

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	W.P.No. 7434/2006 (s) & W.P. No. 11196/2010(s)
2	Parties Name	Shailendra Vs. State of MP & another
3	Date of Judgment	08/07/19
4	Bench constituted of	Hon'ble Shri Justice Prakash Shrivastava
5	Judgment delivered by	Hon'ble Shri Justice Prakash Shrivastava
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Shri Rahul Sethi learned counsel for the petitioner. Shri Rahul Vijaywargiya learned counsel for the respondents.
8	Law laid down	<p>(1) The order treating period of absence from duty is not a punitive order but it is an order passed for accounting an administrative procedure to avoid break in service. The order of <i>dies non</i> is passed in addition to the order of punishment in the departmental enquiry wherein the punishment imposed is lesser than the punishment of dismissal or removal from service. The order of <i>dies non</i> is partly in favour of employee as it avoids break in service in terms of FR-17A. The action of conducting departmental enquiry for misconduct of willful absence under Rule 24(2) of MP Leave Rules is independent of action of treating the period of absence as <i>dies non</i>.</p> <p>(2) Once the order of minor penalty is implemented and period of punishment is over, process cannot be initiated for enhancing the punishment.</p>
9	Significant paragraph numbers	14 to 22

(PRAKASH SHRIVASTAVA)

J u d g e

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(S.B.: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

W.P.No. 7434/2006 (s) & W.P. No. 11196/2010(s)

Shailendra

Petitioner

Vs.

State of MP & another

Respondents

Shri Rahul Sethi learned counsel for the petitioner.

Shri Rahul Vijaywargiya learned counsel for the respondents.

Whether approved for reporting :

ORDER

(Passed on 8/7/2019)

This order will govern disposal of W.P.No. 7434/2006 (s) & W.P. No. 11196/2010(s) as both these writ petitions have been filed by same petitioner and they are in respect of inter-related issues.

2/ In WP No. 7434/2006 (s) petitioner has challenged the order dated 26/10/2006 whereby for the period from 23/12/2001 to 30/8/2004 petitioner has been denied the suspension allowance and period from 1/9/2004 to 1/5/2005 has been treated to be a period of unauthorized absence and appropriate action for this period has been proposed. The petitioner has also challenged the order dated 8/1/2007 by which period from 23/12/2001 to 30/8/2004 and 1/9/2004 to 1/5/2005 has been treated to be dies-non.

3/ In WP No. 11196/10(s) petitioner has challenged the order dated 8/6/2010 by which major penalty of withholding of two increments with cumulative effect has been imposed.

4/ The facts of the case are that petitioner was working as Sub Engineer and was placed under suspension by order dated 22/12/2001. Thereafter charge sheet dated 2/2/2002 was issued to petitioner which was replied by petitioner by denying the charges and after appointing enquiry officer and representing officer the enquiry was conducted and enquiry report dated 20th January 2005 was submitted finding all the ten charges to be proved. The show cause notice alongwith the enquiry report was served upon petitioner which was replied by petitioner and penalty order dated 29/4/2005 was passed by respondent no. 2 inflicting the penalty of withholding of two increments without cumulative effect. Since the minor penalty was imposed therefore, petitioner had filed representations claiming full salary for suspension period and when these representations were not considered he had filed WP No. 3475/06 (s) which was disposed off by directing the competent authority to pass a reasoned order. Thereafter the impugned order dated 26/10/2006 was passed denying the salary for suspension period and proposing the action for unauthorized leave. This order is subject matter of challenge in WP No. 7434/06(s). This petition was earlier disposed off by learned Single Judge on 13/5/2008 holding the petitioner entitled for full salary for suspension period but in Writ appeal no. 804/2008 the Division Bench vide order dated 25/1/2012 had set aside the order of learned Single Judge and remanded the matter back for fresh consideration. In the meanwhile, the petitioner had challenged the order dated 29/4/2005 by filing the appeal

before respondent no. 1 on 13/6/2005. Respondent no. 1 had issued the notice dated 30th June 2009 proposing to enhance the penalty and imposing the penalty of withholding of two increments with cumulative effect. The petitioner had filed the reply and thereafter the impugned order dated 8/6/10 was passed modifying the order of penalty and imposing the major penalty of withholding of two increments with cumulative effect. This order is subject matter of challenge in WP No. 11196/2010(s). The respondents in the meanwhile had passed the order dated 8/1/2007 treating the period of absence as dies-non therefore, petitioner had amended the writ petition no. 7434/06(s) and challenged this order.

