BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL AT NAINITAL

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

------ Chairman

Hon'ble Mr. U.D.Chaube

-------Member(A)

Claim Petition No. 09/N.B./2012

Kuldeep Singh, S/o Sri Bhagwan Singh, R/o Beria Daulat P.O. Bhajua Nagla Tehsil Bajpur, Udhamsingh Nagar.

……Petitioner

Versus.

1. State of Uttarakhad through Secretary, Home, Dehradun.
2. Additional Director General of Police, Uttarakhand, Dehradun.
3. Inspector General of Police, Kumaon Region, Nainital.
4. Superintendent of Police, District Nainaital.

…….Respondents.

Present: Sri A.S.Bisht, Ld. Counsel
for the petitioner.

Sri V.P.Devrani, Ld. A.P.O.
for the respondents.

JUDGMENT

DATED: 4 July, 2013.

(Delivered by Hon'ble Mr. Justice J.C.S. Rawat, Chairman

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

"That the petitioner most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to quash the impugned order dated 17th October, 2011 passed by respondent No.2, order dated 18th April, 2011 passed by respondent No.3 and order dated 18th December, 2010 passed by Respondent no.4, arbitrary and is liable to be contained as Annexure nos. 1, 2 & 3 to this petition."

2. It is admitted case to the parties that the petitioner was a Police Constable in Nainital Police Line and he was transferred to Ramnagar Police Station from Nainital in the forenoon on 22.12.2009. The petitioner had to report his duties in the forenoon of 23.12.2009, but he did not report his duties at Police Station, Ramnagar. The petitioner came to the Police Station on 24.12.2009 for reporting his duties but he was refused to join by the Circle Officer, Ramnagar and was directed to report in the Police Line, Nainital. Thereafter he could not join the duties till 30.12.2009. A report was submitted before the competent authority by the Police officers and the petitioner was suspended by the S.S.P. on 12.3.2010. A regular departmental enquiry was also ordered against him; the charge sheet was served upon the petitioner; the petitioner inspite of service, did not join or participate in the enquiry. The enquiry officer held the petitioner guilty for remaining absent from duties. Thereafter the report was submitted to the S.S.P., Nainital and the S.S.P., Nainital proposed a penalty of dismissal and show cause notice thereof was issued on 9.9.2010. The petitioner submitted his reply against the show cause notice on 7.10.2010 to the S.S.P. stating therein that the petitioner had fallen ill on 23.12.2009, so he could not join his duties on 23.12.2009. When he reached at the Police Station on 24.12.2009 to resume his duties, he was refused by the oral order

of Circle Officer, Ramnagar and was directed to report back to the Police Line, Nainital. He further replied to the show cause notice that the petitioner reached Police Line, Nainital on 25.12.2009, but was refused the duties in the Police Line, Nainital. Proposed punished is too harsh and severe, he was compelled not to join on 23.12.2009 due to his illness, so it was not his wilful absence.

3. The petitioner has further alleged in his claim petition that the petitioner had reported his duties daily at Police Line, Nainital till 30.12.2009,but he was not allowed to join.

4. The respondents have denied the claim of the petitioner. It is further alleged by the respondents that the petitioner did not join on 23.12.2009 at the Police Station, Ramnagar and on the next day, when he joined, he was immediately directed vide G.D. report on 24.12.2009 to report him back at Police Line, Nainital. The said communication was given to the Police Line by the radiogram . It is revealed from the record that the said radiogram was sent on 28.12.2009 by the P.S., Ramnagar to the Police Line, Nainital.

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

6. Ld. Counsel for the petitioner contended that the petitioner was transferred to P.S., Ramnagar from Police Line, Nainital in the forenoon of 22.12.2009, but he could not join his duties at Ramnagar in the noon of 23.12.2009 due to his illness. After being recovered from the illness, the petitioner went to resume the duty to the P.S., Ramnagar on 24.12.2009, where he was refused to join by the oral order of the C.O., Ramnagar and was directed to report back the duties to the Police Line, Nainital. The petitioner was not allowed to resume the duties at Nainital when he reached Nainital

on 25.12.2009. Ld. Counsel for the petitioner further contended that the movement order from Ramnagar to Nainital was not given to him and there is no evidence to the above effect on record. The said order was also not communicated to the Police Line, Nainital by the P.S. Ramnagar till 28.12.2009. The petitioner further contended that this fact is revealed from the statement of one of the witnesses of the enquiry as well as from the report and the original radiogram from the original record. Thus, the absence was not wilful and it was the fault of the respondents not to let him join at the P.S. Ramnagar. Ld. Counsel for the petitioner further contended that the punishment awarded by the S.S.P. by the impugned order and which was upheld by the appellate authority and the revisional authority is too harsh and it does not commensurate with the misconduct committed by the petitioner. Ld. Counsel for the petitioner further contended that the findings recorded by the enquiry officer are not correct and are against the evidence.

