

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. D.K.Kotia

-----Vice Chairman (A)

CLAIM PETITION NO. 21/SB/2014

Deepak Joshi, S/o Late Sri D.N.Joshi, Presently posted as Samiksha Adhikari, Revenue Section 2, Government of Uttarakhand.

.....Petitioner

Versus

1. State of Uttarakhand through Chief Secretary, Government of Uttarakhand, Dehradun.
2. Principal Secretary, Secretariat Administration Department, Government of Uttarakhand, Dehradun.
3. Principal Secretary, Medical Health and Family Welfare, Government of Uttarakhand, Dehradun.

.....Respondents

Present: Sri M.C.Pant, & Sri L.K.Maithani, Ld. Counsels
for the petitioner.

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

JUDGMENT

DATED: APRIL 21, 2017

(Hon'ble Mr. Ram Singh, Vice Chairman (J))

1. The petitioner has filed this claim petition for the following reliefs:-
“(1) To issue order or direction to quash the impugned order dated 11.10.2012(Annexure A-1) and appellate order dated 01.04.2013 (Annexure A-2) and orders dated 17.2.2012 (Annexure A-3 (b) with all consequential benefits after calling the entire records from the respondents.

(2) To award suitable compensation or damages to the petitioner which the Court deem fit and proper in the

circumstances of case and direct for recovery of the same from the erring officers.

(3) Any other relief which the court deem fit and proper in the circumstances of the case.

(4) Cost of the petition be awarded to the petitioner.”

2. The petitioner, who is a Samiksha Adhikari, Revenue Section-2, Government of Uttarakhand, was issued a charge sheet on 12.07.2012 (Annexure: A-4) with the charge that inspite of the recommendation of Departmental Promotion Committee for promotion from the post of Senior Medical Officer to the post of Joint Director, petitioner at the time of putting the proposal for issuing the promotion order, did not include the names of two candidates of Scheduled Tribe category due to which promotion order of those reserved category candidates could not have been issued and, therefore, he was guilty for violation of Rule 3 (1) and 4(1) of Uttarakhand Government Servant Conduct Rules,2002.
3. Petitioner submitted his reply to the charge sheet on 26.07.2012 (Annexure: A-5) denying all the charges and mentioned that the mistake was inadvertent and the names of two Scheduled Tribe Category candidates could not be included in the proposal for issue of promotion order due to accidental slip while doing cut and paste exercise on the computer.
4. After considering the reply, the punishment order was passed by the Principal Secretary, Secretariat Administration, Government of Uttarakhand on 11.10.2012 (Annexure : A 1) and censure entry was awarded to the petitioner.
5. Petitioner submitted departmental appeal against the punishment order to the Chief Secretary on 08.01.2013 but the same was rejected on 01.04.2013.
6. The petitioner has challenged the punishment order mainly on the ground that the censure entry awarded to him was though minor punishment yet it has an effect of major penalty for promotion

purposes. There was no deliberate negligence on his part. The file was moved through Section Officer to Under Secretary and Secretary and at higher level who were to take decision on the basis of the proposal and the complete recommendation of the DPC which was placed on record. Only the petitioner was penalized while no other officer, who dealt with the matter, was punished and discrimination against the petitioner was made and the entire proceedings are against the rules. The proceedings for major penalty were initiated and after denial of the charges by the petitioner, no regular inquiry was conducted. Neither any show cause notice was issued to him on the basis of so called conducted inquiry by the disciplinary authority himself nor there is any evidence against the petitioner to award the punishment, therefore entire proceedings are discriminatory, arbitrary and violative of Article 14 and 16 of the Constitution of India.

7. Respondent Nos. 1 & 2 opposed the petition and have stated that finding sufficient evidence against the petitioner, he was rightly found guilty and minor punishment of censure entry was imposed upon him by the competent authority. It has further been contended that the petitioner was given reasonable opportunity to defend himself, inquiry was conducted according to Rules following due procedure and no discrimination was made against the petitioner. It has been denied that act of respondents was arbitrary or malafide. It has further been contended that the appeal of the petitioner was duly considered and rejected by a speaking order.
8. Petitioner has also filed rejoinder affidavit and same averments have been reiterated which were stated in the claim petition.
9. We have heard Ld. Counsel for the petitioner as well as Ld. A.P.O. on behalf of respondents and perused the record including the original record of inquiry.
10. Ld. Counsel for the petitioner has argued that inquiry has not been conducted properly and as per Rules. According to the petitioner, the disciplinary proceedings were initiated to award major penalty under

rule 7 of the Uttarakhand Government Servant (Discipline and Appeal) Rules, 2003 (as amended in 2010). The charge sheet was issued to the petitioner and the charges were denied by him in his reply to the charge sheet. As per Rule 7, there was a need to conduct the inquiry either by appointing the inquiry officer or by the disciplinary authority himself. According to the petitioner no inquiry was conducted and the punishment order was passed without issuing show cause notice to the petitioner under Rule- 9. Ld. A.P.O. has refuted the arguments of the Ld. Counsel for the petitioner and stated that reply to the charge sheet given by the petitioner was duly considered and a reasoned order of punishment was passed by the Principal Secretary, Secretariat Administration and minor punishment of censure entry was passed against the petitioner.

