

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

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. A.S.Nayal

-----Member (A)

CLAIM PETITION NO. 02/NB/DB/2018

Harish Singh Kaira, S/o Late Bir Singh Kaira, 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, Nainital.
3. Ms. Smita Joshi, presently posted as Additional Private Secretary, Office of the Advocate General, Uttarakhand High Court Campus at Nainital.

.....Respondents

Present: Sri Vinay Kumar, Ld. Counsel
for the petitioner

Sri V.P. Devrani, Ld. A.P.O.
for the Respondents No. 1 & 2

Sri Sandeep Kothari, Ld. Counsel
for the respondent No. 3

JUDGMENT

DATED: APRIL 09, 2019

HON'BLE MR. RAM SINGH, VICE CHAIRMAN (J)

1. The petitioner has filed this claim petition for the following reliefs:-

I. To issue direction in the nature of certiorari quashing the part of the impugned Office Order dated 15th December 2017 issued by the Appointing Authority to the extent it denies the Bonus to the claimant for the period 22nd July 2013 (date of suspension) to 8th September 2016 (the date of order of learned Tribunal) and portion "the claimant would be entitled for all service benefits pertaining to the post after 8th September, 2016 only " be quashed and all the service benefits be given to the claimant w.e.f. 22nd July, 2013.

II. To issue direction in the nature of certiorari quashing the impugned office order/promotion order dated 22nd December 2014 of the Private respondent No. 3, whereby, the private respondent has been temporarily promoted on the post of Additional Private Secretary subject to the regular promotion being made in consultation with the Public Service Commission as well as the recommendation of the Selection Committee in favour of respondent No.3

III. To issue direction in the nature of mandamus directing the respondent No. 2 to hold the Review DPC of the DPC wherein the candidature of the private Respondent No. 3 was considered and recommended for promotion on the post of Additional Private Secretary and to direct the respondent No. 2 to consider the candidature of claimant and all Stenographers who were eligible as on 1st July 2014 for promotion on the post of APS.

IV. To issue direction in the nature of mandamus directing the respondent No. 2 to consider and promote the claimant on the post of Additional Personal Secretary by holding regular promotion exercise as per the provisions of the Service Rules of 2013.

V. To issue direction in the nature of mandamus directing the respondent No. 2 to release the Bonus of the claimant for the period from 22nd July 2013 (date of suspension) to 8th September 2016 (date of judgment of the learned Tribunal), which has been illegally stopped by the respondent No. 2 vide his Office Order dated 15th December 2017 along with penal interest from the date it has become due to the claimant till the date of actual payment.

VI. To issue direction in the nature of mandamus directing the respondent No. 2 to release the two withheld annual increments of the claimant from the date 28/8/2014 to onwards instead of 8/09/2016 as has illegally been held by the respondent No. 2 vide office order dated 15/12/2017 along with penal interest from the

date it has become due to the claimant till the date of actual payment.

VII. To issue direction in the nature of mandamus directing the respondent No. 2 to pay the interest on the delay in payment of the amount of arrears of 1st ACP i.e. from 18th April 2013 and arrears of difference of salary during suspension period till the date of its actual payment.

VIII. To award the cost of the petition or to pass such other order or direction which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

2. Briefly stated, the facts are that the petitioner was appointed on the post of Stenographer on 18.04.2003, in the office of the Advocate General, Uttarakhand, Nainital and his services were confirmed on 15.12.2006. The services of the petitioner are governed by the उत्तराखण्ड महाधिवक्ता कार्यालय अधिष्ठान (कर्मचारियों की सेवा) नियमावली, 2013 and the next promotional post of the petitioner is Additional Private Secretary (APS). The post comes under the purview of the Public Service Commission, hence, promotion by selection can be done in consultation with the Public Service Commission as per their procedural Rules, 2003.

3. A disciplinary proceeding was started against the petitioner on 28.08.2014, in which, after inquiry, he was punished with the punishment of stoppage of two increments for one year and without paying the full salary, he was paid only the subsistence allowance for his suspension period.

4. The punishment order was challenged by the petitioner before this Tribunal in claim petition No. 24/NB/DB/2014, which was allowed by this Tribunal vide judgment and order dated 08.09.2016, with the following order:-

"The claim petition is, hereby, allowed. The impugned orders dated 28.08.2014 (Annexure: 1) and order dated 04.03.2015 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 conducted according to rules and law expeditiously, preferably within a period of six months from the date of this order. No order as to costs."

