BEFORE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN

Present: Hon'ble Mr. Justice J.C.S.Rawat
------ Chairman

Hon'ble Mr. D.K.Kotia
-------Vice Chairman (A)

Claim Petition No. 41/2012

Gayur Ali C/o Shri Mohammad Ahsan, Azad Dairy, 43 Gandhi Road, Innamullah Building, Dehradun.

……Petitioner

Versus.

1. State of Uttarakhand through Secretary, Home Uttarakhand Sachivalaya, Subhash Road, Dehradun.
2. Director General of Police, Agnishaman & Apat Sewa Uttarakhand, Subhash Road, Dehradun.
3. Deputy Director General, Agnishaman & Apat Sewa Uttarakhand, Dehradun.
4. Director General of Police, Garhwal Range, Uttarakhand, Dehradun.
5. Superintendent of Police, District Pauri, Uttarakhand.

…….Respondents.

Present: Sri B.B.Naithani, Ld. Counsel
for the petitioner.

Sri Umesh Dhaundiyal, Ld.A.P.O.
for the Respondent.

JUDGMENT

DATED: JUNE 13, 2013.

Justice J.C.S. Rawat, (Oral)

1. This petition has been filed for seeking the following relief:-

"In view of the facts narrated here in above paragraphs the petitioner most respectfully prays for the following relief:-

(a) That the order No. P.F. 01/2003 dated 22.9.2003 (Annexure-1) passed by the S.P. Pauri and by which the services of the petitioner have been dismissed may be quashed and Hon'ble Tribunal may be pleased to grant all consequential benefits thereafter to treat the petitioner deemed to be continuing in service as if he was never suspended nor his services were ever dismissed.

(b) That the order No. C.O.G./C.A.-Appeal-1(Pauri/2004)dated 31.01.2004 (Annexure-15) by which appeal has been rejected may kindly be quashed.

(c) That the order No. A-52/2007 dated 14.01.2012 (Annexure No.2) passed by S.P.Pauri by which appeal/ revision of appeal has been rejected may kindly be quashed.

(d) The Hon'ble Tribunal may be pleased to quash the order No. D.G.F.-256(6)/2004 dated 29.11.2004 (Annexure-17) by which the revision has been rejected.

(e) That the order NO. P.F.-01/2003 dated 8.10.2003 passed by the S.P. Pauri after the relationship of employer and employee has ceased to exist because of dismissal of services and by which the amount of subsistence allowance has been illegally confiscated may kindly be quashed and declared as void and necessary order may also be issued to S.P. Pauri to make up-to-date payment of subsistence allowance which has yet not been paid to the petitioner.

(f) That a further direction may also be issued to the S.P. Pauri to sanction leave on the basis of medical certificate for the period during which the petitioner could not be present on duty because of illness.

(g) That Hon'ble Tribunal may issue any other direction which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.

(h) That a suitable cost may also be awarded in favour of the petitioner."

2. The petitioner was a Fireman under the Fire Service Act 1944 & U.P. Fire Service (Recruitment and Conditions Service) Rules 1945(hereinafter referred to as Fire Act, 1945) and he was posted as such in the Headquarter District Pauri, Uttarakhand from where he remained absent from duties. It is the allegation in the charge sheet that he remained absent for 136 days, though the reason best known to the respondents, the period has not been disclosed in the charge sheet. Thereafter a preliminary enquiry was conducted against the petitioner about his absence from duties. The petitioner was found guilty in the preliminary enquiry and the departmental enquiry was proceeded against the petitioner after framing the charges. The petitioner did not participate in the enquiry and the enquiry officer recorded the statement of the witnesses and found him guilty of the absence from duties. Thereafter, the S.P., Pauri being the departmental authority came to the conclusion that the petitioner should not be retained in the department and he should be dismissed from service. A show cause notice to that effect was issued to the petitioner. Meanwhile, the petitioner was also suspended for the same by the S.P., Pauri on 18.11.2002. The petitioner did not reply to the show cause notice and the disciplinary

authority came to the conclusion that the petitioner is guilty of the charge of misconduct against him and he was removed from service.