11. Ld. Counsel for the petitioner has contended with the specific plea that when the procedure for imposing major penalty was initiated under Rule-7 of the Discipline & Appeal Rules, 2003 and a charge sheet was issued to the petitioner, who denied all the charges and submitted his reply mentioning all his submissions, then it was necessary to conduct an inquiry either by appointing an inquiry officer or by the disciplinary authority himself. Ld. Counsel for the petitioner has submitted that no inquiry was conducted and the punishment was awarded to the petitioner.
12. As per Rule 7, the disciplinary authority is empowered to appoint an inquiry officer or to conduct the inquiry himself. The procedure after completion of inquiry is mentioned under Rule 8 and 9 of the said rules. In the present case Rule-8 did not apply because the inquiry was conducted by the disciplinary authority himself. Action on the basis of the inquiry report can be taken under Rule-9 which reads as under:-

“9 (1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government Servant. The Inquiry Officer shall thereupon proceed to hold the

inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule-7.

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government Servant shall be exonerated by the Disciplinary Authority of the charges and informed him accordingly.

(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 to 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 the charged Government Servant.”

13. Sub rule (4) of Rule 9 covers both the cases i.e. inquiry by the inquiry officer or inquiry by the disciplinary authority and it says that if the disciplinary authority having regard to the finding on all or any of the charges, is of the opinion that any penalty specified in Rule 3 (it includes major and minor penalty both) should be imposed on the charged Government servant, he shall give copy of the inquiry report and his findings regarding sub section (2), if any, to the charged Government servant and require him to submit his representation, if he so desires, within a specified time. Sub rule (4) further provides that, “The disciplinary authority having regard to all the record relating to the inquiry and representation of the charged Government servant, if any, subject to the provision 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 the charged Government servant”.

14. In the present case the disciplinary authority has not examined any witness and he has based all his findings of inquiry on the basis of reply of the petitioner to the charge sheet and documentary evidences and has drawn a conclusion that the charges are proved against the petitioner. But after drawing this conclusion of inquiry, no show cause notice was issued by the disciplinary authority inviting the representation of the employee, if any, within a reasonable time. This exercise was a must as per Rules after recording his finding that the charges are proved. The disciplinary authority was also bound by the Rules of natural justice to give an opportunity through a show cause notice to an employee to make his submission. In the present case the disciplinary authority has deviated from the Rules and principles of natural justice. The punishment order passed by the disciplinary authority has not been passed as per the provisions of the concerned rules i.e. Rule-9 of the Discipline & Appeal Rules, 2003.
15. Ld. A.P.O. has submitted that as the inquiry was conducted by the disciplinary authority himself, so there was no need to give any such notice before passing the punishment order. This Court is of the view that this argument of Ld. A.P.O. is not tenable because the Rule 9(4) applies in both the circumstances when inquiry is conducted by the disciplinary authority himself or by the inquiry officer. If the inquiry is conducted by the inquiry officer, the disciplinary authority must be in concurrence with his findings and then the disciplinary authority is duty bound to issue a show cause notice along with the inquiry report. If the disciplinary authority himself has conducted the inquiry and has come to the conclusion that the charges are proved, in these circumstances too, he is also duty bound to issue a show cause notice along with his findings to the petitioner to give him an opportunity to make his submission. The Rule does not exonerate the disciplinary authority from this mandatory exercise.