5. After the above judgment of this Tribunal, the petitioner submitted certified copy of the judgment, before his appointing authority with the request to take appropriate action, in terms of the order and after completion of six months, petitioner again submitted representations on 15.03.2017, in April, 2017, June, 2017 and November, 2017, with the request for granting of ACP, remaining salary for the suspension period i.e. 22.07.2013 to 28.08.2014, payment of two annual increments, which were withheld and for payment of Bonus for the year 2013 to 2016 and to consider the candidature of the petitioner for promotion to the post of APS w.e.f. 3rd December, 2014 along with all consequential benefits. It is also mentioned that in the mean time, respondent no. 3 who was junior to the petitioner, in stenographer cadre, was given temporary promotion on the post of APS, superseding him, for the reasons that petitioner was facing inquiry and later on was punished in the year 2014. As after the judgment of this Tribunal, this ineligibility was removed hence, petitioner made a request for considering him for promotion on the post of APS from the date, his junior was promoted and to hold a review DPC for this purpose.

6. On the representation of the petitioner, three members committee was constituted by the Appointing Authority. After considering the report of the committee, respondent passed the impugned order dated 15.12.2017, whereby, the claim of the petitioner

for grant of the benefit of ACP w.e.f. 18th April 2013 and remaining salary for the suspension period was allowed but the respondent without any reason and plausible explanation in the same order, refused to grant the Bonus to the petitioner for the period 22.07.2013 to 08.09.2016. In the same order, it was also directed that the petitioner will be entitled for all service benefits and payment of withheld two annual increments only from the date of the judgment of the Tribunal i.e. 08.09.2016. Hence, petitioner had filed this petition, alleging that the said order is bad and illegal, by which, petitioner was debarred from Bonus, and inspite of granting of all the service benefits from back date, the benefits were allowed only after the date of the order, hence, according to the petitioner, the said order is liable to be modified and quashed, to this extent .

7. The petitioner also contended that he is much senior to respondent No. 3 in the cadre, and respondent no. 3 did not complete 5 year of continuous service on the first date of recruitment, for considering her for promotion to the post of APS in the recruitment year 2014-15. She completed four years and six months of service at that time, when the DPC was held; the selection committee, constituted by the appointing authority, was not as per the rules as contemplated under the Public Service Commission Rules, 2003. The ineligibility because of which, the petitioner was deprived from promotion on the post of APS in 2014, has already been removed by this Tribunal after the judgment dated 08.09.2016, hence, the candidature of the petitioner is required to be considered for promotion to the post of APS from the date, a person junior to him was promoted i.e. 22.12.2014, even though temporary. Now, petitioner has become eligible for the promotional post w.e.f. 22.12.2014 because no further disciplinary proceedings have been initiated and completed against the petitioner, within the time allowed in the order of the Tribunal. The person junior to the petitioner, is drawing higher salary than the petitioner and now, without there

being any ineligibility on the candidature of the petitioner, he has to work under the person who is six years junior to him in the cadre of Stenographer. It is also contended that the promotion of respondent No. 3 was not as per the provisions of law, hence, request has been made to set aside the promotion order of the respondent No. 3, with a request to consider the candidature of the petitioner for promotion and to hold a review DPC accordingly. With these contentions, petition has been filed for the aforesaid reliefs.

8. The claim petition was opposed by the respondents and also by the private respondent No. 3 on several grounds and a preliminary objection was also raised that the petition is barred for raising of plural reliefs in one petition. Furthermore, it has been contended by the respondents that at the time of meeting of DPC, for the post of Additional Private Secretary (APS) on 22.12.2014, the petitioner was not eligible to be considered for promotion in terms of the G.O. dated 08.07.2009 as the punishment order was in force against him. The Uttarakhand Advocate General Employees Service Rules, 2013, are applicable in the matter according to which, the departmental promotion and appointments can be done as per rules. The petitioner was not found suitable and accordingly, he was not granted such promotion and the promotion of the respondent No. 3 was made temporarily, with a specific order that the regular promotion will be made later on, as per Rules. The services of the petitioner were not satisfactory hence, HOD had special rights of stopping the additional benefits when the incumbent was found ineligible, as in his case, the punishment was in force. According to respondents, the departmental promotion committee had recommended the name of respondent No. 3, strictly in accordance with the prevalent Rules hence, she was promoted accordingly. The petitioner will be considered for promotion on the post of APS whenever, there will be vacancy in future and he will be found eligible. The HOD is doing communication with the

Government for the additional post. According to the respondents, the petitioner has already been paid the benefit of increments and he is not entitled for the payment of any such arrears of Bonus. As the punishment was in force at the relevant time and under the powers derived from various Government Orders, hence, the HOD was having legal right not to allow any such benefit to an unsuitable employee. The bonus was an ex-gratia payment, granted by the State Government to its employees on the basis of the satisfactory service in a particular year, and after that period, he is not entitled for any arrears on this count.

