits.

2. By way of factual background, it has been noted that the petitioner admittedly remained absent from the duty, without getting his leave sanctioned, since 09.06.2013, where-after the respondents issued explanation letters, stately sent at the home address of the petitioner and, upon non-receipt of the reply, it was inferred that the petitioner is guilty of misconduct and after issuing show cause notice, he was removed from the service, *vide* order dated 06.02.2014. It is case of the petitioner that absence from duty was not willful inasmuch as the petitioner was arrested, by the local Police, on 08.04.2013 in a false criminal case bearing F.I.R No.76/2013 dated 10.03.2013, under Sections 302/148/149 of the Pakistan Penal Code, 1860 registered at Police Station *Dhanote*, District *Lodhran* and remained incarcerated in jail till 19.04.2019 and upon his release, after acquittal from the

said case, he immediately filed an application with the respondents for his reinstatement, as absence from duty was without any fault that can be attributed to the petitioner. However, the said application was rejected *vide* order 27.11.2020, which constrained the petitioner to file constitutional petition bearing W.P No.460/2021 that was allowed *vide* order dated 18.11.2021, with the consent of both parties, and it was directed that representation/appeal of the petitioner pending with respondent No.1 be decided within a period of two months, through a speaking order, in accordance with law, after extending a fair opportunity of hearing, whereafter impugned order dated 01.03.2022 has been passed by respondent No.1.

3. Learned counsel for the petitioner submits that, on the one hand, the petitioner has been non-suited on the ground that petitioner's representation/appeal was time barred by a period of 05 years and 03 months and on the other hand such punishment for absence from duty has been imposed, which is alien to the Punjab Emergency Service Leave, Efficiency and Discipline Rules 2007 ("the Rules"), as the only penalty that can be awarded to an employee of M/s Rescue 1122 under Rule 6 thereof is deduction of emergency allowance or one fifth of salary. Places reliance on the case reported as "*Faisal Mehboob Khan v. Chief Secretary and 2 others*" (2018 PLC (CS) 216) in support of his contention.

4. Conversely, learned Assistant Advocate General along with ALO of the respondent-department have supported the impugned orders with the averments that prolong absence of the petitioner from duty was willful and hence, the impugned orders are in accordance with law.

5. Arguments heard. Record perused.

6. Interplay of the factual matrix of the case and applicable law puts forth following questions that require opinion of this Court:

- i. Whether every unauthorized absence from duty is necessarily a willful absence even if the same is caused by compelling circumstances beyond the control of an employee and the petitioner's representation/appeal was rightly dismissed having been time barred ignoring the fact that the petitioner was behind the bar in a criminal case in which he was ultimately acquitted by a Court of competent jurisdiction?
- ii. Whether the department had the authority to impose penalty of removal from service in terms of Rule 6 of the Rules?

7. At the outset, it is important to observe that in any organization, it is expected from an employee to maintain discipline; act with responsibility; perform his duty with sincerity; and serve the institution with honesty and devotion. Absence from duty exhibits lack of devotion on part of an employee towards the duty leading to indiscipline in the work culture of an organization and such act cannot be countenanced. However, at the same time, this Court cannot lose sight of the fact that a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before drawing the conclusion that an employee is guilty of misconduct (willful absence in the present case) in general and imposing major punishment of removal from service in particular.

8. Absence without any application or prior permission may amount to unauthorized absence, but it does not always mean that the same is willful. If the absence is the result of compelling circumstances under which it was not possible for an employee to report or perform duty, such absence cannot be held to be willful. Such compelling circumstances due to which an employee might have absented himself is a matter to be considered on case to case basis. In all such cases where absence is not willful, the employee cannot be held guilty of failure of devotion to the duty or behaviour unbecoming of a government servant. The Supreme Court of Pakistan in case reported as "*Ijaz Akbar v. The Director General (Ext.)L&DD, Punjab,*

Lahore and others"(2024 PLC (C.S.) 129), observed that unauthorized absence from the duty entails two options before the departmental authorities. Firstly, that unauthorized absence may be condoned by treating it as *ex-post facto* leave if the explanation offered by the accused employee is found to be justified; and secondly, if the employee does not appear or the explanation offered is found not to be satisfactory, the disciplinary proceedings may be initiated against such employee that may result in imposition of penalty, which may range from a major penalty of dismissal or removal from service to a minor penalty of censure or withholding of increment for a specific period, mainly depending upon number of factors, which *inter alia*, include the nature of service, the position (duty) of the employee in that service, the period of absence and the cause for the absence. Thus, it becomes clear that where an absent employee comes back and seeks to join his duty, the departmental authorities are obligated to determine whether the unauthorized absence was willful or was the result of such compelling circumstances which were beyond the control of the employee. The impugned order(s) reveals that the element of "willfulness" was never looked into in the case of the petitioner as there were compelling circumstances of registration of the FIR against the petitioner and his consequent arrest and incarceration in jail till 19.04.2019 rendered it beyond his control to report to the authorities concerned.

9. This Court is fully cognizant of the nature of the service rendered by the petitioner, i.e., emergency services, which require strict adherence to discipline, however, the nature of services performed alone cannot be considered as sole determining factor, rather the cause of absence has to be juxtaposed with it, in order to determine whether an unauthorized absence is willful or otherwise. Only when the determination as to willfulness is reached at, the second question as to quantum of penalty/punishment is to be looked at whether the penalty imposed is proportionate to the facts of the case

as the principle of proportionality has become well embedded in our jurisprudence.