16. Ld. A.P.O. has argued that as the punishment passed by the disciplinary authority is of minor nature, hence after inviting the reply of the petitioner, the punishment order was rightly passed because it is a minor penalty. This Court is of the view that once the procedure for major penalty was started, then the complete procedure prescribed for the same was to be followed and it is immaterial that the awarded punishment is major or minor. The disciplinary authority is not permitted to deviate from the track which he had started from the very beginning and in this case the disciplinary authority has not completely followed the procedure which he had started initially. As the decision of inquiry in this case was made on the basis of documentary evidence only, and opportunity to cross-examine any of the witnesses was not available, hence it was necessary to hear the petitioner before passing the order of punishment which was not done in this case.
17. In view of the Court, Rules have not been followed and punishment order passed by the disciplinary authority is without following the principles of natural justice and procedural law. Hence, the impugned order needs to be set aside accordingly. The petitioner has also sought cancellation of order dated 17.2.2012 (Annexure: A-3 B). This order is of administrative nature for the department and no such direction can be issued by the Tribunal on this count.
18. Ld. Counsel for the petitioner has also argued that the disciplinary authority treated the petitioner with discrimination. According to the petitioner, he was an employee of lowest cadre in the hierarchy and moved the file with entire proceedings of D.P.C. and as per the Secretariat Rules, responsibility for moving any such proposal lies on the Section Officer against whom no action was taken. The disciplinary authority in its order (Annexure: A-1) mentioned that the complete responsibility for initiating a proposal in a Section lies upon the Dealing Assistant and In-charge of the Section and Under Secretary and higher officers can only take decision on the file. Ld. Counsel for the petitioner has argued that in the present case although file was started/moved by

the petitioner but the proposal shall be deemed to have been initiated by the Section officer and on the basis of all the available record, the decision was to be taken by the higher officer of the department at the level of Under Secretary, Additional Secretary and Secretary. Ld. Counsel for the petitioner has argued that none of them has been held responsible for any such fault and the petitioner, who simply moved the file and was an employee of lowest cadre in the hierarchy, was pin pointed and a discriminatory attitude was adopted towards him which is violative of provisions of Article 14 and 16 of the Constitution. This argument is very substantive and the department should treat all the responsible persons equally. There is no record available before the Tribunal to know whether any such action has been taken against other persons or not. Hence, no opinion on this argument needs to be expressed at this stage and it is left to the Government to do needful in this respect.

19. Ld. Counsel for the petitioner has also argued that the reservation in the promotion was not permitted in view of the dictum of the Hon'ble Supreme Court and the Hon'ble High Court and the petitioner cannot be punished for the omission which was not permitted by law. Ld. A.P.O. has argued that at the relevant date, the judgment of Hon'ble High Court for ban on promotion in reservation was not passed and the same was passed on a date later in time. Ld. Counsel for the petitioner has argued that the ban on the promotion in the reservation was actually put by the order of Hon'ble Apex Court much prior to the order of the Hon'ble High Court, and the Hon'ble High Court has only clarified and expressed the dictum of the Hon'ble Supreme Court. In this regard Ld. Counsel for the petitioner has cited the judgment of Hon'ble Uttarakhand High Court in **Vinod Prakash Nautiyal and Others Vs. State of Uttarakhand and others, W.P. (S/B) No. 45/ 2011** decided on 10.07.2012 in which Hon'ble Court has held as under:

“ The vires of Section 3(7) of the said Act was challenged in a group of writ petitions filed before the Hon'ble Allahabad High Court. The

challenge, thus, thrown ultimately reached the Hon'ble Supreme Court. The Hon'ble Supreme Court in Special Appeal No. 2608 of 2011 and connected appeals held that Section 3(7) of the said Act runs contrary to the dictum of the Hon'ble Supreme Court rendered in the case M. Nagaraja and Others Vs. Union of India and Others reported in (2006) 8 SCC 212 and, accordingly, not sustainable.....It is, however, made clear that henceforth, no promotion can be given by the State of Uttarakhand by taking recourse to Section 3(7) of the Act. It shall be deemed to be non-existent from today.”

This plea was neither raised by the petitioner before the disciplinary authority in his reply nor before the appellate authority in his appeal and at the stage of arguments he is raising it for the first time before the Tribunal. Still the petitioner is free to raise it before the department and this Court is not expressing any opinion on this point.

20. In the result the Court is of the view that the petition deserves to be allowed and the impugned order of punishment needs to be set aside giving liberty to the department to complete the inquiry afresh as per rules.

ORDER

The claim petition is allowed. The impugned order dated 11.10.2012 (Annexure: A-1), appellate order dated 01.04.2013 (Annexure: A -2) are hereby set aside with all its effects and operation. However, the disciplinary authority is at liberty to conduct the inquiry according to the Rule 9(4) of the Discipline and Appeal Rules, 2003 and the petitioner will also be at liberty to raise all the pleas before the disciplinary authority which he has raised in his arguments before the Tribunal. No order as to costs.

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

(RAM SINGH)
VICE CHAIRMAN (J)

DATE: APRIL 21, 2017
DEHRADUN
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