7. Ld. A.P.O. Sri V.P. Devrani appearing on behalf of the State contended that the petitioner's absence from duties from 23.12.2009 to 24.12.2009 as well as 25.12.2009 to 30.12.2009 was wilful and without any leave. He further contended that the petitioner is a habitual absentee and the punishment which has been awarded to him by the different authorities has also been referred in the enquiry report; this Court is not sitting as an appellate Court and the appreciation of evidence is not permissible unless it is perverse. The evidence amply proves the guilt of the petitioner.

8. It is settled law that judicial review is not akin to the adjudication on merits by reappreciating the evidence as an appellate authority.

The only consideration the Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the findings or whether the conclusion is based on no evidence. The adequacy or reliability is not a matter which can be permitted to be convinced before the Court or Tribunal. Perusal of the record reveals that there is evidence that the petitioner had not reported the duties as alleged above and the enquiry officer has categorically held he was absent from his duties.

9. Before proceeding to merits of the case we will like to discuss the tretite of law on the point that in the departmental enquiry in a case of the absence of the delinquent, what has to be considered before arriving to the conclusion that the absence comes within the category of the grave misconduct. It should be established that the absence is not the result of the compelling circumstances under which it was not possible to report or perform the duties, such absence cannot be held to be wilful. Any absence, without application or prior permission, may be considered as only misconduct, but such absence cannot be held to be a wilful absence. In the case of the departmental enquiry, if it is established by the evidence that the allegation of unauthorized absence from duties is established then the disciplinary authority is required to also see as to whether the absence was wilful or not. If the absence is not wilful, that will not amount to grave misconduct. 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. Perusal of the impugned order of the S.S.P., Nainital as well as report of the enquiry officer had not held that the absence of the petitioner was wilful. The S.S.P. has only indicated in the show cause notice issued to the petitioner as well as in the impugned order that it is amply proved by the record that the petitioner was absent from duties without prior permission and his absence was unauthorized. The similar finding had been received by the S.S.P., Nainital from the enquiry officer. The petitioner himself has stated in his reply to the show cause notice that he was compelled not to join duties on 23.12.2009 at P.S. Ramnagar due to ill health and thereafter he reported the duties at Police Line, Nainital and he was not allowed to resume the duties. This fact was not considered while passing the impugned order.

11. Now it is to be seen as to whether the punishment of dismissal awarded by the disciplinary authority is too harsh and it does commensurate to the gravity of the misconduct. Ld. Counsel while contending that the punishment is harsh, he also pointed that the norms which have been laid down in the different authorities regarding awarding of the punishment, have not been taken into consideration while awarding the punishment. Ld. Counsel for the State refuted the contention. The punishment to be imposed by the S.S.P. is the discretion of the authority, unless such penalty is disproportionate or shocking to the conscious of the Court, there can be no occasion for the Tribunal to interfere with the punishment. It is well settled position of law that the punishment should commensurate with the magnitude of the misconduct committed by the delinquent; if lesser penalty can be imposed without jeopardizing the interest of the administration, then the punishing authority should not impose the maximum penalty of the dismissal from service. When rules require that the disciplinary authority will determine the penalty after applying its mind to the enquiry report, then it shows that he has to pass a reasoned order however taking an overall situation and commutative view, the disciplinary authority may impose maximum penalty, but after considering all the aspects of the case. Generally the Courts or the Tribunal cannot interfere with the discretion of the punishing authority where the discretion has been rightly exercised by the authority concerned. At this place we would like to mention that this State has been carved out from the State of U.P. in the year 2000 by the U.P. Reorganization Act. Prior to the creation of the State, all the authorities of the Allahabad High Court are binding upon us. The Allahabad High Court in the case of **Shamsher**

Bahadur Singh Vs. State of U.P. and others reported in 1993 (1) UPLBEC 488 has held, *"if the delinquent is incorrigible and is totally unfit for the Police service, his services should be dispensed with otherwise a lesser punishment should be given to the delinquent. While imposing the maximum punishment of dismissal from service, it should be considered that it would result an economic death of the employee and the gravest punishment should be given in the graver charges where the lesser punishment serves the purpose and it given a curative effect, the disciplinary authority must exercise its discretion to grant the lesser punishment. It is also necessary that the punishing authority while determining the quantum of punishment, has to consider whether punishment to be inflicted is absolutely necessary to carryout the discipline in the force."*

12. The provisions contained in the regulations as well in the Act and the Rules may there under clearly indicate that the punishment should commensurate with the gravity and magnitude of the misconduct. In **B.C. Chaturvedi Vs. Union of India, [1996] INSC 1022; AIR 1996 SC 484** the moot question for consideration before the Hon'ble Bench of three Hon'ble Judges of the Supreme Court was as to whether the Tribunal can direct the authorities to reconsider the punishment with cogent reasons in support thereof or reconsider themselves to shorten the litigation. The Hon'ble Apex Court has held as under in para 18:-