10. The extreme punishment of removal from service has been awarded without any inquiry or determination by considering the cause of absence. This Court is of the opinion that every unauthorized absence is not willful absence if the same is caused by compelling circumstances beyond the control of an employee. At this juncture, it is imperative to observe that the petitioner has been non-suited on the ground that the criminal proceedings and departmental proceedings can go on side by side and the departmental proceedings are independent of the result of criminal proceedings while placing reliance on case reported as "Muhammad Sardar Khan v. Senior Member (Establishment), Board of Revenue, Punjab, Lahore" (**1985 SCMR 1062**). Respondent No.1 has misconceived the *dicta* laid down in case of Muhammad Sardar Khan supra. There is no cavil to the proposition of law that the result of criminal proceedings cannot have bearing on the departmental proceedings but this proposition of law is relevant where departmental proceedings and criminal proceedings are based upon same occurrence and mere exoneration in criminal proceedings do not absolve the delinquent official from the departmental proceedings as both involve different standards of proof. However, the said proposition of law is not relevant in the instant case because the issue in the instant case is neither exoneration from the criminal proceedings and benefit thereof in the departmental proceedings nor the underlying occurrence in the criminal as well as departmental proceedings is same, rather the issue in the instant case is whether the unauthorized absence of the petitioner from duty was willful or otherwise, on account of arrest in a criminal case. The petitioner's reference to his arrest in criminal case followed by criminal proceedings and his subsequent acquittal were the reasons justifying his absence and for not filing the appeal within time. The petitioner has not relied upon his acquittal in criminal case as a ground

for his reinstatement in service and award of back benefits. The arrest of the petitioner and subsequent confinement in jail for more than 05 years fully justified as to why the appeal was not filed in time. Therefore, this Court is of the view that the petitioner's appeal has been erroneously dismissed having been time barred.

11. Before rendering opinion on the second question, it will be advantageous to reproduce the contents of impugned removal order dated 06.02.2014 which reads as under:

“I, therefore, in exercise of powers conferred upon me under the provisions of the *Leave Efficiency & Discipline Rules of the Service, impose the penalty of Removal from Service upon you* from the date of absence on account of wilful absence from duty. Furthermore, you are directed to submit your complete uniform and other accessories issued to you in the Stores of District Multan and then approach the Accounts Office for clearance of dues, if any.”

(Emphasis supplied)

Bare reading of Rule 6(m) of the Rules reveals that the same does not provide for any penalty of dismissal from service. Rule 6 reads as under:

- “6. **Special offences and penalties** (1) If an official:
- (a)
 - (b)
 - (c)
 - (d)
 - (e)

Explanation....

- (f)
- (g)
- (h)
- (i)
- (j)
- (k)

- (l)
- (m) is absent from duty without prior permission of the reporting officer, he shall be liable to one fifth deduction of salary with allowance for each day's absence.”

There is no other punishment except one provided in Rule 6(m) of the Rules i.e., deduction of 1/5th salary etc. However, it is Rule 7 of the Rules which is applicable in the instant case as was the position in case of *Faisal Mehboob Khan supra*. Rule 7 reads as under:

7. Procedure under the Act XII of 2006.... An official shall be liable to be proceeded against under the provisions of the Act XII of 2006, if he is:

- (a) **guilty of misconduct** or any undesirable act;
- (b) guilty of corruption or is reasonably considered to be corrupt;
- (c) inefficient; and
- (d) engaged or is reasonably believed to be engaged in subversive activities, and his retention in service is prejudicial to national security, or is guilty of disclosure of official secrets to any unauthorized person.”

(Emphasis supplied)

It is well evident from the above quoted Rule 7 of the Rules that the disciplinary proceedings can be carried out against a regular employee of the department under the Punjab Employees Efficiency and Discipline Act, 2006 (“**the PEEDA**”), which provides for major and minor penalties for misconduct. Per Section 2(n)(vii) of the PEEDA, absence from duty is form of misconduct. Admittedly, the petitioner is a regular employee of the respondent department. In present case, it is not in dispute that the petitioner was removed from service on account of absence from duty under the Rules and not under PEEDA. This Court is of the opinion that the removal of the petitioner who is regular employee of the respondent department is not envisaged under Rule 6 of the Rules as held in case of *Faisal Mehboob Khan supra*. In

the said case, it has been also held that the department can initiate disciplinary proceedings against its regular employee in accordance with law i.e, PEEDA and in order to remove the petitioner under the PEEDA, it was obligatory upon the respondent-department to prove his willful absence from duty and as examined hereinabove, element of "willfulness" was never looked into by the competent authority.

12. In view of the above discussion, the present petition has merits and hence, accepted. The impugned orders of removal from service passed by the respondent department, and affirmed by the respondent No.1/Appellate Authority are set aside. The petitioner stands reinstated in service. As regards the back benefits, this Court is cognizant of the fact that on one end of the spectrum, it is the petitioner who has not worked for a long time and, at the other end, he has also suffered a lot as the legal and factual position of the case has not been appreciated by respondent No.1 while hearing his departmental appeal, and hence, the petitioner is entitled to certain portion of the back benefits, however, this Court intends to show restraint in determining the same and leave it to the discretion and wisdom of the department, which shall be decided expeditiously, preferably within 03 months, keeping in view the doctrine of proportionality.

13. **Allowed** in the above terms.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge