

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

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. D.K.Kotia

-----Vice Chairman (A)

**CLAIM PETITION NO. 07/NB/DB/2015**

Kheema Nand Tiwari, S/o Late Sri P.C. Tiwari, Presently posted as Stenographer, Office of the Advocate General, Uttarakhand High Court Campus, Nainital.

.....Petitioner

**VERSUS**

1. State of Uttarakhand through Secretary, Law, Government of Uttarakhand, Dehradun.
2. Advocate General, Uttarakhand having its Office at High Court Campus, Naintial.

.....Respondents

Present: Sri Alok Mehra, Ld. Counsel  
for the petitioner.

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

**JUDGMENT**

**DATED: SEPTEMBER 08, 2016**

**(HON'BLE MR. D.K.KOTIA, VICE CHAIRMAN (A))**

1. The petitioner has filed the present claim petition for seeking the following relief:

*I. To quash and set aside the impugned Punishment Order No. 87/2014 dated 28/08/2014 (Annexure No.1), after calling the record of Enquiry Proceedings, whereby the Disciplinary Authority has imposed punishment of stoppage of two increments for one year.*

*II. To quash and set aside the order No. 166/Estt./2015 dated 4/3/2015 (Annexure No. 2), whereby it has been ordered that the claimant would not be entitled to any other pay and allowances, except the subsistence allowance already paid to him, for the period of suspension.*

*III. To issue direction in the nature of mandamus directing the respondents to pay the entire salary for the period from 22<sup>nd</sup> July 2013 to 28<sup>th</sup> August 2014; treat the entire suspension period of the claimant to be spent in service and to grant all consequential benefits including A.C.P. & Promotion etc.*

*IV. To award the cost of the petition or to pass such order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case. "*

2.1 The relevant facts in brief are that the petitioner, who is working on the post of Stenographer in the office of the Advocate General, Uttarakhand, Nainital, was placed under suspension on 22.07.2013 (Annexure: 4). It is mentioned in the suspension order that it has been decided to institute a departmental enquiry

against the petitioner on the charge of demanding/receiving illegal gratification from the Pairokars of various departments for typing the Counter Affidavits which were dictated by the Law Officers of the State for filing in the Hon'ble High Court. **It has also been mentioned in the suspension order that the charges proposed against the petitioner are of serious nature and if proved, the petitioner may be liable for a major penalty.**

2.2 After the suspension of the petitioner, the respondent No. 2 proceeded to conduct the departmental proceedings and a charge sheet containing two charges was issued to the petitioner on 29.08.2013 (Annexure: 5). The petitioner submitted reply to the charge sheet on 27.09.2013 (Annexure: 6) and denied the charges. Thereafter, the Chief Standing Counsel was appointed as the enquiry officer on 09.10.2013 to conduct the inquiry.

2.3 The enquiry officer proceeded to record statements of the witnesses named in the charge sheet. The enquiry officer also recorded the statement of one Sri Narendra Prasad Godiyal who was not named as witness in the charge sheet. For the purpose of taking statements of the witnesses, the enquiry officer wrote letters to witnesses on 28.10.2013/23.12.2013 and sought their statements in writing. The enquiry officer also sought information orally regarding conduct of the petitioner from two Pairokars of Health Department and Education Department on 09.12.2013 and 16.12.2013 respectively.

2.4 After taking written/oral statements of the witnesses, the enquiry officer wrote a letter to the petitioner on 07.01.2014 enclosing written statements of six witnesses (Annexure: 7). The petitioner was asked to submit his written reply on written/oral

statements of the witnesses within 21 days to the enquiry officer. It was also mentioned by the enquiry officer in his letter that if the petitioner wants to cross-examine the witnesses, the petitioner may state so in his reply.

2.5 The petitioner submitted his reply to the above mentioned letter of the enquiry officer on 03.02.2014 (Annexure: 8). In the last paragraph of his reply, the petitioner requested to reinstate him and to drop the enquiry against him. The petitioner has also mentioned in this paragraph of his reply that **if his suspension is not revoked and the departmental proceedings are not dropped by the respondents, the petitioner would like to cross-examine the witnesses named in the charge sheet.**

2.6 The enquiry officer demitted the office of the Chief Standing Counsel on 05.03.2014 and a new enquiry officer was appointed on 02.07.2014. The new enquiry officer issued a letter on 14.07.2014 requiring the petitioner to appear in his office for personal hearing on 15.07.2014. The petitioner appeared before the enquiry officer on 15.07.2014 for personal hearing and he was heard by the inquiry officer.

2.7 After that, the enquiry officer submitted his enquiry report (Annexure: 10). The Disciplinary Authority, agreeing with the enquiry report submitted by the enquiry officer, issued a notice to the petitioner on 31.07.2014 to show cause within seven days as to why the punishment of stoppage of two increments for one year be not imposed upon the petitioner. A copy of the enquiry report was enclosed with the show cause notice (Annexure: 10). The petitioner submitted his reply to the show cause notice on 06.08.2014 (Annexure: 11). After considering the reply to the show

cause notice, the Disciplinary Authority did not find it satisfactory and concluded the disciplinary proceedings vide order dated 28.08.2014 (Annexure: 1) by reinstating the petitioner with following punishment:

“(1) Two annual increments of Sri K.N. Tiwari are stopped for a period of one year.”

2.8 The petitioner was also issued a show cause notice on 14.10.2014 requiring him to show cause as to why period of suspension be treated as a period not spent on duty and as to why no other pay and allowance is paid to the petitioner apart from the subsistence allowance already paid to the petitioner (Annexure: 12). The petitioner submitted his reply to the show cause notice on 11.11.2014 (Annexure: 13). After considering the reply given by the petitioner, the Appointing Authority passed an order dated 04.03.2015 stating that the petitioner would not be entitled to any other pay and allowance except the subsistence allowance already paid to him for the period of suspension (Annexure: 2).

2.9 The main grounds on the basis of which the impugned order has been challenged are that the pairokar who was the main witness was not examined in the inquiry; the inquiry officer recorded the statements of the witnesses behind the back of the petitioner without any intimation or notice to the petitioner; in reply to letter of the inquiry officer dated 07.01.2014, the petitioner in his reply dated 03.02.2014 stated that in the event, disciplinary authority decides to continue to proceed against the petitioner, he may be given opportunity to cross-examine the witnesses mentioned in the charge sheet which was not given; the inquiry has not been conducted according to the principles of

natural justice; and the inquiry report is based on conjectures and surmises, the same cannot be sustained.

3. Respondents No. 1 & 2 have opposed the claim petition and it has been stated in their joint written statement that the petitioner has been punished after he was found guilty for the misconduct in the inquiry which was conducted in a just and fair manner. The enquiry proceedings have been conducted as per Rules and Law and no prejudice has been caused to the petitioner. The petitioner has been provided full opportunity of defence during the course of the enquiry. It has further been stated in the written statement that the petitioner has participated in the enquiry proceedings. The petitioner was permitted to cross-examine and specify the names of witnesses to lead his evidence vide letter dated 07.01.2014 (Annexure: 7). The petitioner in oral/written requests has not disclosed/specified the names of witnesses to whom he wanted to cross-examine and, therefore, he has chosen not to cross-examine any of the witnesses. The petitioner has also been given an opportunity of hearing by the newly appointed enquiry officer which the petitioner availed and at that time also, the petitioner did not disclose the names of the witnesses to whom he wanted to cross-examine. It has also been contended that the scope of judicial review is very limited and the court/tribunal do not interfere with the findings of facts arrived at by the enquiry officer unless the findings are malafide or perverse. The Tribunal is not an Appellate Authority and, therefore, it cannot reappraise the evidence. It is also settled proposition of law that the Disciplinary Authority is the sole judge of the facts to come to its conclusion and in the present matter, the competent authority

has acted in a fair and just manner within its jurisdiction. The charges against the petitioner were proved in the inquiry and he has been rightly punished by the competent authority after considering the reply to the show cause notice (enclosing the inquiry report) issued to the petitioner. The order to pay only the subsistence allowance for the suspension period is also rightly passed according to the financial rules. The grounds taken in the claim petition are not legally sustainable and the claim petition is devoid of merit and the same is liable to be dismissed.

4. The petitioner has also filed the rejoinder affidavit and in it the same averments have been reiterated which were stated in the claim petition.

5. We have heard learned counsel for the parties and perused the record including the original record of enquiry carefully.

6. Learned counsel for the petitioner has mainly argued that the enquiry against the petitioner has been conducted in highly improper manner. The petitioner has not been provided due opportunity of hearing to defend himself and there is gross violation of the principles of natural justice. The petitioner has not been provided any opportunity to cross-examine the witnesses on whose statements the enquiry officer has relied upon. It has been stated by the learned counsel for the petitioner that the enquiry officer instead of recording oral evidences of the witnesses, written statement of witnesses were obtained from the witnesses. The enquiry officer in his letter to the petitioner dated 07.01.2014 (Annexure: 7) has mentioned that the following witnesses have provided their written statements to the enquiry officer.

1. श्री परेश त्रिपाठी, अपर मुख्य स्थायी अधिवक्ता, उत्तराखण्ड, नैनीताल ।
2. श्री राकेश चन्द्र, वरिष्ठ वाद अधीक्षक, कार्यालय महाधिवक्ता ।
3. श्री जे०के० लखेड़ा, वाद अधीक्षक, कार्यालय महाधिवक्ता ।
4. श्री मनोज सिंह कैंड़ा, निजी सचिव ।
5. श्री नरेन्द्र प्रसाद गोदियाल, सहायक समीक्षा अधिकारी, कार्यालय महाधिवक्ता ।
6. श्री बिजेन्द्र उपाध्याय, सहायक समीक्षा अधिकारी, कार्यालय महाधिवक्ता ।

It has also been stated by learned counsel for the petitioner that out of above six witnesses, one witness namely Sri Narendra Prasad Godiyal was even not named in the charge sheet. The enquiry officer enclosed the written statements of these six witnesses with his letter dated 07.01.2014 and asked the petitioner to submit his reply on these statements within 21 days. The enquiry officer also asked the petitioner to state in his reply whether the petitioner would like to cross-examine these witnesses. In addition to the above six witnesses, the enquiry officer in his letter dated 07.01.2014 has also mentioned that the oral information about the conduct of the petitioner was also taken from two other persons namely Sri L.P. Saxena and Sri G.P.Avasthi, who belong to Health Department and Education Department respectively. It has further been stated by the learned counsel for the petitioner that the petitioner, in his reply dated 03.02.2014 to the said letter of the enquiry officer dated 07.01.2014, very specifically mentioned that in case the respondents decide to continue the proceedings against the petitioner, he would like to cross-examine the witnesses which were mentioned in the charge sheet. The relevant paragraph of petitioner's reply in his letter dated 03.02.2014 is reproduced below:



“अतएवं उपरोक्त तथ्यों के परिप्रेक्ष्य में उत्तरदाता/विपक्षी के विरुद्ध की जा रही समस्त कार्यवाही व निलम्बन, निराधार, विधि विरुद्ध एवं निर्धारित विधिक प्रक्रिया के प्रतिकूल होने से समस्त कार्यवाही निरस्त की जाने योग्य है। यदि फिर भी विभाग द्वारा उत्तरदाता/विपक्षी के विरुद्ध आरम्भ की गयी यह कार्यवाही व निलम्बन निरस्त नहीं किया जाता तो ऐसी दशा में उत्तरदाता/विपक्षी आरोप पत्र में वर्णित गवाहों से जिरह करना चाहेगा तांकि सत्य सामने आ सके।”

The counsel for the petitioner further stated that in spite of request by the petitioner, he was not allowed to cross-examine the witnesses and as a result, his right to defend himself has been denied which is in gross violation of the principles of natural justice. Since the petitioner was not allowed to cross-examine the witnesses, the whole enquiry proceedings get vitiated and, therefore, the punishment order passed on the basis of the enquiry is liable to be quashed.

7. Learned A.P.O. has refuted the argument given by the learned counsel for the petitioner in para 6 above and in his counter argument has stated that the petitioner was provided opportunity to cross-examine the witnesses during the enquiry but the petitioner neither in oral nor in written request disclosed/specified the names of the witnesses to whom he wanted to cross-examine. The petitioner was also provided an opportunity of personal hearing by the new enquiry officer on 15.07.2014 but during personal hearing also, the petitioner did not ask for the cross-examination of the witnesses. The contention of learned A.P.O. is that the petitioner himself not availed the opportunity to cross-examine the witnesses. The petitioner was given the opportunity to cross-examine the witnesses but he chose not to cross-examine any of the witnesses. It has been stated by

the learned A.P.O. that at each and every stage, the petitioner was provided sufficient opportunity of hearing.

