

**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)

**CLAIM PETITION NO. 11/NB/DB/2021**

Dr. M.K.Tiwari, aged about 52 years, s/o Sri Ram Krishna Tiwari, presently serving in Joint Director's Grade, Jawahar Lal Nehru District Hospital, Rudrapur, District Udham Singh Nagar.

.....Petitioner

**vs.**

1. State of Uttarakhand through Secretary, Medical Health and Family Welfare Department, Government of Uttarakhand, Dehradun.
2. Director General, Medical Health and Family Welfare, Uttarakhand, Dehradun.
3. Chief Medical Superintendent, Jawahar Lal Nehru District Hospital, Rudrapur, District Udham Singh Nagar.

.....Respondents.

Present: Sri Bhagwat Mehra, Advocate, for the Petitioner.

Sri Kishor Kumar, A.P.O., for the Respondents.

**JUDGMENT**

**DATED: NOVEMBER 17, 2021**

**Justice U.C.Dhyani (Oral)**

By means of the present claim petition, the petitioner seeks following reliefs:

*"A. To set aside the impugned order dated 19.11.2020 issued by the Respondent No. 1 (Annexure No. 1 to Compilation-I).*

*B. To declare the action of the Respondents, particularly respondent No. 1, in the matter of non-payment of salary and other service benefits for the period 11.04.2017 to 16.07.2019 and treating the same as "Break in Service", as arbitrary and illegal.*

*C. To direct the Respondents, to forthwith release all service benefits to the petitioner for the period from 11.04.2017 to 16.07.2019 including Salary, Annual Increments etc.*

*D. To direct the Respondents, particularly Respondent No. 1 to forthwith grant the benefit of S.D.A.C.P. (Special Dynamic Assured Career Progression) Scheme to the petitioner in the Pay Level 13-A*

*on completion of 20 years continuous satisfactory service in the department which became due on 31.01.2017 to him.*

*E. To direct the Respondents to grant all consequential benefits to the petitioner.*

*F. To pass any other suitable order as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.*

*G. To allow the claim petition with costs."*

2. Brief facts, giving rise to the present claim petition, are as follows:

The petitioner has, *inter-alia*, challenged the order dated 19.11.2020 in present claim petition. The petitioner, a Medical Officer in the State Services remained absent, without leave, from 11.04.2017 to 16.07.2019. Departmental proceedings were initiated against the petitioner. A charge sheet was issued to him on 25.09.2019 (Copy Annexure: C.A 10), followed by a Supplementary charge sheet on 07.01.2020 (Copy Annexure: C.A.16). Director, Medical Health & Family Welfare, Kumaon Division, Nainital was appointed as inquiry officer, who submitted his report on 05.09.2020 and found that the petitioner was absent unauthorizedly from 11.04.2017 to 16.07.2019, which will amount to 'break in service'. It was also decided that he will not be entitled for any financial or service benefits during 'break in service'. The disciplinary proceedings which were initiated on the basis of charge sheet dated 25.09.2019 and Supplementary charge sheet dated 07.01.2020, were accordingly, concluded. The impugned order dated 19.11.2020 has been brought on record as Annexure: A1.

The challenge to the impugned order by the petitioner, is principally on the grounds-(i) impugned order has been passed as punishment, for which there is no provision, (ii) no show cause notice was given to him, (iii) no opportunity was given to him before passing the impugned punishment order, (iv) copy of the inquiry report was never given to him (v) 'break in service' is not a 'punishment' under the Uttarakhand Govt. Servant (Discipline and Appeal) Rules, 2003.

3. Let us now, briefly discuss the above principal submissions. In para 22 of the claim petition, it has been submitted that the impugned order has been passed on the basis of some inquiry report submitted by the inquiry

officer on 05.09.2020. It is the submission of learned Counsel for the petitioner that neither copy of such inquiry report was ever served upon the petitioner nor petitioner was ever given opportunity to submit his reply to the conclusion/findings, if any, arrived at/recorded by the inquiry officer. The inquiry officer was himself appointed on 08.07.2020.

4. The petitioner was directed to go on duty in *Chardham Yatra vide* letter dated 01.04.2017, but he did not comply with the same (copy of the order dated 24.04.2017 Annexure: CA3). A news item was published in the Hindi Daily on 02.07.2017 for his unauthorized absence, but he did not report for duty (copy of news item order dated 02.07.2017 Annexure: CA-7). It has been stated, in the Counter Affidavit that the petitioner moved an application for voluntary retirement on 19.06.2017 (Annexure: CA 8), which was rejected by the Medical Health and Family Welfare Department *vide* order dated 05.02.2019 (Annexure: CA9). In the W.S., severe allegations of non-performance and insincerity have been levelled against the petitioner. Before that, petitioner was posted at Udham Singh Nagar, from where he was transferred to Almora, but he did not join there and consequently, he was relieved from Udham Singh Nagar. A Charge sheet dated 25.09.2019 (Annexure: CA10) was issued to him. Although petitioner gave joining in the Directorate on 09.05.2019 but soon thereafter went away and did not join the respondent Directorate. On seeking permission of the Govt., the petitioner joined at Udham Singh Nagar on 17.07.2019 (Annexure: CA 14), but remained absent from 09.05.2019 to 16.07.2019. Supplementary charge sheet was issued to him. Director, Medical, Health and Family Welfare, Kumaon Division, Nainital was appointed as inquiry officer (Copy of the order dated 08.07.2020 is Annexure CA-18). The inquiry officer submitted his report on 05.09.2020 (Annexure: CA19) to the Directorate. On the basis of the inquiry report, the unauthorized absence of the petitioner from 11.04.2017 to 16.07.2019 was termed as 'break in service' with no financial or service benefits (Copy Annexure: CA20). Inquiry proceedings were, accordingly, closed.

