

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
BENCH AT NAINITAL**

Present: Hon'ble Mr. Justice U.C. Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

Writ Petition No. 462 (S/B) of 2018
[Reclassified and Renumbered as Claim Petition No. 95/NB/DB/2022]

Dr. Sanjeev Prakash, aged about 54 years, s/o late Sri V.P. Srivastava, presently posted as Ortho. Surgeon (Joint Director Grade), B.D. Pandey Government Hospital, Nainital.

.....Petitioner

versus

1. State of Uttarakhand through Secretary, Medical, Health and Family Welfare, Dehradun.
2. Director General, Medical, Health and Family Welfare, Dehradun.

.....Respondents

Present: Ms. Devika Tiwari, Advocate, for the Petitioner
Sri Kishore Kumar, A.P.O. for the Respondents

Judgement

Dated: 16th August, 2023

Justice U.C. Dhyani (Oral)

Hon'ble High Court of Uttarakhand has been pleased to pass an order on 14.09.2022 in WPSB No. 462 of 2018, Dr. Sanjeev Prakash vs. State of Uttarakhand and another, which (order) reads as under:

“Mr. Piyush Garg, learned counsel for the petitioner.

Mr. K.N. Joshi, learned Deputy Advocate General for the State.

The petitioner has preferred the present writ petition for the following relief:-

“i. To issue a writ or direction in the nature of certiorari quashing the order dated 06.03.2018 served upon the petitioner on 04.06.2018, passed by Respondent No.1, whereby the petitioner has been awarded a punishment of break in service from 01.04.2015 to 05.01.2017 in violation of principal of natural justice and in violation of the statutory rules governing the services of the petitioner.”

The petitioner is a public servant. The Uttarakhand Public Service Tribunal has the jurisdiction to deal with the issue raised in this writ petition.

Considering the fact that the petition is pending since 2018 and pleadings have been completed, we direct the Registry to transfer the complete records of the case to the Tribunal, which shall be registered as a claim petition and be dealt with by the Tribunal, in accordance with law.

We request the Tribunal to endeavor to dispose of the petition at an early date, considering that the writ-petition is pending since 2018.

The petition stands disposed of accordingly.”

2. The original record of the writ petition has been transferred to this Tribunal *vide* letter no. 13515/UHC/Service (S/B) 2022 dated 21.09.2022 of the Deputy Registrar (Judicial) of the Hon'ble High Court. The same has been registered as claim petition no. 95/NB/DB/2022.

3. It is a case in which the petitioner remained absent for 645 days unauthorizedly. After enquiry, he was punished with 'Break in Service' *vide* order dated 06.03.2018 of respondent no.1, which is under challenge in this petition (copy Annexure No. 1).

4. Facts, in brief, giving rise to present petition are as follows:

4.1 The petitioner was appointed as Medical Officer, in the Medical Department in the erstwhile State of U.P. in the year 1997. The petitioner belonged to Hill Cadre and on creation of State of Uttarakhand, the petitioner was allocated the State of Uttarakhand.

He joined his transferred place of posting at B.D. Pandey Hospital, Nainital on 14.11.2014. According to the petition, the family of the petitioner was settled at Lucknow. The petitioner's son was ill for which he had to go to Lucknow for taking care of him. The petitioner applied for leave for that purpose on 12.02.2015. He went on leave *w.e.f.* 02.03.2015 in pursuance of such sanctioned-leave.

4.2 During such leaves, the petitioner's son suffered fracture in his leg which compelled the petitioner to overstay with his family. Facing such compelling circumstances, he moved an application for extension of leave for further 60 days through his Controlling Officer, which was not sanctioned by the department. When petitioner's son recovered, he joined his duties at B.D. Pandey Hospital, Nainital on 06.01.2017. The petitioner was given joining by the department without any objection.

4.3 The petitioner was issued show cause notice on 08.02.2017 alleging that he took leave for thirty days from 02.03.2015 and then again applied for earned leave for further sixty days, which was not sanctioned and hence he remained absent for a long period. The petitioner replied to the same on 22.03.2017.