5/ Learned counsel for petitioner submits that respondents are not justified in imposing the major penalty of withholding of two increments with cumulative effect as the same amounts to double jeopardy. He further submits that petitioner is entitled to full salary for the suspension period if the order of minor penalty is restored and that the period cannot be treated as dies non without conducting full fledged enquiry and such an order is punitive in nature. He has also submitted that penalty has been enhanced to circumvent the contempt proceedings and after 5 years the order of penalty has been malafidely modified and none of the grounds raised in appeal have been considered by appellate authority.

6/ As against this learned counsel for respondents has submitted that under Rule 27(2)(iii) of MPCCA Rules the power exists with the authority to enhance the punishment. He further submits that petitioner is not entitled for restoration of order of minor penalty and order of dies not has rightly been passed.

7/ Having heard the learned counsel for the parties and on

perusal of the record it is noticed that the order of minor penalty withholding two increments was passed on 29/4/2005. Paragraph 6.6 of writ petition no. 11196/2010(s) reveals that said punishment order was implemented and period of punishment came to an end in May 2008. The show cause notice for enhancing the punishment in terms of Rule 27(2) proviso (iii) of MP Civil Services (Classification, Control and appeal) Rules, 1966 was issued on 30th June 2010 which was after punishment period was over. Once the petitioner had suffered punishment, thereafter the issue of enhancing the punishment did not arise.

8/ The record further reflects that writ petition no. 3475/06(s) was disposed off by order dated 11/8/2006 with a direction to respondents to decide the representation and the said order was not complied with therefore, the petitioner had initiated the contempt proceedings. The order dated 8/6/2010 enhancing the punishment and imposing the punishment of withholding of two increments with cumulative effect has been passed after five years of passing of original order of minor punishment dated 29/4/2005 and in the meanwhile the increments of petitioner were restored and he was granted increments in May 2008 and 2009. Hence such a belated order of modifying the penalty otherwise lacks bonafide. The order of minor penalty could not have been modified after penalty period was over and the minor penalty order was fully implemented.

9/ A perusal of order dated 8/6/2010 reflects that the competent authority has enhanced the punishment by a cryptic order simply by stating that the charges are serious in nature, even without taking note of the charges in departmental enquiry.

10/ Having regard to the aforesaid, I am of the opinion that the impugned order dated 8/6/2010 imposing the major penalty of withholding of two increments with cumulative effect cannot be sustained and is hereby set aside.

11/ So far as the impugned order dated 26/10/2006 is concerned, the said order reflects that petitioner was not present in the headquarter from 23/12/2001 to 30th August 2004 during suspension period.

12/ Counsel for the petitioner has failed to point out any rule, regulation or circular under which the petitioner was entitled to receive full salary for suspension period though he remained absent from headquarter during suspension. Hence I am of the opinion that the order dated 26/10/2006 does not suffer from any error.

13/ So far as the order dated 8/1/2007 treating the period from 23/12/01 to 30th August 2004 and 1/9/2004 to 1/5/2005 as dies non is concerned, it is not in dispute that during the aforesaid period petitioner was absent from duty and he has not worked.

14/ Dies non is a short for *dies non juridicus* which means either a day on which no legal business is done or the day that does not count. Dies non has been defined in Black's Law Dictionary to mean "A *day not juridical. A day exempt from court proceedings, such as a holiday or a Sunday.*" The Oxford Dictionary defines dies non as a day on which no business is done or day that does not count or cannot be used.

15/ Bombay High Court in the matter of **India Central Government Health Scheme Employees Association Vs. Union of India reported in 2005 SCC Online (Bombay) 537; (2005) 4 MAHLJ 939** has duly taken note of this dictionary

meaning of dies non by holding that such period is to be treated as without any business and therefore, non-existent by both employer and employee and hence the employee is not entitled to any remuneration for such period.