5. Whereas it is the submission of learned Counsel for the petitioner that 'break in service' is not a punishment under the statutory rules, the respondent department relied upon the Rule 420 of Civil Service Regulations. According to the respondent department, had the petitioner been continuously present and served the respondent department, he would have been promoted to level 13-A and it was not possible to give the benefit of SDACP and promotion, because of unauthorized absence of the petitioner, which amounts to 'break in service'.

6. It is submitted by learned Counsel for the petitioner that the claim petition should be allowed, *inter-alia* in view of the judgment passed by Hon'ble Supreme Court in Vijay Singh vs. State of U.P. and others, (2012)5 SCC 242. It is further submitted that regarding prayer No. B and C of the claim petition, since petitioner's request for VRS was rejected *vide* order dated 05.02.2019 by the respondent No. 1, which was communicated to him on 07.03.2019 and in pursuance thereof, the petitioner submitted his joining on 09.05.2019, thereafter, he was kept in compulsory waiting by the respondents themselves and his posting was ordered only on 16.07.2019, as such for the period 09.05.2019 to 15.07.2019, the petitioner cannot be blamed for not discharging duties, as such the petitioner is entitled for salary for the aforesaid period. Similarly, the petitioner was on sanctioned casual leave from 12.04.2017 to 21.04.2017, as such, he is also entitled for salary for the said period. It has further been submitted that the period of absence from 22.04.2017 to 08.05.2019, various applications were submitted by applying for leave, but the same were neither sanctioned nor rejected by the respondent department and he submitted his application for voluntary retirement from service on 19.06.2017, which was ultimately decided by the competent authority only on 05.02.2019, as such since the petitioner has completed more than 20 years of service till April, 2017, therefore, he should be at liberty to apply for leaves for the aforesaid period, if leaves are remaining in his leave account, and simultaneously, the competent authority may be directed to consider and decide the same in accordance with law.

Learned A.P.O. has vehemently opposed the same, by arguing that the petitioner has not worked for 2 years, therefore, he is not entitled for pay on the principle of 'no work no pay'.

7. It is an admitted fact that the charge sheet was issued against the petitioner, followed by a Supplementary charge sheet. Order of the inquiry officer regarding 'break in service' culminated into closure of disciplinary proceedings. It is, therefore, clear that the order dated 19.11.2020 (Annexure: A1) was passed as punishment.

8. The question, which arises for consideration before this Tribunal is, whether such order is tenable?

9. In Civil Appeal No. 3550 of 2012, Vijay Singh vs. State of U.P. & others, (2012)5 SCC 242, following has been observed by the Hon'ble Supreme Court in paras 7, 8, 9,10, 11, 12, 13, 16 and 17 of the decision, which 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.....

.....  
 .....  
 .....

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. Respondent department and learned A.P.O. has heavily relied upon Rule 420 of the Civil Service Regulations, which reads as below:

*“420. an interruption in the service of an officer entails forfeiture of his past service, except in the following cases:*

*(a) authorised leave of absence.*

*(b) unauthorised absence in continuation of authorised leave of absence so long as the office of the absentee is not substantively filled; if his office is substantively filled the past service of the absentee is forfeited.*

*(c) suspension immediately followed by reinstatement which need not be to the same office.*

*(d) abolition of office or loss of appointment owing to reduction of establishment.*

*(e) transfer to non-qualifying service in an establishment under government control, the transfer must be made by competent authority; an officer who voluntarily resigns qualifying service cannot claim the benefit of this exception. Transfer to a grant-in-aid school entails forfeiture.*

.....

*(g) time occupied in transit from the one appointment to another provided that the officer is transferred under the orders of the competent authority, or if he is non gazetted officer with the consent of the head of his old office.”*

11. **Petitioner’s case, undoubtedly, is a case of ‘unauthorized absence’, but Rule 420 of Civil Service Regulations relate to the pension, as is evident from the following excerpts taken out from the Civil Service Regulations:**

***“Civil Service Regulations relating to Pension”***

***1.(a) These regulations are intended to define the conditions under which pension is earned by service in the Civil Departments, and in what manner it is calculated.***

***5. Unless there be something repugnant in the subject or context, the terms defined in this Chapter are used in the Regulations in the sense here explained.***

***41. Pension.- Except when the term “Pension” is used in contradiction to Gratuity, “Pension” includes Gratuity.***

***Part IV-Ordinary Pensions, Chapter XV- General Rules, Section-I Extent of Application.***

***348-A. Every pension shall be held to have been granted subject to the conditions contained in Chapter XXI.***

***351-B. In case in which a pension is not withheld or withdrawn under Article 351-A but the amount of any pecuniary loss caused to Government is ordered to be recovered from the pension, the recovery should not ordinarily be made at a rate exceeding one-third of the gross pension originally sanctioned including any amount which may have been committed.***

***Decisions of the State Government***

***3. The temporary service of constables enlisted in connection with the Police arrangements for the Allahabad Kumbha Fair of 1942 in accordance with the orders issued in G.O. no. 334-P/VIII, dated the 30<sup>th</sup> June, 1941, who subsequently joined the regular Police Force, shall count for pension.***

.....