"As to whether the High Court/Tribunal can direct the authorities to reconsider punishment with cogent reasons in support thereof or reconsider themselves to shorten the litigation. In this case, at para 18, this Court has observed as under:- "A review of the above legal position would establish that the disciplinary

authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

13. Thus, it is apparent that the Court, if finds that the punishment is shocking and disproportionate, he can set aside the order as has been held by the Hon'ble Supreme Court in the case of **Ramkishan Vs. Union of India 1995 (6) SCC 157**, the Police Constable was dismissed from service for using offensive language against the officers, the Hon'ble Apex Court held that the Constable should not have been dismissed from service and the Court held that the punishment was harsh and disproportionate to the gravity of charge and modified the penalty of stoppage of two increments with cumulative effect.

14. In the instant case the petitioner was only absent for few days and the punishment seems to be quite harsh and shocking. Hon'ble Apex Court in Civil Appeal No. 10217 of 1995 Mandeep Kumar and others Vs. State of Haryana and Another has held as under:-

"Appellant's absence form duty on 3.3.1991, for 1 day, 6 hours and 35 minutes, on 26.4.1991, for 10 hours and 35 minutes, on 22.5.1991, for 16 hours being a marginal lapse on his part, we, in the facts and circumstances of the case, think that he may be given a fresh opportunity to improve his excellence in the performance of duty. If the appellant absents himself from duty without leave even on a single occasion during next two years, his services may be discharged. On reinstatement, pursuant to this order, the appellant would not be eligible for payment of arrears of salary."

15. Similarly the Ld. Counsel for the petitioner relied upon the decision of *Mirza Barkat Ali Vs. Inspector General of Police All 2002(2) UPLBEC 1871* in which the petitioner was a Police Constable and he remained absent from duties for 109 days without any information and the punishment of dismissal was found too harsh and excessive. The Hon'ble Court considering all the earlier decisions of the Hon'ble Allahabad High Court as well as Hon'ble Apex Court, remanded the matter for determining the quantum of punishment to the departmental authorities. In the instant case the petitioner was also absent for few days i.e. from 23.12.2009 to 30.12.2009 at the most and he has been awarded the punishment of dismissal from service and the petitioner has taken a plea that he was ill on 23.12.2009 and thereafter he was not allowed to resume the duties at P.S. Ramnagar as well as at Police Line, Nainital. The original file reveals that the petitioner was not given the movement order from Ramnagar to Nainital; no such document could be demonstrated before us by the Ld. A.P.O. It is also apparent from the record that the radiogram was sent to Police Line on 28.12.2009; this also shows that the movement order was not given to the petitioner at the time of his departure from P.S.

Ramnagar to Police Line Nainital. It is also revealed from the record that the petitioner was ill and he was admitted in the Government hospital and he also took treatment in the All India Medical Institute in the year 2009 from April to June, though the period does not correspond to the present period. His father also filed some medical papers before the enquiry officer during the enquiry, which were sent by the enquiry officer to the S.S.P. vide letter dated 23.6.2010; it also contains some medical certificates which have been sent to the S.S.P. Nainital. The entire record also reveals that the petitioner is suffering from some disease and the enquiry officer himself has said at that point of time by the above letter that his enquiry may be postponed.

16. In view of the above and in the light of the discussion, we find that the impugned punishment is too harsh and clearly disproportionate and shocking to the charge levelled against the petitioner and the penalty of removal from service awarded by the impugned order is severe and excessive. Moreover, we find that the respondents authorities have not at all considered the effect of relevant provisions regulating the procedural safeguard which had to be considered while determining the quantum of punishment. The departmental authority has also not considered the aspect that the absence was wilful or not. In these circumstances the impugned order dated 18.12.2010, appellate order dated 18.04.2011 and the revisional order dated 17.10.2011 are clearly stand vitiated in law.

17. On the careful consideration we set aside the impugned order dated 18.12.2010, appellate order dated 18.04.2011 and the revisional order dated 17.10.2011 and direct the disciplinary authority i.e. S.S.P., Nainital 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 consider 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 petitioner shall be reinstated in service forthwith. The payment of arrears of salary from the date of the dismissal to the period of reinstatement, shall be considered by the departmental authorities while making final order in the enquiry subject to the final order. The petition is disposed of accordingly. No order as to costs.

Sd/-	Sd/-
(U.D.CHAUBE) MEMBER (A)	(JUSTICE J.C.S.RAWAT) CHAIRMAN

DATE: 4 July, 2013
NAINITAL