8. We have gone through the record and careful examination of it reveals that the petitioner though had very specifically requested to cross-examine the witnesses who have been mentioned in the charge sheet vide his letter dated 03.02.2014 but the respondents did not respond to his request. The petitioner was neither given any reply of his letter nor he was otherwise informed any decision about his request to cross-examine the witnesses. After the letter of the petitioner dated 03.02.2014, the next stage of enquiry was taken up on 14.07.2014 when a letter was written to the petitioner by the new enquiry officer and the petitioner was asked to present himself in the office of the enquiry officer on 15.07.2014 for personal hearing. The record of personal hearing (Annexure: R7 to the written statement) as recorded by the enquiry officer is reproduced below:

“श्री हरीश सिंह कैड़ा, आशुलिपिक (निलंबित) एवं श्री खीमानन्द तिवारी, आशुलिपिक (निलंबित), आरोप पत्र संख्या-72/आरोप पत्र दिनांक 29-08-2013 में उल्लिखित आरोपों के सम्बन्ध में कार्यालय आदेश संख्या 61/अधि/2014 एवं 62/अधि0/2014 दिनांक 14.07.2014 के क्रम में आज दिनांक 15.07.2014 को नियत समय पर अधोहस्ताक्षरी के सम्मुख अपना व्यक्तिगत पक्ष रखने हेतु उपस्थित हुए तथा उनकी व्यक्तिगत सुनवाई की गई है। ”

Perusal of the above record of personal hearing reveals that nowhere the issue of providing opportunity to cross-examine the witnesses by the petitioner has been dealt with. On the basis of the above record of personal hearing, it cannot be said that the petitioner chose not to avail the opportunity to cross-examine the witnesses. The fact remains that the petitioner had requested to

allow him to cross-examine the witnesses mentioned in the charge sheet vide his letter dated 03.02.2014 and this letter remained unanswered by the enquiry officer. In the whole record of inquiry, we do not find any material which would show that the petitioner declined or refused to avail the opportunity to cross-examine the witnesses. On the contrary, record reveals that he insisted on cross-examination of the witnesses mentioned in the charge sheet and the inquiry officer did not provide opportunity to the petitioner to cross-examine the witnesses. It is, therefore, difficult to agree with the contention of the learned A.P.O. that the petitioner was provided opportunity to cross-examine the witnesses but he himself did not avail the opportunity. In our opinion, the learned A.P.O. could not demonstrate that the petitioner chose not to cross-examine the witnesses.

9. In the case of **Rajendra Prasád Tripathi Vs. State of U.P. (2005) 1 LLJ 701**, the Division Bench of the Allahabad High Court in paragraph 9 of its order observed as under:

*“9. An opportunity of personal hearing to a charged officer does not mean that immediately after submission of reply to the charge-sheet, or even if the charge-sheet has not been replied, the charged officer/official would be summoned and he would be required to say in general as to what he wants to suggest and say against the charges. This cannot be termed as personal hearing in any manner for the purpose of enquiry. The normal procedure of enquiry is that the charges levelled against the delinquent officer have to be established/proved in the manner in which they should be proved and for that*

*matter, the department is required to lead evidence first and thereafter the delinquent officer is given an opportunity to cross-examine or rebut the evidence. This would include adducing of further evidence or any other evidence as the delinquent officer may deem proper, both oral as well as documentary. It is after the stage of evidence that the occasion arises for affording the opportunity of hearing. It is often seen that in holding the departmental enquiry, the enquiry officer in the government department, after submission of the reply to the charge-sheet by the charged officer or even in cases where reply is not submitted by the delinquent officer, does not fix any date, time and place for holding the enquiry, nor gives any intimation to the charged officer/official, but proceeds to submit his report on the basis of the reply submitted, or if not, then on the basis of the charge-sheet and the documents available on record, as the case may be. This procedure does not have the sanctity of law and is not only in violation of the principles of natural justice, but also against various service rules, wherein the procedure of enquiry has been specifically provided.”*