***8. The Governor has been pleased to declare, under Article 361-A, Civil Service Regulations that the temporary service of passed cadets of 1944 and subsequent sessions of the Police Training College until the termination of the war rendered in vacancies in connection with war schemes, shall qualify for pension.***

***421. The authority who sanctions the pension may commute retrospectively periods of absence without leave into leave without allowances.***

***Condemnation of Interruption and Deficiencies***

***422. Interruptions in service either between two spells of permanent and temporary service or between a spell of temporary and permanent service or vice versa may be condoned by the Pension Sanctioning Authority subject to the following conditions, namely:***

***(1) The interruptions should have been caused by reasons beyond the control of the government servant concerned;***

***(2) Service preceding the interruptions should not be less than of five years' duration, and in cases where there are two or more such interruptions, the total service, pensionary benefits in respect of which will be lost if the interruptions are not condoned, should not be less than five years; and***

***(3) Interruptions should not be more than of one year's duration and in cases where there are two or more such interruptions the***



*total period of interruptions sought to be condoned, should not exceed one year;*

*Provided that the above power may be exercised by the pension sanctioning authority in cases in which the qualifying service even otherwise is not less than of ten years' duration.*

*Decisions of the State Government*

*It has been decided, in relaxation of the provisions of Article 422, the in case of re-appointment of a retrenched person on the same or any other post the interruption between the date of retrenchment and re-appointment shall be treated as condoned but the period of interruption shall not be included in qualifying service.*

*[Finance Department no. G-2/3060/X-6-67, dated the 30<sup>th</sup> January, 1968]"*

*Decisions of the State Government*

*With effect from April 1, 1961, Article 370-A, has been deleted and Article 370 has been re-written envisaging the counting towards pension of all continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post except in their cases mentioned therein. A question has been raised whether in view of the absence of a reference of Article 370 in the note under Articles 422 and 422-A interruptions could as from April 1, 1961 be condoned between spells of temporary and permanent service. It is hereby clarified that condonation of such interruptions is not permissible under Article 422-A or 422 C.S.R.*

*Champter XVIII-Conditions of Grant of Pension, Section I-Classification of Pensions.*

*Section II-Compensation pension.*

12. The moot question 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 Vijay Singh's case (*supra*).

13. There are also other aspects of the petitioner's case. It appears that the show cause notice was never issued to the petitioner. It is definite that second show cause notice was never given to the petitioner. Had the second show cause been given, the same would have found mention in the impugned order. Sub rule (4) of Rule 9 of the Uttarkhand Govt. Servant (Discipline and Appeal) Rules, 2003 reads as below:

*"(4) If the Disciplinary Authority, having regard to its findings on all or any of charges, is of the opinion that any penalty specified in Rule-3 should be imposed on the charged Government Servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records*

*relating to the inquiry and representation of the charged Government Servant, if any, and subject the provisions of Rule-16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule-3 of these rules and communicate the same to charged Government Servant.*  
”

*[Emphasis supplied]*

14. It is also settled law that any punishment imposed upon any employee which is not provided in any relevant rules is *non-est* in the eyes of law. ‘Break in service’, as has been stated, is not a punishment under Rule 3 of the Uttarakhand Govt. Servant (Discipline and Appeal) Rules, 2003. No second ‘show cause notice’ was ever given to the petitioner. It is true that Civil Service Regulations may be applied to any employee but the fact of the matter is that when no punishment of ‘break in service’ has been prescribed in the Rules of 2003, therefore, order directing ‘interruption in service’ cannot be given as punishment, which leads this Tribunal to come to the irresistible conclusion that the order impugned (Annexure: A1) cannot sustain in the eyes of law and should, therefore, be set aside.

15. The claim petition is, accordingly, allowed in view of the decision rendered by Hon’ble Apex Court in Vijay Singh vs. State of U.P. & others, (2012)5 SCC 242. The impugned order dated 19.11.2020 (Annexure: A1) is hereby set aside and all subsequent orders flowing from the impugned order are also set aside. Respondents are directed to consider the case of the petitioner for all consequential benefits including promotion etc., taking into account the service record of the petitioner, in accordance with law.

**(RAJEEV GUPTA)**  
VICE CHAIRMAN (A)

**(JUSTICE U.C.DHYANI)**  
CHAIRMAN

DATE: NOVEMBER 17, 2021  
DEHRADUN

KNP