9. Respondent No. 3, in addition to the above, has also opposed the petition on the ground that the claim petition is barred by limitation, as the relief was not sought within the period of limitation prescribed. The petitioner never objected or represented against the constitution or recommendation of the DPC at the time when promotion of the private respondent was made hence, the prayer made in para-III of the relief clause, also cannot be granted now.

10. According to respondents, there were serious allegations of misconduct against the petitioner and in the previous round of litigation, this court allowed the petition, purely on technical ground and not on the merit of charges and further liberty was granted to the appointing authority to start the disciplinary proceedings afresh. The petitioner was not exonerated from the charges and surprisingly, the disciplinary authority refrained from initiating the further inquiry against the petitioner and he was unduly favoured by the disciplinary authority, hence at this stage, the relief claimed by the petitioner, cannot or should not be allowed to him. The promotion of the private respondent was made and issued only after completion of 5 years of requisite service and it was not the only criteria to promote stenographers on the post of APS. Other grounds and merits of the candidates were also to be considered. Furthermore, the promotion granted to respondent No. 3 is not a regular promotion, hence, no right

could be accrued in favour of the petitioner inasmuch as no such legal right was violated hence, the interim relief, sought by the petitioner in his previous petition, was never granted in his favour. The order dated 15.12.2017, has not been passed in terms of liberty granted by the learned Tribunal in its judgment dated 08.09.2016. Without availing the option of liberty granted by the Hon'ble Tribunal to the department, the petitioner has been unduly favoured and the relief sought by the petitioner cannot be granted and the petition deserves to be dismissed.

11. The petitioner in his Rejoinder Affidavit, has supported the version of the claim petition and denied the contention of the Counter Affidavit filed by the respondents and has submitted that as the punishment order dated 28.08.2014, passed against the petitioner was quashed by the Tribunal and no fresh disciplinary proceedings were initiated against him, hence, after the period mentioned in such judgment, the petitioner is entitled for the relief sought as above and the temporary promotion of the respondent no. 3 is not as per law and the candidature of the petitioner should be considered by the DPC because of the reasons that on the date, when the DPC was held, the punishment order was in existence but it was set aside in 2016 and now the petitioner is entitled for promotion and all the reliefs sought as above.

12. We have heard both the sides and perused the record.

13. It is an admitted fact that the disciplinary proceeding was started against the petitioner in the year 2013, levelling the charge of demanding 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 is also an admitted fact that after the inquiry, the petitioner was punished vide order dated 28.08.2014 and a punishment of stoppage of two increments for one year was imposed and vide order dated 04.03.2015,

it was ordered that he will not be paid the salary for the suspension period, except the subsistence allowed. The record also reveals that on account of disciplinary proceedings, the petitioner was not paid the Bonus for that period (2013 to 16) in view of the concerned G.O. issued by the Government.

14. Admittedly, the claim petition was filed by the petitioner against the order passed by the respondents and that claim petition No. 24/NB/DB/2014 was decided by this Tribunal vide its judgment dated 08.09.2016 and a procedural irregularity was noticed by the court that the oral evidence of the witnesses were not taken in the presence of the petitioner and no opportunity was provided to the petitioner to cross examine the witnesses, hence, for violation of the rules, during the inquiry, the claim petition was allowed the punishment order dated 28.08.2014 and orders about non-payment of salary dated 04.03.2015 were set aside. However, the respondents were given liberty to proceed afresh against the petitioner, from the stage of charge sheet, in accordance with law, if they so desire and to complete the disciplinary proceeding as per law within a limited time frame. Furthermore, the liberty was also granted to the respondents to put the petitioner under suspension in accordance with law, if they find that he is liable to be suspended. It is to be noticed that vide judgment dated 08.09.2016, the petitioner was not exonerated from the charges on its merit.

15. Although, liberty to the respondents was granted by this Court to proceed afresh in relation to the charges levelled against the petitioner, within a stipulated time of six months, but the respondents did not choose to go for further inquiry and the charges were allowed to die in its own way.

16. According to the petitioner, after passing the stipulated period of such liberty to the respondents, the petitioner submitted his representation to the respondents, to grant him all the service benefits,

which were withheld on account of punishment orders dated 28.08.2014 and order dated 04.03.2015, as these were set aside by this Court vide judgment dated 08.09.2016. A request was also made to consider him for promotion and to grant him the Bonus for that period. But the respondents vide order dated 15.12.2017, although allowed the pay for the suspension period but rejected his prayer for Bonus and withheld service benefit i.e. increments were not allowed from back date, but the order was passed to grant such benefits from the date of the judgment of this Tribunal, passed on 08.09.2016.