3. Feeling aggrieved by the said order, the petitioner preferred an appeal before the appellate authority. The appellate authority also dismissed the appeal and thereafter he submitted a review petition/memorandum against the appeal to the Government, which was sent to the appellate authority and the appellate authority sent it to the S.P. and he further sent it to Additional S.P., who disposed of the same by rejecting the memorandum. Thereafter, the petitioner also preferred a revision petition before the competent authority which was also dismissed. Feeling aggrieved by all the orders, the petitioner has preferred this petition.

4. The respondents filed W.S. and refuted all the contentions made in the claim petitions. The respondents have categorically stated that there was sufficient evidence against the petitioner and the petitioner has been rightly dismissed from service; the petitioner was given sufficient opportunity to defend his case but he did not avail any opportunity. The respondents have further alleged that the petitioner committed grave misconduct willfully, hence he is liable to be punished by way of dismissal; the petitioner was not on duties for 136 days without any permission or leave, hence the misconduct was proved against him. The respondents have also stated that all the impugned orders have been passed by applying the mind by the authorities. At last respondents have prayed that the petition may be dismissed.

5. We have heard learned counsel for the parties and perused the record.

6. Ld. counsel for the petitioner contended that the impugned order was passed by the S.P., Pauri on the ground that the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules 1991((hereinafter referred to as Rules 1991) applicable to Uttarakhand are not applicable in the case of the petitioner but the Fire Service Act 1944 and the Fire Services Rules, 1945 are applicable on the petitioner. He further contended that the petitioner’s misconduct is squarely covered under Section 9 of the aforesaid Act as such a complaint should have made against him under Section-9 by the S.P. to the Magistrate concerned and the punishment should have been awarded U/S 9 of the said Act. The case of the petitioner is not covered under the Regulation 477 of the Police Regulation and the Rules 1991, applicable to Uttarakhand. Ld. counsel for the petitioner further contended that the petitioner’s leave was sanctioned without pay on 22.9.2003 and the order of granting of said leave is on

record. It is not in dispute that the leave has been granted without pay on 22.9.2003 by the respondents. Ld. counsel further contended that if the leave has been granted, the absence of the petitioner cannot be said to be a willful absence. Ld. counsel for the petitioner further contended that the petitioner's misconduct has been condoned by way of allowing the leave, applicable to the petitioner, as such the punishment awarded by the punishing authority does not commensurate with the gravity of the misconduct and is harsh, disproportionate, inappropriate and shocking. The departmental authority should have awarded a lesser punishment. It was further contended that while considering the gravest punishment against the petitioner, the circumstances of the case should have been considered prior to awarding the punishment by the punishing authority. Ld. counsel for the petitioner further contended that the enquiry report clearly indicates that the past conduct of the petitioner has been taken into consideration holding him guilty. He further contended that at the bottom of the report, the S.P., Pauri has endorsed that he is agreeable to the enquiry report and to put up a notice to that effect. The impugned punishment as well as the notice also indicate that he is agreeable to the enquiry report completely as such the past conduct of the petitioner has been considered by the punishing authority while awarding the punishment. Ld. counsel for the petitioner further contended that the punishing authority as well as the appellate authority and the revisional authority have not applied their minds to the facts and circumstances of the case; it is revealed that the order impugned of the S.P., Pauri does not indicate that he has come to an independent finding of the dismissal considering the facts of the case; and it further reveals that the dismissal order has been passed under the Uttaranchal Police Officers(Punishment & Appeal) Rules, 2002 which are not in existence for Police Department. He further pointed out that the impugned order is liable to be vitiated on the above grounds.

7. Sri Umesh Dhaundiyal, Ld. A.P.O. appearing on behalf of State refuted the contention and contended that the absence was a willful absence, the petitioner was not on duty during the period indicated in the charge sheet and he did not obtain any permission from the competent authority. Thus, the absence of the petitioner was absolutely willful. Ld. A. P.O. further contended that the leave, which was granted to the petitioner was only to complete the record card of the petitioner. Ld. P.O. further contended that the dismissal order was passed after due application of mind by all the