10. In the case of **Pradeep Kumar Saxena vs. Chairman/Managing Director, U.P. Sahkari Gram Vikas Bank Ltd. and Ors. (2008) III LLJ 819**, the Division Bench of the Allahabad High Court in paragraph 9 held as under:

*“9. It is settled proposition of law that enquiry means an enquiry, in accordance with law, where allegations*

*contained in the charge sheet should be proved by oral evidence adduced by the department first and thereafter the delinquent employee may get an opportunity to cross-examine witnesses and the Enquiry Officer shall afford an opportunity to the delinquent employee to lead evidence in defence. Only after giving opportunity to lead evidence in defence, the Enquiry Officer may proceed to provide opportunity of personal hearing to the delinquent employee. Mere grant of personal hearing to the delinquent employee shall not amount sufficient compliance of the principles of natural justice.....”*

11. It is a settled law that opportunity to cross-examine the witnesses is the fundamental requirement to meet the principles of natural justice. In the case of **S.C.Girotra Vs. United Commercial Bank (UCO Bank) and Ors (1996)ILLJ 10 SC**, the Hon’ble Supreme Court has held that *“It is also clear that no opportunity was given to the appellant to cross-examine either the makers of that report, Mr. V.P. Jindal and Mr. J.R. Sharma or the officers who had granted such certificates which formed evidence to prove the charges which led to the order of dismissal passed by the disciplinary authority, even though those persons were examined for the purpose of proving the documents relating to them. In our opinion, the grievance made by the appellant that refusal of permission to cross-examine these witnesses was denial of reasonable opportunity of defence to the appellant, is justified.”*

12 It is also pertinent to mention that Rule 7(10) of the Uttarakhand Government Servants (Discipline and Appeal)

(Amendment) Rules, 2010 also provides that the evidence of the witnesses shall be recorded in presence of the charged government servant who shall be given opportunity to cross examine such witnesses. The said Rule reads as under:

**“(10) The Disciplinary Authority or the Inquiry Officer, whosoever is conducting the inquiry shall proceed to call the witnesses proposed in the chargesheet and record their oral evidence in presence of the charged government servant who shall be given opportunity to cross examine such witnesses after recording the aforesaid evidences. After recording the aforesaid evidences, the Inquiry Officer shall call and record the oral evidence which the charged government servant desired in his written statement to be produced in his defence.”**

Admittedly, the inquiry officer in the present case has not taken oral evidence of the witnesses in presence of the petitioner. The inquiry officer has by writing letters to the witnesses obtained written statements of the witnesses. According to the Rule mentioned above, it was mandatory on the part of the inquiry officer not only to record oral evidence of the witnesses in presence of the petitioner but also to provide opportunity to the petitioner to cross examine the witnesses. In the present case, the inquiry officer has neither recorded the evidence of witnesses in presence of the petitioner nor opportunity was provided to the petitioner to cross examine the witnesses. We, therefore, find that the provisions of Rule 7(10) of the said Rules have been violated and the inquiry, therefore, is illegal and in gross violation of the principles of natural justice.

13. For the reasons stated in paragraph 8 to 12 of this order above, we reach the conclusion that the petition deserves to be allowed.

**ORDER**

The claim petition is, hereby, allowed. The impugned orders dated 28.08.2014(Annexure: 1) and dated 04.03.2015 (Annexure: 2) are set aside. However, it would be open to the disciplinary authority to proceed afresh against the petitioner in accordance with law from the stage of reply to the charge sheet. The respondents would be at liberty to suspend the petitioner if they find that he is liable to be suspended in accordance with law. The question regarding payment of salary for the period of suspension would be decided by the competent authority at the appropriate time during the inquiry or after the inquiry as the law permits. If the said proceeding of inquiry is started against the petitioner, the same would be concluded according to rules and law expeditiously, preferably within a period of six months from the date of this order. No order as to costs.

**(RAM SINGH)**  
VICE CHAIRMAN (J)

**(D.K.KOTIA)**  
VICE CHAIRMAN (A)

*DATE: SEPTEMBER 08, 2016*  
*NAINITAL*

*KNP*