17. This order has been challenged on the ground that ineligibility of the petitioner which was imposed by the punishment order dated 28.08.2014, has been removed by the order of this Tribunal dated 08.09.2016 and it will be presumed now that no such proceeding was either initiated or proceeded legally against the petitioner. This court agree with this argument of the petitioner to the extent that although on the merits of the petition, decision was not made by this court but on account of procedural irregularity, the punishment order was set aside and, as the respondents did not exercise their liberty to start inquiry afresh, which was granted by this Tribunal, hence, the effect of inaction on the part of the respondents, will be that the ineligibility of the petitioner for promotion and other service benefits, does not exist against him now. Hence, court finds that he is entitled to all the service benefits, accrued to him on account of the employment, which were denied, in view of the punishment order dated 28.08.2014, later on set aside by the court on 08.09.2016..

18. According to the petitioner, vide order dated 15.12.2017 (Annexure: 1), the service benefit of ACP and pay for suspension period was granted but withheld increment and all other benefits of service on account of his employment, were allowed from the date of the order of the Court i.e. 08.09.2016. Now, in this manner, the petitioner has been

deprived from the service benefits for the period from April 2013 to September, 2016.

19. It has been argued that the respondents cannot deprive the petitioner from the service benefits for this period. We agree with the argument of the petitioner to this extent, because, when the punishment order dated 28.08.2014 has been set aside, even on technical grounds and respondents have not exercised the liberty granted to them about their right to conduct an inquiry afresh, in such circumstances, the petitioner cannot be denied the due benefits of service for the interim period.

20. Before the court, learned A.P.O. has contended that grant of Bonus by the government is not such a benefit which necessarily accrued to the petitioner as a matter of right, on account of his employment. We agree with this argument because of the reason that right to Bonus is not a benefit of service, which accrued to an employee, simply because of being in the employment. It cannot be said that it is a benefit of service as a matter of right. It is usually granted by the government through a specific government order for a particular period, on some conditions and Government Order of a particular period, cannot be made applicable for other financial years, automatically. The grant of Bonus is like an ex-gratia payment, made as an incentive by the government, for a particular financial year, to its employees, who rendered unblemished and good services to the government, and simply because of his being in the government employment, every employee is not entitled for the same.

21. Admittedly, the petitioner, against whom disciplinary proceedings were undertaken and resulted into the punishment in those particular years, was not entitled for such Bonus for that year, on account of non-fulfillment of the conditions of the concerned G.O., granting the Bonus. In view of the fact that the petitioner was not

exonerated from the charges against him on merit, this court finds that he is not entitled for any arrears of such Bonus for past years. As this benefit of Bonus is not attached with the service conditions hence, court finds that the prayer of the petitioner for granting the arrears of Bonus for the year 2013 to 2016 cannot be accepted now and to this extent, the impugned order dated 15.12.2017 passed by the respondents, is correct and needs no interference.

22. As regards the other benefits, attached with the employment i.e. payment of withheld increments and also right to be considered for promotion, are the rights, which accrued to the petitioner, on account of his employment in the government. Hence, the impugned order, by which the petitioner was denied such benefits for the interim period, is not correct and needs to be set aside and corrected accordingly and the petitioner is entitled for the payment of withheld increments from the date, the same were withheld, as the order to withhold the increment was set aside by this Court vide order dated 08.09.2016 and such order will be made effective from the back date. Hence, the part of the impugned order dated 15.12.2017 for not allowing such benefit from July 2013 to September 2016 needs to be set aside and the petitioner is entitled for such monetary benefits from back date and to this extent, petition needs to be allowed.

23. The petitioner has also sought the relief of considering him for promotion to the post of APS. It has been contended by the petitioner that in the year 2014, respondent no. 3, who is more than 5 years junior to the petitioner, was promoted. Although such promotion was made temporarily and the petitioner was denied such promotion on account of disciplinary proceedings, which later on resulted into punishment, but when such punishment order was set aside by this court on 08.09.2016 and the ineligibility of the petitioner for considering him promotion, has been washed away with retrospective effect, hence, now, the petitioner is entitled to be considered for

promotion from the date, when his junior was considered. We agree to the same.