authorities and it cannot be held that the order was passed without applying the mind. The Rules which have been referred, are due to typographical error and it was not a willful mistake on the part of the authorities. It was further contended that the past conduct of the petitioner can be considered while awarding the punishment and the order does not depict that his past conduct has been considered. Ld. A.P.O. further contended that the Section 8 & 9 of the U.P. Fire Service Act 1944 are definitely applicable in the case of the petitioner. The opening sentence of Section-8 clearly provides that in addition to any other form of punishment to which members of the U.P. Fire Service may be liable under any law or the rule for the time being in force, the I.G. of Police or any other officer may award additional punishment to such delinquent. Thus, these sections clearly indicate that Rule 1991 as well as Regulation 477 (which was later on substituted by the Rules 1991) are applicable in the case of the petitioner. It was further pointed that Rule 22 made under the said Act clearly reveals that the aforesaid provisions of Police Regulations are applicable in the case of the petitioner.

8. We have considered all the submissions of the parties. It is necessary for the punishing authority to consider the case of petitioner of dismissal based on misconduct of absence; firstly the delinquent remained absent and secondly the absence was willful. For the same we would like to refer the judgment of Hon'ble Apex Court in Shri Bhagwan Lal Arya Vs. Commissioner of Police, Delhi and others 2004 (4) SCC 560. In the instant case the Hon'ble Apex court has held that the petitioner was a Police Constable in the Delhi Police. He remained absent from duties and he sent an application for leave, but he was charged for the absence from duties and at the same time his leave was also granted by the concerned authority. The moot question came before the Hon'ble Apex Court that if the leave has been granted to him, then how the punishment can be imposed upon him for the willful absence. It was further held that if the leave has been granted and he remains absent, though he may have committed misconduct, but it was not a grave misconduct, for which the maximum punishment of dismissal from service should be awarded to him. The Hon'ble Apex Court has held as under:-

"10. In the instant case, the appellant had absented himself for 2 months, 7 days and 17 hours on medical grounds. The above two rules provided that penalty of removal can be imposed only in cases of grave misconduct and continued misconduct indicate incorrigibility and complete unfitness

for Police service. The absence of the appellant on medical grounds with application for leave as well as sanction of leave can under no circumstances, in our opinion, be termed as grave misconduct or continued misconduct rendering him unfit for Police service.

12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him the punishment of removal from service since their earlier order of termination of appellant's service under Temporary Service Rules did not materialise. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government Doctors as grave misconduct in terms of Delhi Police (Punishment & Appeal Rules, 1980). Non-application of mind by quasi-judicial authorities can be seen in this case. The very fact that respondents have asked the appellant for re-medical clearly establishes that they had received applicant's application with medical certificate. This can never be termed as willful absence without any information to competent authority and can never be termed as grave misconduct.

9. This case is squarely covered by this judgment. The Hon'ble Apex Court in the instant case set aside the punishment of removal and the petitioner was punished by the Hon'ble Court that the period shall not be counted on duty and the delinquent would not be entitled for any service benefits for the said period as indicated in the judgment. Thereafter the Hon'ble Apex Court in the case of Krushankant Parmar Vs. Union of India 2012 (3) SCC 178 in Paragraphs 17, 18 & 19 has held as under:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry officer on appreciation of evidence though held that the appellant was unauthorizedly absent from duty but

failed to hold that the absence was wilful; the disciplinary authority as also the appellate authority, failed to appreciate the same and wrongly held the appellant guilty."

10. In view of the above it is amply established that the petitioner remained absent but his duties have been regularized and the leave has been granted to him without pay, as such the punishment awarded to the petitioner is very harsh, disproportionate, inappropriate and shocking to the conscious of the Court. We find substance in the arguments of the Ld. counsel for the petitioner.

11. Whereas the applicability of the Rules 1991, applicable to Uttarakhand, framed under the Police Act is concerned, those rules are applicable in the case of the petitioner by virtue of the Fire Act, 1945 in Rule 22. It is not in dispute that the said Rules of 1991 are applicable, but the only dispute is that whether in case of the misconduct of absence, the petitioner should have been punished under the 1991 Rules, applicable to Uttarakhand or he should have been dealt with under Sections 8 & 9 of the Fire Act 1945, applicable to Uttarakhand and the Rules made there under. The language of the Section 8 is clearly indicative that these rules are in addition to the Police Act/ Rules 1991 and it is not in derogation of this Police Act/Rules 1991. We do not find any force in the contention of the petitioner. We conclude that the Police Act as well as 1991 Rules made under the Act are applicable in the case of the petitioner.