16/ The Division Bench of this Court in the matter of **Battilal Vs. Union of India and others reported in 2005(3) MPHT 32** clarifying this position has held that when the authority directs that the period will be treated dies non, it means the continuity of service is maintained but the period treated as dies non will not count for leave, salary, increment, pension. The Division Bench vide order dated 26.6.2014 in WA No.66/2014 has also held that on account of treating the period dies non, continuity of service is maintained. The single bench of this Court also in the matter of **Mahesh Kumar Shrivastava Vs. State of M.P. and others reported in 2007(3) MPLJ 525** has reiterated that dies non means continuity of service but the period will not be treated as leave, salary, increment and pension. Hence, it is clear that treating the period of unauthorized absence as dies non does not result into break in service because seniority is maintained.

17/ FR-17A provides for treating the period of unauthorized leave as break in service and reads as under:

“F.R. 17-A Without prejudice to the provisions of Rule 27 of the MP Civil Services (Pension) Rules, 1976, a period of an un-authorized absence-

(i) in the case of an employee working in industrial establishment during a strike which has been declared illegal under the provisions of the Industrial Disputes Act, 1947 (No. 14 of 1947) or the MP Industrial Relations Act 1960 (No. 27 of 1960) or any other law for the time being in force;

(ii) in the case of other employees as a result of acting in combination or in concerted manner, such as during a strike, without any authority from,

or valid reason to the satisfaction of the competent authority; and

(iii) in the case of an individual employee, remaining absent un-authorisedly or deserting the post,

shall be deemed to cause an interruption or break in service of the employee, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required.”

18/ The above rule is without prejudice to Rule 27 of the MP Civil Service (Pension) Rules, 1976 which provides for effect of interruption in service.

19/ Rule 24(2) of MP Leave Rules, 1977 deals with willful absence and provides as under:

“Willful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action.”

20/ Hence in case of absence without leave one or more of the following actions can be taken:

- i) Period of unauthorized absence can be treated as break in service under FR-17A;
- ii) Disciplinary action can be taken against the employee concerned for unauthorized leave and one of the punishment prescribed in the applicable rules can be imposed.
- lii) Period of absence can be treated as dies non which has the effect of giving seniority for the period of absence but not counting the period of absence for leave, salary, increment and pension.

21/ The Supreme Court in the matter of **State of Punjab Vs. Dr. P.L. Singla, reported in 2008(8) SCC 469** has held:

“11. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

12. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline.

13. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may.

14. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend

upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted, it will result in break in service, thereby affecting the seniority, pension, pay etc., of the employee. Any consequential order directing how the period of absence should be accounted, is an accounting and administrative procedure, which does not affect or supersede the order imposing punishment. “

22/ The Supreme court in the above judgment has made it clear that in the case of unauthorized absence if in a departmental enquiry the punishment does not result in severance of employment meaning thereby any punishment lesser than the punishment of dismissal or removal or compulsory retirement is imposed than a consequential order as to how the period of absence is to be accounted for and dealt with in service record is to be passed since absence of such an order results in break in service effecting seniority, pay etc. and such a consequential order is an accounting and administrative procedure which does not effect or supersede order of punishment. Hence order of treating the period of absence as dies non is only an accounting and administrative procedure to avoid break in service and it can not be treated to be punitive order. It is also worth noting that order of dies non is partly in favour of the employee concerned because it maintains continuity in service and seniority otherwise in terms

of FR 17A break in service will take place. Rule 24(2) of the MP Leave Rules is for taking action for the misconduct of willful absence therefore, it is an action independent of action of treating the period as dies non. In view of the binding precedent of the Hon'ble Supreme court in the matter of Dr. P.L. Singla (supra) u/A 141 of the Constitution the plea of counsel for petitioner to treat the order of dies non as stigmatic and punitive order on the basis of judgments of this court in the matter of **Anusuyya Bai and others Vs. State of MP & others reported in 2004(3) MPLJ 627** and in the matter of **Mahesh Kumar Shrivastava Vs. State of MP and others reported in 2007(3) MPLJ 525** can not be accepted. Hence the order dated 8/1/2007 treating the period as dies non does not suffer from any error.

23/ In view of above analysis WP No. 11196/2010(s) is allowed by setting aside the order of major penalty dated 8/6/2010. WP No. 7434/06(s) is dismissed as the orders dated 26/10/2006 and 8/1/2007 do not suffer from any error. Signed order has been kept in the file of WP No. 11196/10(s) and a copy thereof has been placed in the record of the connected writ petition.

C.C. as per rules.

(Prakash Shrivastava)
Judge

BDJ