24. The petitioner also contended that respondent no. 3 was not eligible for promotion at the time when the promotion order was passed because she did not complete requisite 5 years of compulsory service as stenographer. Whereas, respondents replied to the fact that she was granted promotion from the date after she completed the 5 years of her service as stenographer. Respondents have also contended that it was not a regular promotion, and was made temporarily and regular promotion is yet to be made, as per the rules. Learned counsel for the petitioner has contended that since last more than four years, respondent no.3 is enjoying all the benefit of promotion and there is no provision in the Rules to make such promotion on temporary basis, without being recommended by a proper selection committee, constituted in consultation with the Public Service Commission.

25. The petitioner has also contended that promotion of the respondent no. 3 was not as per law and it needs to be set aside and the review DPC should be held in accordance with the law and the petitioner should be promoted. This court finds that even if she was promoted temporarily, but under the rules, promotion could be made only after consultation with the Public Service Commission, in accordance with law. For such promotion, permanent or temporary, constitution of promotion committee has been prescribed in the rules, according to which, the committee was not constituted. However, at the time of promotion of respondent no. 3, petitioner was not eligible for promotion on account of disciplinary proceedings, but once the order of the court was passed, setting aside the punishment order, and respondent did not start a fresh inquiry on this count, within the stipulated period for which liberty was granted, then it becomes necessary to consider the petitioner for promotion to the next stage in accordance with law, specially when respondent No. 3, junior to him, is

enjoying the benefit of promotion and also drawing the salary, higher to him. The Fundamental rules also require that a senior employee should be considered and granted promotion, if eligible, from the date, his junior was allowed.

26. The respondents have argued that the promotion of the respondent No. 3 is temporary and it was made with a condition that regular promotion will be made, later on, in accordance with law. We find that since, passing of two years of the judgment of this Tribunal, respondent has not considered the petitioner's case for promotion and they are sleeping over the matter since last three years and temporary promotion of a person for a long period of 4-5 years, without following the provisions of law and without considering the case of others who stands above in the seniority, is not desirable in law. A temporary promotion cannot continue for a such long period, especially when the senior employee, like petitioner became eligible for promotion in the year 2016, after claim petition of the petitioner was allowed on 08.09.2016

27. Hence, this court do agree with the argument of the petitioner that respondents 1 and 2, instead of allowing the respondent no. 3 to continue temporarily on promotional post, should be directed to hold a review DPC and to consider the case of the petitioner, alongwith respondent No. 3, for promotion to the post of Additional Private Secretary, in accordance with law, within a reasonable period.

28. Learned counsel for the respondents has argued that there is no such post vacant for which the petitioner can be considered. This court does not agree with this argument because of the fact that the post which is occupied by the respondent No. 3, will still be deemed to be vacant for considering the employees for regular promotion, and the petitioner as well as respondent no. 3 and all other persons coming under the zone of consideration, should be considered for promotion,

by holding a DPC, in accordance with law. Hence, instead of allowing respondent no. 3 to continue on the promotional post indefinitely, there is a need for such a direction to respondent Nos. 1 and 2 to hold a review DPC of DPC, wherein the candidature of the private respondent no. 3 was considered in the year 2014, and such respondents should be directed to hold a regular promotional exercise and to consider the petitioner as well as all other eligible candidates for the post of APS, as per the provisions of service rules and other concerned Rules.

29. The plea of bar by limitation and about plural relief, raised by the respondents, cannot be accepted because all the reliefs are consequential with the same cause of action.

30. Accordingly, the claim petition of the petitioner deserves to be partly allowed and the following order is hereby passed.

ORDER

The claim petition is partly allowed. The prayer of the petitioner for granting the benefit of Bonus to him for the period July 2013 to September 2016 is not allowed and is rejected. Modifying the impugned order dated 15.12.2017, the respondent Nos. 1 and 2 are directed to grant other service benefits, pertaining to the post and to allow and release the withheld increments of the petitioner from back date i.e. 28.08.2014 onwards.

Respondent No. 2 is also directed to consider the candidature of the petitioner for promotion to the post of Additional Private Secretary (APS), by holding a review DPC of DPC, by which the respondent No. 3 was considered and recommended for promotion, as per rules, instead of allowing temporary promotion of respondent No. 3 for indefinite period. Respondent No. 2 is also directed to complete the regular promotional exercise, as per the provisions of the concerned Service Rules, within a period of three months from

the date of this order of the court, and the temporary promotion order dated 22.12.2014 of respondent No. 3, will become ineffective automatically after such period of three months from today with all its future consequences.

No order as to costs.

Sd/-

(A.S.NAYAL)
MEMBER (A)

Sd/-

(RAM SINGH)
VICE CHAIRMAN (J)

DATE: APRIL 09, 2019

NAINITAL

KNP

