

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWPOA No.5378 of 2019

Reserved on: 29th April, 2021

Decided on: 5th May, 2021

Bishan Singh Chandel

Versus

Himachal Pradesh University and another

.....**Petitioner**

.....**Respondents**

Coram

Ms. Jyotsna Rewal Dua, Judge

Whether approved for reporting?¹ Yes.

For the Petitioner: Mr. Sanjeev Bhushan, Senior Advocate
with Mr. C.D. Negi, Advocate.

For the Respondents: Mr. Surender Verma, Advocate.
(Through Video Conference)

Jyotsna Rewal Dua, Judge

The petitioner claims his promotion to the post of Planning & Development Officer alongwith the pay scale attached to it from a retrospective date. This claim stands on two planks. *Firstly*, that the respondent-University in an arbitrary and discriminatory manner, did not exercise the discretionary power to relax the applicable rules in favour of the petitioner for his promotion to the post of Planning &

¹ Whether reporters of print and electronic media may be allowed to see the order?

Development Officer, while at the same time, in exercise of this very power, similarly situated employees were promoted by the respondent to the post of Deputy Registrar etc. and *secondly*, notwithstanding above, the respondents had given additional charge of the post of Planning & Development Officer to the petitioner w.e.f 12.11.2014. The petitioner superannuated on 31.03.2015 while discharging the duties of Planning & Development Officer, therefore, the pay scale attached to this post is required to be released in his favour.

2. Facts:-

2(i). On 29.11.2011, the Executive Council of the respondent-University had before it an Agenda No.17 regarding providing relaxation in the Recruitment & Promotion Rules (in short 'R&P Rules') while effecting promotions to the vacant posts of Deputy Registrar and Special Secretary. The Executive Council resolved and authorized the Vice-Chancellor of the respondent-University to take appropriate decision on matters pertaining to relaxation of R&P Rules in favour of the incumbents keeping in view their seniority as well as justification for relaxation in their favour.

2(ii). The petitioner had joined the respondent-University in the year 1974. He was promoted as Deputy Registrar on ad hoc basis vide office order dated 21.01.2014 by granting him relaxation of one and a half months' service period as Assistant Registrar. His ad-hoc promotion was regularized w.e.f. 10.03.2014 vide office order dated 21.10.2014. The petitioner was senior-most serving Deputy Registrar at that time.

2(iii). In terms of the Himachal Pradesh University Ministerial and Administrative Service (Recruitment, Promotion and Certain Conditions of Service) Rules framed by the Executive Council of the respondent-University as notified on 06.01.1973, further promotion from the post of Deputy Registrar could either be to the post of Additional Controller of Examinations or to the post of Planning & Development Officer. The post of Additional Controller of Examinations and Planning & Development Officer are to be filled up 100% by promotion from the feeder channel of Deputy Registrars. The relevant rules providing the required length of service as Deputy Registrar for promotion to these two avenues read as under:-

"14.18: Additional Controller of Examinations:

i) Minimum length of approved service.	Three years as Deputy Registrar. OR Two years as Deputy Registrar and with at least two years as Assistant Registrar. Desirable: Experience of having worked in Examination Branches of the University.
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14.19: Planning & Development Officer:

i) Minimum length of approved service.	Three years as Deputy Registrar. OR Two years as Deputy Registrar and with at least two years as Assistant Registrar."
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2(iv). One post of Planning & Development Officer became available in the respondent-University on 31.07.2014. Petitioner was serving as senior-most Deputy Registrar at the time. His case for promotion to this post was processed by granting him relaxation in the requisite length of service. Though the Vice-Chancellor of the respondent-University on 12.11.2014 did not exercise the power to grant relaxation in favour of the petitioner for facilitating his promotion to the post of Planning & Development Officer, however, noticing that work against the post of Planning & Development Officer was of urgent nature and somebody needed to be posted there, ordered to give additional charge of the post to the petitioner without any financial benefits.

2(v). Aggrieved against (i) respondent's refusal to relax the condition of length of service required for

petitioner's promotion to the post of Planning & Development Officer and (ii) also aggrieved against non-grant of the pay scale (financial benefits) attached to the post of Planning & Development Officer, i.e. the work, which the petitioner was discharging w.e.f. 12.11.2014 till his superannuation on 31.03.2015, the petitioner has preferred the instant petition for the following substantive reliefs:-

- I) That the respondents may kindly be directed to promote the applicant as Planning and Development Officer either w.e.f. 1st September, 2014 or in the alternative w.e.f. 12.11.2014 from which date the applicant has been performing the work of Planning and Development Officer with all consequential benefits of pay arrears etc.*
- II) That the respondents may kindly be directed to pay the arrears to the applicant with interest @ 9% per annum in the interest of law and justice."*

3.