4.4 Petition is support by the documents, which are enclosed with it.

5. Learned Counsel for the petitioner submitted that as per Rule 7 of Uttarakhand Government Servants (Discipline and Appeal) Rules, 2003 (as amended in 2010) (*for short, 'Discipline and Appeal Rules'*), charge-sheet along with charges must contain proposed documentary evidence and name of the witnesses proposed to prove charges against concerned Govt. servant, but in total disregard to the procedure for conducting enquiry, charge-sheet did not provide any evidence and witnesses, thus, no case was made out against the petitioner.

6. It is the submission of learned Counsel for the petitioner that as per Rule 73 of the Financial Handbook Vol. 2, Part 2 to 4, if a Govt. servant is absent after the end of the leave, he will not be entitled to 'no-leave salary', which is equivalent to half of the average salary.

7. Counter affidavit has been filed by Sri Ravindra Thapliyal, the then Director General, Medical, Health and Family Welfare, Dehradun, on behalf of the respondents, denying the material averments contained in the petition. In the C.A., it has been stated, among other things, that unauthorized absence is in violation of the Uttarakhand Government Servants' Conduct Rules, 2002, and therefore, the petition being devoid of merits is liable to be dismissed.

7.1 Counter affidavit is supported by the relevant documents.

7.2 Rejoinder affidavit thereto has been filed reiterating the facts contained in the petition.

8. This Tribunal has, in the past, on the basis of decisions rendered by the Hon'ble Supreme Court and Hon'ble High Court of Uttarakhand, maintained that no punishment can be given to an employee which has not been prescribed in the Discipline and Appeal Rules. A reference of the decision rendered by Hon'ble Supreme Court in Vijay Singh vs. State of U.P. and others, (2012) 5 SCC 242, may be given in this regard.

9. In Civil Appeal No. 3550 of 2012, Vijay Singh vs. State of U.P. & others, (2012)5 SCC 242, observations of the Hon'ble Supreme Court in paras 7, 8, 9,10, 11, 12, 13, 16 and 17 of the decision, are quoted herein below for convenience:

"7. The only question involved in this appeal is as to whether the disciplinary authority can impose punishment not prescribed under statutory rules after holding disciplinary proceedings....."

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8. Admittedly, the punishment imposed upon the appellant is not provided for under Rule 4 of Rules 1991. Integrity of a person can be withheld for sufficient reasons at the time of filling up the Annual Confidential Report. However, if the statutory rules so prescribe it can also be withheld as a punishment. The order passed by the Disciplinary Authority withholding the integrity certificate as a punishment for delinquency is without jurisdiction, not being provided under the Rules 1991, since the same could not be termed as punishment under the Rules. The rules do not empower the Disciplinary Authority to impose "any other" major or minor punishment. It is a settled proposition of law that punishment not prescribed under the rules, as a result of disciplinary proceedings cannot be awarded.

9. This Court in State of U.P. & Ors. v. Madhav Prasad Sharma, (2011) 2 SCC 212, dealt with the aforesaid Rules 1991 and after quoting Rule 4 thereof held as under:

"16. We are not concerned about other rule. The perusal of major and minor penalties prescribed in the above Rule makes it clear that sanctioning leave without pay is not one of the punishments prescribed, though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not one of the punishments prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties. Denial of salary on the ground of "no work no pay" cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms."

(Emphasis added)

10. The Authority has to act or purport to act in pursuance or execution or intended execution of the Statute or Statutory Rules. (See: The Poona City Municipal Corporation v. Dattatraya Nagesh Deodhar, AIR 1965 SC 555; The Municipal Corporation, Indore v. Niyamatulla (dead) by his Legal representatives, AIR 1971 SC 97; J.N. Ganatra v. Morvi Municipality, Morvi, AIR 1996 SC 2520; and Borosil Glass Works Ltd. Employees Union v. D.D. Bambode & Ors., AIR 2001 SC 378).

11. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: Bachhittar Singh v. State of Punjab & Anr., AIR 1963 SC 395; Union of India v. H.C. Goel, AIR 1964 SC 364; Mohd. Yunus Khan v. State of U.P. & Ors., (2010) 10 SCC 539; and Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors., (2011) 5 SCC142).

Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant.

12. This very ground has been taken by the appellant from the very initial stage. Before the appellate authority such a ground was taken. Unfortunately, the appellate authority brushed aside the said submission observing that the judgments mentioned by him to the effect that integrity could not be withheld as punishment not prescribed under the statutory rules, had no application to the case, and therefore, in that respect no further consideration was necessary. The order of punishment imposed by the disciplinary authority did not require any interference. The revisional authority rejected the revision as not maintainable observing as under:

“Representation is not maintainable. Withholding of integrity certificate does not come under punishment under 1991 Rules.....Therefore, the revision is returned without hearing on merit on the ground of non maintainability.”

(Emphasis added)

13. We fail to understand, if the revisional authority was of the view that integrity could not be withheld as punishment, why the mistake committed by the disciplinary authority as well as by the appellate authority could not be rectified by him. This shows a total non-application of mind. In such a fact-situation, the subordinate officer has to face the adverse consequences without any fault on his part. The grievance raised by the appellant that recording the past criminal history of an accused is relevant in non-bailable offences only as it may be a relevant factor to be considered at the time of grant of bail, and he did not record the same as it was a bailable offence, has not been considered by any of the authorities at all. Undoubtedly, the statutory authorities are under the legal obligation to decide the appeal and revision dealing with the grounds taken in the appeal/revision etc., otherwise it would be a case of non- application of mind.

16. Undoubtedly, in a civilized society governed by rule of law, the punishment not prescribed under the statutory rules cannot be imposed. Principle enshrined in Criminal Jurisprudence to this effect is prescribed in legal maxim *nulla poena sine lege* which means that a person should not be made to suffer penalty except for a clear breach of existing law. In *S. Khushboo v. Kanniammal & Anr.*, AIR 2010 SC 3196, this Court has held that a person cannot be tried for an alleged offence unless the Legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2(n) of Code of Criminal Procedure 1973, or Section 3(38) of the General Clauses Act, 1897. The same analogy can be drawn in the instant case though the matter is not criminal in nature.

Thus, in view of the above, the punishment order is not maintainable in the eyes of law.

17. In the result, appeal succeeds and is allowed. The impugned order dated 8.7.2010 withholding integrity certificate for the year 2010 and all subsequent orders in this regard are quashed. Respondents are directed to consider the case of the appellant for all consequential benefits including promotion etc., if any, afresh taking into consideration the service record of the appellant in accordance with law.”

[Emphasis supplied]

10. The moot question, in the light of the above is, whether a declaration for interruption or break in service to the concerned employee can be given as punishment? The reply, in the humble opinion of this Tribunal is, in the negative, especially when Tribunal's inference is seen in the light of the decisions of Vijay Singh (*supra*) and Madhav Prasad Sharma (*supra*).

11. The petition deserves to be allowed on this short ground alone, setting aside the impugned order and leaving it open to the respondents to pass appropriate orders, in accordance with law.

12. Order accordingly.

13. The claim petition is, accordingly, allowed in view of the decisions rendered by Hon'ble Apex Court in Vijay Singh vs. State of U.P. & others, (2012) 5 SCC 242 and catena of other decisions referred to in the body of the judgement. The impugned order dated 06.03.2018 (Annexure: A1) is hereby set aside, leaving it open to the respondents to pass appropriate orders, in accordance with law. No order as to costs.

14. It is made clear that the Tribunal has not gone into other legal aspects of the case, as canvassed by learned Counsel for the petitioner and learned A.P.O.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: 16th August, 2023
DEHRADUN
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