12. Ld. counsel for the petitioner further pointed out that the respondents have not applied their mind while passing the impugned order which was refuted by the Ld. A.P.O.. The order and the enquiry report which are on record, clearly reveal that the S.P., Pauri, after the perusal of the report has written on the report that he is agreeable to the said report and he further endorsed that the notice to the petitioner should be placed before him. The impugned order as well as the notice clearly reveal that the punishing authority has awarded the punishment under 2002 Rules which are not in existence under the Police Act. The Ld. A.P.O. could not demonstrate any such rule applicable to petitioner framed in the year 2002. Further more the endorsement reveals that the punishing authority had to apply his mind to the proposed punishment and there was no question of preparing the notice in a format as directed by him in the enquiry report, so the impugned order further reveals that the punishing authority has not applied his mind while awarding the punishment. Thus, we find force in the contention of the Ld. counsel for the petitioner on this point.

13. Whereas the past conduct is concerned, it is very settled law that if the past conduct is considered, then definitely the notice should be given to petitioner preferably it should be mentioned in the charge sheet. The Hon'ble Apex Court in the case of Mohd. Yunus Khan Vs. State of U.P. & others 2010(7) 970 has held as under:-

33. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the post conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment.

34. This Court in Union of India & others Vs. BIshamber Das Dogra, [26] (2009) 13 SCC 102, considered the earlier judgments of this Court in State of Assam Vs. Bimal Kumar Pandit, [27] AIR 1963 SC 1612; India Marine Service (P) Ltd. Vs. Their Workmen, [28], AIR 1963 SC 528; State of Mysore Vs. K Manche Gowda,[29] AIR 1964 SC 506; Colour-Chem Ltd. Vs. A.L. Alaspurkar &others,[30] AIR 1998 SC 948; Director General, RPF Vs. Ch. Sai Babu,[31] (2003) 4 SCC 331, Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate,[32] (2005) 2 SCC 489; and Govt. of A.P. & others Vs. Mohd Taher Ali,[33] (2007) 8 SCC 656 and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in the absence of statutory rules, the Authority may take into consideration the indisputable past conduct/ service record of the delinquent for "adding the weight to the decision of imposing the punishment if the fact of the case so required."

14. Perusal of the impugned order does not indicate that the past conduct of the petitioner has been considered by him expressly. But the Ld. counsel for the petitioner pointed out that if he has considered the enquiry report and he is agreeable, it will amount that the findings recorded by the enquiry officer about the past conduct have been considered by him while passing the order. Thus, the petitioner has not been informed at any point of time about the such past conduct.

15. Ld. counsel for the petitioner has further prayed that he should be granted the subsistence allowance from the date of suspension to the date of dismissal. It is not in dispute that the said amount be payable to him

according to the suspension order , the only fact which was disputed by the Ld. A. P.O. appearing on behalf of State that the petitioner did not furnish the requisite certificate, so his allowance was not given to him. Ld. A.P.O. has categorically stated that if the petitioner had furnished the certificate, the subsistence amount would have been released to him; at the same time it was contended that the petitioner did not report his duties during the suspension period where he was attached. Ld. A.P.O. could not demonstrate the specific pleading in W.S./C.A. that he did not remain present at the place where he was attached. It is settled principal of law that the Order 6 & 7 of the C.P.C. are not applicable, but in the case of the claim petitions the principle of law applicable to pleadings in general are applicable in the petitions, W.S./C.A. also. If the W.S. does not contain any facts, it cannot be taken surprisingly at the time of the arguments of the parties. In view of the above Ld. A.P.O. has categorically stated that the order of withholding the salary was passed under Fundamental Rule 54 of Financial Hand Book. That this order does not relate to the subsistence allowance and as such his subsistence allowance during suspension period has not been withheld by the respondents. Rule 54 clearly emphasize that the punishing authority has a power to issue a separate order along with notice in the case of dismissal to the delinquent official not to pay the salary to the delinquent till the dismissal order. But only the passing of the order by the punishing authority to withhold the salary is not sufficient under the provisions of Rule 54 of the Financial Hand Book. The Suspension allowance cannot be withheld by the authorities. The Hon'ble Apex Court in State Government of M.P. Vs. Shankerlal (SC) 2008 (116) FLR 982. has held as under:-