Contentions:-

Heard learned counsel for the parties and gone through the record.

3(i). Learned Senior Counsel for the petitioner submitted that in the circumstances similar to that of petitioner, the respondent-University had relaxed the length of service required under the R&P Rules for promotion to the post of Deputy Registrar. S/Sh. Waryam Singh Bains and Nitya Nand Sharma were promoted as Assistant Registrars w.e.f. 01.02.2014 and 10.03.2014, respectively,

vide office order dated 21.10.2014. Their names figured at Sr. Nos.3 and 4 in order of seniority. One Sh. Mohinder Kumar Gupta was promoted as Assistant Registrar vide same order of 21.10.2014 w.e.f. 27.01.2014. He was senior to Sh. Waryam Singh Bains and Nitya Nand Sharma and was accordingly reflected above them at Sr. No.2. Under the Rules, an Assistant Registrar with two years of service as such is eligible for further promotion to the post of Deputy Registrar. Ignoring the claim of senior incumbent Sh. Mohinder Kumar Gupta, the respondent-University on 12.11.2014 promoted S/Sh. Waryam Singh Bains and Nitya Nand Sharma as Deputy Registrars by granting them relaxation of one year and three months' in the service required as Assistant Registrar. Learned Senior Counsel argued that the case of the petitioner was at much better footing as compared to S/Sh. Waryam Singh Bains and Nitya Nand Sharma for grant of relaxation as petitioner was the senior-most Deputy Registrar serving with the respondent-University when the post of Planning & Development Officer became available. No one would have been superseded had he been promoted to the said post by way of relaxation of R&P Rules. Whereas, S/Sh. Waryam

Singh Bains and Nitya Nand Sharma were promoted to the post of Deputy Registrar in relaxation of length of service required under the R&P Rules, superseding their senior Sh.

Mohinder Kumar Gupta. Length of service required to be relaxed in case of the petitioner's promotion was almost the same as relaxed in case of S/Sh. Waryam Singh Bains and Nitya Nand Sharma. Therefore, learned Senior Counsel contended that the respondent-University has discriminated against the petitioner in refusing to relax the length of service required under the R&P Rules for his promotion to the post of Planning & Development Officer.

Petitioner, therefore, is required to be promoted as Planning & Development Officer w.e.f. 01.09.2014.

It is also contended by learned Senior Counsel for the petitioner that in any case the respondent had taken the work of Planning & Development Officer from the petitioner w.e.f. 12.11.2014. The petitioner superannuated on 31.03.2015 while discharging the duties of the said post.

The action of the respondents in not giving the financial benefits attached with the post of Planning & Development Officer while extracting this work from him was absolutely illegal. Therefore, learned Senior Counsel prayed that the

petitioner deserves to be granted the monetary benefits attached to the post of Planning & Development Officer w.e.f. 12.11.2014.

3(ii). Learned Standing Counsel for the respondent-University produced the relevant record during hearing of the case. While admitting the main factual aspects of the matter, learned counsel submitted that an amendment had been carried out in the Himachal Pradesh University Act, 1970 w.e.f. 16.03.2015, whereby following Sub-Section (1) was substituted for Section 28(1) of the Principal Act:-

"(a) for sub-section(1), the following sub-section shall be substituted, namely:-

"(1) There shall be a Finance Committee and its constitution, the term of office of its members other than ex-officio members shall be as laid down in the Statutes. All financial matters and service matters relating to service conditions of the employees of the University including creation, up-gradation or filling of the posts, framing of Recruitment and Promotion Rules, revision of pay and allowances shall first be placed before the Finance Committee, and thereafter such matters shall be placed before the Executive Council with its recommendations."

Learned counsel for the respondent-University submitted that in accordance with the above amendment carried out in the Himachal Pradesh University Act, 1970, the matters regarding service of employees of the respondent-University are now required to be considered first by the Finance Committee and thereafter the matters are to be placed before the Executive Council with its

recommendations. After coming into force of the amendment on 16.03.2015, the respondent-University has not relaxed the conditions prescribed in the applicable rules for promotion of its employees. It is for this reason that the case of ad-hoc promotion of the petitioner to the post of Planning & Development Officer could not be favourably considered even during the month in which he was to retire, i.e. March, 2015.

4. Observations:-

4(i). Claim of retrospective promotion:-

Petitioner, in essence, claims that respondent-University be directed to exercise discretionary power of relaxation of the Recruitment & Promotion Rules in his favour for his retrospective promotion to the post of Planning & Development Officer. This claim is based upon analogy of relaxation power exercised by the respondent-University while promoting some other incumbents.

4(i)(a). The Executive Council on 29.11.2011 had authorized the Vice-Chancellor to decide all those cases, which required relaxation in the R&P Rules keeping in view the seniority and justification for such relaxation.

