

No. Det 28 of 2019

Regulation 42(3) (b) of the Public Service Commission Regulations is clear that *“The intention to administer a warning shall be communicated to the officer in writing, and he shall be given an opportunity to reply”.*

The Appellant, an OIA, has appealed against the decision of the Respondent regarding a *“warning administered on grounds of unsatisfactory conduct as per Regulation 42(3)(a) of the Public Service Commission (PSC) Regulations, as subsequently amended”* to him.

Appellant’s Case

The Appellant solemnly affirmed as to the correctness of his Grounds of Appeal (GOA) and his Statement of Case (SOC).

His GOA were as follows:

- “1. On... , I am addressed in the capacity of Ag Senior OIA to submit written explanations on an issue of ...clearance, whilst I was only an OIA and had never been sanctioned with any letter of authority nor any written instruction to perform and shoulder higher responsibilities until the ... where I was instructed verbally for the first time.*
- 2. Procedural flaw and malingering by the Department of ACI management, misleading the Commission to approve assignment of duties since the period preceding ... that is from ..., when such higher responsibility was not shouldered by me and for which I refused to accept any financial gratification which would otherwise be an act of corruption.*
- 3. Lack of fair consideration by ACI Management to objectively and transparently investigate on the issue based on substantial, factual and tangible elements such as entries, duties, records, rosters, notes of meetings, procedures and documentation amongst others since the ... Clearance Office is ISO Certified and also the actions/inactions of responsible officers vis-à-vis certain unfounded claims which is unethical and violates the principles of good governance.*
- 4. On ..., I am administered a warning on ground of unsatisfactory conduct in accordance with Regulation 42(3)(a). However, the warning was “ultra vires” provision 42(3)(b) of PSC regulations as I was never communicated with the*

intention of management to be administered a warning, nor given an opportunity to explain.

5. Following my formal complaint with ACI Management, a controversial Departmental Inquiry board was set up on two occasions, on ... and ... by the Director to enquire on the flawed warning inflicted by himself in breach of regulation 42(3)(b) to which I attended in presence of the President of the Union whereby the chairperson and members failed to provide an explanation on the legitimacy of this board and fundamental answers. At the first sitting, I exacted my right to silence and to give my statement only in the presence of an attorney which the board never allowed me the opportunity and again was victim of usage of false by the members during the second board hearing. In the absence of my statement, the Board miraculously arrived to a recommendation, unknown to me so far, whereby based on which the Director of the department stopped the assignment of duties as Senior OIA and maintained the warning.

6. I Suffered victimization by ACI Management on occasions and purposes listed below:

(a) being a staff adamant on transparency and raising concern on management inaction on the deteriorating working conditions in the Clearance office, staff levels and competence management, misuse of public funds on capital expenditures worth millions, lack of forward vision of management to implement transitions as per the international relevant organisation recommendation.

(b) Precedent act of malingering and usage of false by the Ag SIA in regarding shouldering of higher responsibilities to me during vacation of the Senior OIA.

(c) For being a Union Member.

(d) Acts of favouritisms in favour of the Senior OIA nomination to overseas training that was contested in....

(e) Falsely, unfounded and malicious allegations made against myself by the Senior OIA with regards to non-delivery of my duties that I reported to the Ag Divisional Head and necessary entries logged in our occurrence book.

(f) Acts of moral harassment and influential methods by the Human Resource Division and ACI top management to intimidate my stand.

(g) I have been used as a scapegoat to take on charge and liability, the failure of ACI management to discharge its administrative responsibilities vis-à-vis higher responsible authorities.

(h) Shouldered higher responsibilities as Ag Senior OIA only on verbal instruction from ... to ... (28 Months and 03 days) for which payment of allowances is still pending to date". (SIC)

In his SOC, Appellant averred as follows: that he was the most senior OIA appointed since ... and that he works both on shift system and day duty as his colleagues. He then explained the job structure of the Division and explained that SIA and Senior OIA working during office hours but that the Clearance Services are manned on a 24/7 basis and 4 OIAs out of 10 work on a rotation basis at all times. As regards the issue before the Tribunal he gave a detailed chronology of the events including the confusion regarding the issue of assignment of duties of Senior OIA to him and insisted again that it was only on the ... at a meeting that he was instructed to act in the capacity of Senior OIA. He could not accept responsibility for an act prior to that or accept any allowance for which he had not delivered in a higher capacity before that date.