"The High Court, in our opinion, committed a serious error in holding that the question of prejudice is irrelevant in so far as it misread and misinterpreted ***Jagdamba Prasad Shukla****. No law in absolute terms in this connection was laid down therein. The relief was granted to the appellant having regard to the fact situation obtaining therein. It was found as of fact that no subsistence allowance, had been given. It was not established that communication in relation to subsistence allowance was, in fact, served upon the appellant therein and despite repeated requests, subsistence allowance was not paid. The fact that the Court therein opined that no justifiable ground has been made for non-payment of the subsistence allowance all through the period of suspension till removal, made, itself be a ground for arriving at the conclusion that the delinquent*

officer was suffering from financial crunch on account thereof as also his illness"

16. It is not in dispute that the suspension allowance was given. It is also not in dispute that the certificate has been given by the petitioner to that effect. Now the respondents are directed to pay the suspension allowance for the period from the date suspension order was passed till the date of his dismissal from service.

17. Ld. counsel for the petitioner has also tried to emphasize that the Court should also quash the suspension order passed by the competent authority during the period when the departmental enquiry was proceeding against the petitioner. Ld. A.P.O. refuted the contention of the Ld. counsel for the petitioner. It is a well settled principle of law that when the petitioner has been punished by the departmental authority by dismissing him from service, the order of suspension would merge into the dismissal order. It is also settled principle of law that the suspension is not a punishment to a Government employee. The right of judicial review against the suspension order is very limited one. The Court, while reviewing the suspension order does not visit the merits of the case. The suspension order which has been annexed with the petition as Annexure-4, clearly indicates that in contemplation of the departmental proceedings against the petitioner, the petition has been suspended for his unauthorized absence from duties. If the petitioner has been suspended in contemplation of the departmental enquiry, the suspension cannot be challenged on the ground that it is bad in law. Perusal of the entire record further reveals that the said enquiry was also completed with the dismissal of the petitioner, as such it cannot be said that the suspension order was bad in law. The period, which was regularized by the departmental authority by granting the leave without pay to the petitioner was an order dated 22.9.2003, thus, the suspension order cannot be visited by this Court in this petition.

18. As discussed above the petitioner has also prayed that the order passed by the departmental authority forfeiting the salary of the petitioner during the period he was absent or he remained suspended. The said order has been passed under Fundamental Rule 54 of Financial Handbook. The Rule 54 specifically indicates that if a Government servant is dismissed or punished, the departmental authority can proceed under Rule 54 for not granting the salary during the period when he was suspended and as such the departmental authority was competent to pass such order under Rule 54, but the departmental authority has committed a legal error only by

passing an order to withhold the salary; as a matter of fact it should have been held that the salary will not be payable to the petitioner. But the facts remain that the dismissal as well as consequential orders are liable to be quashed. The competent authority would decide this fact while disposing of the final enquiry against the petitioner as has been observed above.

19. On the careful consideration we allow the claim petition and set aside the impugned order dated 22.09.2003 (Annexure-1), appellate order dated 31.01.2004 (Annexure-15), order dated 29.11.2004 (Annexure 17) and the revisional order dated 14.01.2012 (Annexure-2) and direct the disciplinary authority i.e. S.P. Pauri that he will award any of the lesser punishment having due regard of the nature and the circumstances of the case and gravity of the offence in the light of the observations made herein and further with the direction that while issuing a fresh show cause notice to the petitioner, he will also hold that as to whether the absence was wilful or not and thereafter he will send a show cause notice as provided under Article 311 and the Rules and Regulations made under the Police Act and pass the suitable orders in the light of the observations made above. This matter should be disposed of as expeditiously as possible, preferably within a period of 6 months from the date of the presentation of the copy of this order before the respondents. The respondents are directed to pay the subsistence allowance for the period from the date suspension order was passed till the date of his dismissal from service.

20. The petition is disposed of accordingly. No order as to costs.

Sd/- Sd/-

(D.K.KOTIA) (JUSTICE J.C.S.RAWAT)
VICE CHAIRMAN (A) CHAIRMAN

DATE: JUNE 13, 2013
DEHRADUN

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