4(i)(b). The record shows that the cases of the petitioner, Sh. Waryam Singh Bains and Sh. Nitya Nand Sharma for granting them relaxation in the length of service required under the rules for their promotion to the next higher post, were considered by the Vice-Chancellor of the respondent-University simultaneously on 12.11.2014. Following was observed while refusing to exercise the power of relaxation in favour of the petitioner and for exercising this power in favour of other two employees:-

1. *There is no justification to promote Sh. Bishan Singh Chandel, Deputy Registrar (Estate) to the post of Planning & Development Officer. However, keeping in view the requirement of work, he is given the additional charge of the said post without any financial benefits till further orders.*
2. *Sh. Waryam Singh Bains and Sh. Nitya Nand Sharma would be superannuating this month, therefore, there is justification to give them relaxation in the service period and they may be promoted to the post of Deputy Registrar during their service tenure by giving them relaxation.”*

Respondent did not find any justification to relax the length of service required under the Rules in favour of the petitioner for his promotion to the post of Planning & Development Officer. However, only on the ground that S/Sh. Waryam Singh Bains and Nitya Nand Sharma, serving as Assistant Registrars, were due for superannuation in the ongoing month, they were promoted to the next higher post of Deputy Registrar in relaxation of

length of service required under the R&P Rules. While exercising power of relaxation in favour of these two incumbents for purposes of their promotion to the post of Deputy Registrar, the respondent-University also overlooked the claim of their senior-Sh. Mohinder Kumar Gupta. During hearing of the case, learned Standing Counsel for the respondent-University informed that subsequent to the promotions of his juniors, Sh. Mohinder Kumar Gupta approached the erstwhile learned H.P. Administrative Tribunal by way of Original Application No.477 of 2015, which was decided on 27.04.2015. On the directions issued by the learned Tribunal, the respondent-University on 29.04.2015 promoted said Sh. Mohinder Kumar Gupta to the post of Deputy Registrar.

The reasoning advanced by the respondent-University for granting relaxation in required length of service to S/Sh. Waryam Singh Bains and Nitya Nand Sharma is at sharp variance to the one given, while refusing to exercise relaxation power in favour of the petitioner despite the fact that attending circumstances in all the three cases were almost similar. It is an admitted position that the petitioner was the senior-most Deputy Registrar.

He also needed relaxation in length of service of around a year and three months for promotion to the post of Planning & Development Officer. This period almost equals the period relaxed in favour of S/Sh. Waryam Singh Bains and Nitya Nand Sharma. Considering the necessity of work to be discharged against the promotional post of Planning & Development Officer, the respondent though gave additional charge of the said post to the petitioner, but refused to relax length of service required under the R&P Rules for his promotion to this post. Whereas, requisite length of service was relaxed in favour of S/Sh. Waryam Singh Bains and Nitya Nand Sharma in view of their impending retirement within next few days and that too by ignoring the claim of their senior. These facts leave no manner of doubt that the discretionary power to relax the rules had been indiscriminately exercised by the respondent-University.

4(i)(c). In ***Amrik Singh and others Versus Union of India and others, (1980) 3 SCC 393***, power to relax rules and regulations in certain cases conferred under Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960, was being considered. It was held “that Government must be satisfied, not subjectively but

objectively, that any rule or regulation affecting the conditions of service of a member of the All India Services causes undue hardship, then the iniquitous consequence thereof may be relieved against by relaxation of the concerned Rule or Regulation. There must be undue hardship and, further the relaxation must promote the dealing with the case "in a just and equitable manner". These are perfectly sensible guide-lines. What is more, there is implicit in the Rule, the compliance with natural justice so that nobody may be adversely affected even by administrative action without a hearing."

In ***Syed Khalid Rizvi and others Versus Union of India and others, 1993 Supp (3) SCC 575,*** while considering All India Services (Conditions of Service-Residuary Matters) Rules, 1960, it was held that no employee has a right to promotion, but he has only the right to be considered for promotion as per Rules. Conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to rules. The former cannot be relaxed. Relevant paras are as under:-

"31. *No employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are*

defeasible..... Accordingly we hold that seniority, though, normally an incidence of service, Seniority Rules, Recruitment Rules and Promotion Regulations form part of the conditions of recruitment to the Indian Police Service by promotion, which should be strictly complied with before becoming eligible for consideration for promotion and are not relaxable.