During cross-examination, the Appellant produced documents and further details regarding *inter alia* his work schedule in support of his case. He averred that he was not aware that on ... Mr S. obtained a promotion to the post of AIS and that one post of Senior OIA became vacant. He learnt about this later. He conceded that at that time he was the most senior OIA and he was next in line to be promoted Senior OIA. He denied that as soon as the vacancy occurred, Mr S. told him that he would start working in the capacity of Senior OIA. It was only about one week later on ... that at tea time he rose the issue of actingship with Mr S. who disagreed with the idea. Appellant maintained his version.

The Appellant averred that he did not depose before the Board of Inquiry. However, he was told that the recordings of the Board would be verbatim and he would be asked to sign same but he was never called to do so and the report was finalised.

The Appellant averred that he was treated unjustly and asked the Tribunal to order the Respondent to withdraw the warning arbitrarily administered to him based on erroneous grounds and procedural flaws.

He produced a copy of a letter from the ACI to Mr G., regarding the same incident in which it is clear that Mr G. had given his explanations concerning the incident. He

was given fourteen days to show cause why a warning should not be administered to him whereas Appellant was given no such letter to show cause.

Respondent's Case

The representative of the Respondent solemnly affirmed as to the correctness of Respondent's Statement of Defence (SOD).

The Respondent averred that the Appellant was acting as Senior OIA since ... and he was placed on day duty as from ... to manage the day-to-day running of the Clearance Office and he reported directly to the IOS. This followed the vacancy of the second post of Senior OIA which became vacant on

The Respondent averred that Mr G. took the correspondence issued by the authority as approval for the ... and Mr G. only inquired from Mr S. whether a clearance could be accepted from the authority instead of the Ministry of ... and Mr S. confirmed same.

Appellant was performing higher duties as Senior OIA and he was removed from shift and de facto assigned the duties of Senior OIA. The duties of Senior OIA was to check, update and process data of relevant information.

Appellant should have informed his immediate supervisor who was Mr S. and not Mr SP, who was scheduled for the amendments of ... Publications. Instead of informing Mr S, the Appellant and Mr G. decided to speak to a representative of the Company, requesting him to withdraw the letter conveying approval.

The Respondent averred that actingship would start on the day the vacancy occurred, provided that the recommended officer had done the higher duties. The request would be transmitted to the Human Resources Department, who would forward the recommendation to the Respondent. The recommended officer would be informed after the decision of the Respondent was obtained.

The Respondent stated that the Appellant was informed verbally in ... that a request for his actingship had been forwarded to the Commission

The Appellant was given the opportunity to explain on the issue of clearance to the company and it was subject to his explanations that a warning was issued to him.

The Respondent admitted that it had received a letter from the Federation of Civil Service and other Unions on ... and a letter from the Appellant on

The Respondent averred that in a letter dated ..., the Ministry of ...informed the Appellant:

- (1) That there was no provision for an appeal mechanism for disciplinary proceedings in cases where a warning was administered on a public officer;and
- (2) That Appellant was advised to perform to the best of his ability and in the interest of the service.

A document to that effect was produced.

The Board of Inquiry was set up to investigate why a warning should not be given. On the sitting dated ..., once the Board had provided all the clarifications raised by the Appellant, the latter refused to reply to the Board and he exacted the right to silence. The Board also informed the Appellant that if he wanted to bring a legal representative he should write to the ACI and Appellant did not submit any correspondence on this issue. Despite the fact that Appellant exacted his right to silence, Appellant made remarks and statements to the Board which were irrelevant to the case. The conclusion of the Board was based on the hearing of all other persons convened by it.

The Respondent denied that Appellant was not performing the duties of Senior OIA when the incident occurred and that he could not be held responsible for it.

The representative of the Respondent stated that the Responsible Officer can issue a letter of assignment of duties to an officer without reference to the PSC for an initial six months. In case an extension of the assignment of duties is needed, the Responsible Officer must seek the approval of the Commission. According to her, in this case, the Appellant had not been given any letter or been told that he was assigned the duties of Senior OIA at the time the vacancy as Senior OIA occurred.

The ACI Mr P, deponed. He certified that OIAs are required to work on a shift system and Senior OIA are required to work on day duty. It was also the Senior OIA who managed the day-to-day running of the clearance office as approved to an OIA. The Appellant was put on day duty on

The reason was that when Mr SB was promoted in ..., it was not possible to assign the duties of Senior OIA to the Appellant as an OIA was on leave and the Department needed 4 OIAs to operate the shift system. When the officer on leave returned, the Appellant was then able to be assigned the duties of Senior OIA.

The ACI did not ask Appellant to perform the duties of Senior OIA but this was done by Appellant's immediate supervisors. It was the practice that the officer be told verbally. The ACI averred that Mr S., Senior OIA, Mr SB, IOS and Mr GV, officer-in-charge of the Management had confirmed in writing that they told Appellant to assume responsibility and he was removed on ... from the shift system for him to perform the duties of Senior OIA. On..., a letter was sent to the Commission regarding Appellant for assignment of duties as from As he was assigned the duties of Senior OIA, Appellant should have reported the incident to the IOS and not to Mr S., Senior OIA. The latter told the ACI that Appellant had not reported the incident in the proper format and Appellant had dealt with the company on his own without anybody else knowing in the department. The ACI himself only knew about it on ... when he was questioned by the Higher Office.

The ACI then explained about the setting up of the Board of Inquiry and the approval of the PSC for the official assignment of duties of Senior OIA to Appellant and the change in the effective date of the assignment of duties.

The ACI stated that an acting Senior OIA could still be working on shift if there was a shortage of staff in addition to his day duty and he would be paid an allowance. This was the practice in the department. He drew attention to Note 2 of the Scheme of Service of Senior OIA, where it is said that a Senior OIA may be required to work on shift.

The ACI was finally cross-examined on the reason as to why the Appellant was not given the opportunity to reply before the warning was administered to him as it was

done in the case of G. The more so, both officers were allegedly involved in the same incident. He replied that he was not aware of that and that it was the Human Resource Department who did same.

Counsel for Respondent made reference to one of the Determinations of the Tribunal as regards issue of notification to give a warning (Website reference Det 1 of 2016).

The Respondent averred that the appeal had no merit and that it be set aside.

Determination

The appeal concerns the warning administered on the Appellant by the Respondent. The incident that led to the warning occurred on ... when an OIA issued a letter to the company without the prior approval of the Higher Office.

The two issues that need to be addressed are:

- (i) Whether the Appellant was acting as Senior OIA at the time of the incident and was therefore responsible for the action taken by Mr G. who was an OIA; and
- (ii) Whether the Appellant was given notice that a warning could be given to him before the letter of warning was issued on ...

Issue No (i)

From Documents produced by Respondent, the Tribunal learnt that: The Ag Divisional Head of the Department had issued a note on ... to the ACI informing him of the intention to assign the duties of Senior OIA to the Appellant. The ACI wrote to the Commission on ... recommending the Appellant, the senior-most OIA who was fully qualified to act in the capacity of Senior OIA with effect from ... and gave its approval for acting appointment of Appellant as Senior OIA w.e.f. ..., date the vacancy occurred. The ACI then wrote another letter to the Commission on ... stating that: "*Since the Appellant has stated in writing that he was not assigned the duties of Senior OIA since ..., it would not be appropriate to offer him an acting appointment as from that date in*

accordance with paragraph 3 of your letter under reference, we have therefore initiated an internal investigation to clarify the issue". On ..., the ACI wrote to the Appellant stating that "Covering approval has been obtained from the Public Service Commission for the grant to you of an acting appointment as Senior OIA from ... to" On ..., the ACI wrote to the Appellant that the Board of Inquiry had submitted its report and in line with its recommendation, it had been decided that the assignment of duties of Senior OIA to Appellant be stopped forthwith.

It is clear therefore from the above that the Appellant had not been assigned officially the duties of Senior OIA at the time of the act of Mr G. on The ACI only wrote to the Commission later, albeit that the ACI recommended backdating the assignment of duties to The backdating was contested by the Appellant and finally the Commission gave covering approval for the assignment to start as from

The question then remains as to whether the Appellant was asked to perform the duties of Senior OIA, pending the procedure to get official approval of the Commission to assign him the duties of Senior OIA. It is noted that the Ag Departmental Head had written a note to the ACI on ..., i.e. before the date of the incident. However, it is not known whether the Ag Divisional Head had informed the Appellant about this. The Appellant was adamant that the first time that he heard about action being taken to assign to him the duties of Senior OIA was at a meeting in the office of the ACI on The ACI on the other hand stated before this Tribunal that he got confirmation in writing from the supervisors of Appellant that they had informed the Appellant that he should perform the duties of Senior OIA before action was initiated to formally assign to him these duties. But no documents were produced to that effect and none of the supervisors came to give evidence before the Tribunal. Further, although according to Appellant he was going to be provided with the Notes of Proceedings to sign same, he was never given such an important document. These were not produced before the Tribunal either.

The situation is blurred. It is not clear whether the refusal of the Appellant to backdate his assignment of duties to ... would make him liable to be responsible for the incident or whether the ACI had done so to make him accountable as supervisor of Mr G.

It is noted that the Appellant reported the incident to Mr S., Senior OIA, giving the impression that the latter was his immediate supervisor. Respondent opined that the Appellant should have reported the case to Mr SB, SAI which would be the right channel if the Appellant was really performing the duties of Senior OIA, if he was doing so unofficially. Once more, it would have helped the Tribunal to get the version of Mr S.

The Respondent averred that Mr G. and the Appellant spoke to the company to try and get them to withdraw the letter of approval given to them. But the Appellant was never cross-examined on this issue.

It is also not clear why the Appellant was checking and updating relevant information when this is normally the duty of a Senior OIA, as averred by the Respondent. Again, this was never put in cross-examination to Appellant.

In view of the contradictory versions of the parties and the fact that the Respondent did not produce documentary evidence nor bring witnesses which the Respondent could easily have summoned, the Tribunal cannot pronounce itself on issue No (i).

Issue No (ii)

This issue concerns the need to inform the officer about the possibility that a warning be given to him and allowing him the opportunity to make his case. The Respondent averred that the Ministry of ... had advised the Appellant that: “there is no provision for an appeal mechanism for disciplinary proceedings in cases where a warning is administered on a public officer”. However, Regulation 42(3) (b) of the PSC Regulations is clear that *“The intention to administer a warning shall be communicated to the officer in writing, and he shall be given an opportunity to reply”*. Furthermore, if the Respondent believed that no appeal mechanism existed, one may ask why there was a Disciplinary Committee.

The incident occurred on ... and the letter of warning was issued on Between these two dates, the following took place:

- (a) On..., he was asked in writing to explain on an issue of clearance;

- (b) On ..., the Appellant replied to the ACI and he explained that he drew the attention of Mr G. to the mistake and he informed his immediate supervisor, namely Mr S., Senior OIA of the matter. He was not involved in the process phase of clearance and when the mistake was found he immediately informed his immediate supervisor;
- (c) On ..., the Appellant was informed by the ACI that subsequent to the findings of the Board of Inquiry, the warning issued to him on ... was maintained;
- (d) However, when the case of Mr G. was treated, Respondent did ask him to show cause why a warning should not be issued to him before issuing the warning while the same treatment was not afforded to the Appellant.

The question one may ask is whether the letter issued to Appellant to give explanations regarding the flight clearance incident can be construed as an initial step prior to take action against him in case of unsatisfactory explanations. Does the Respondent have to state clearly in writing as per Regulation 42(3)(b) of any intention to administer a warning? The Tribunal finds that the Respondent should be consistent in its approach when dealing with the same incident and should treat all officers involved alike. Respondent should have applied Regulation 42(3)(b) to both officers which it did not do.

Det 1 of 2016 cannot be resorted to in this case as the facts are not similar.

In the absence of a scrupulous respect of the PSC Regulations, the Tribunal quashes the decision of the Respondent and remits the matter back to it to take corrective measures.