33. *Rule 3 of the Residuary Rules provides the power to relax rules and regulations in certain cases – where the Central Government is satisfied that the operation of – (i) any rule made or deemed to have been made under the Act, or (ii) any regulation made under any such rule, regulating the conditions of service of persons appointed to an All India Service “causes undue hardship in any particular case”, it may, by order, dispense with or relax the requirements of that rule or regulation, as the case may be, to such an extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a “just and equitable manner”. Rule 3 empowers the Central Government to relieve undue hardship caused due to unforeseen or unmerited circumstances. The Central Government must be satisfied that the operation of the rule or regulation brought about undue hardship to an officer. The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, that too in an individual case. The Central Government on its satisfaction of those conditions, have been empowered to relieve such undue hardship by exercising the power to relax the condition. It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. The latter too must be in writing that too with the consultation of UPSC.....”*

Hon'ble Apex Court in **Suraj Parkash Gupta**

and others Versus State of J&K and others, (2000) 7

SCC 561, after taking note of various pronouncements on the subject, observed that relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Relevant para in this regard reads as under:-

"32. On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission dated 25-11-1997, shows that the Commission was prepared to give its opinion in regard to regularisation of each promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. In our view, there can be no hardship for a person seeking appointment or promotion to go by the procedure prescribed therefor. The relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Narender Chadha case must be treated as an exception and not as a rule. In fact, if such relaxation is permitted in favour of the promotees then the same yardstick may have to be applied for direct recruits. In fact the J&K Government has already started to do so and this has not been accepted by this Court in Narinder Mohan case and Dr. Surinder Singh Jamwal case referred to above. If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in case it is required to be consulted there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancies of the Government). Such a blanket power of relaxation of Recruitment Rules cannot be implied in favour of the Government."

In the facts of instant case, relaxation in requisite length of service period was granted by the respondent-University in favour of some employees for the purpose of their next promotion only on the ground of their impending retirement even ignoring the claim of their senior, while exercise of same power was refused in favour of others, who also needed relaxation in required length of service by the same period and exercise of such power in their favour would not have resulted in any supersession. It is well settled that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. The discretionary power to relax should be

exercised sparingly to meet exceptional situation warranting such exercise. From the facts, it appears that the respondent-University did not exercise the discretionary power of relaxation either in a judicious or in an equitable manner. The principle that relaxation should only be an exception and not the rule, was not kept in mind by the respondents while exercising this power. Apparently, the principle that adherence to Recruitment & Promotion Rules should not ordinarily be considered as hardship for a person seeking appointment or promotion thereunder, was also not followed strictly. Be that as it may. The cases of grant of relaxation by the respondent-University being relied by the petitioner for claiming similar treatment are neither before this Court nor the same can be gone into at this stage. However, on the analogy of exercise of this discretionary power of relaxation in favour of some incumbents, the respondent-University cannot be directed to exercise same discretion in favour of the petitioner.

Exercise of discretionary power of relaxation in one's favour cannot be claimed as a matter of right. It remains a fact that subsequent to the amendment carried out in the Himachal Pradesh University Act, 1970 on 16.03.2015,

power of relaxation has not been used by the respondent. It is not for the Court to use the power and effect relaxation. Therefore, the claim of the petitioner for retrospective promotion to the post of Planning & Development Officer by way of relaxation of requisite length of service under the R&P Rules is held to be not tenable. By way of abundant caution, it is clarified that observations made heretofore with respect to mode and manner of exercise of discretionary power of relaxation are only for the purpose of adjudication of petitioner's claim and shall have no effect upon the concluded cases.

4(ii). Claim of pay scale attached to the higher post:-

4(ii)(a). While refusing to exercise in petitioner's favour, the discretionary power to relax the period of service required for promotion to the post of Planning & Development Officer, the respondent-University had given him additional charge of the same post keeping in view the work requirement. The decision in this regard as contained in Note No.261 dated 12.11.2014 reads as under:-

"1. There is no justification to promote Sh. Bishan Singh Chandel, Deputy Registrar (Estate) to the post of Planning & Development Officer. However, keeping in view the requirement of work, he is given the additional charge of the said post without any financial benefits till further orders."

This was followed by an order dated 12.11.2014, whereunder petitioner was to look after the work of Planning & Development Officer in addition to his own duties without any financial benefits till further orders:-

"Shri Bishan Singh Chandel, Deputy Registrar, Estate Office will look after the work of Planning & Development Officer with immediate effect in addition to his own duties without any financial benefits till further orders."

It is an admitted fact that the petitioner worked as Planning & Development Officer w.e.f. 12.11.2014 till his superannuation on 31.03.2015. In support of petitioner's claim of pay of this post, reliance has been placed upon a decision rendered in CWP(T) No.7099 of 2008.

4(ii)(b). In **CWP(T) No. 7099 of 2008**, titled ***Shiv Dayal Kataria Versus Himachal Pradesh University***, a Co-ordinate Bench of this Court while taking note of the fact that the petitioner therein had worked as Superintending Engineer in the respondent-University, held him entitled for financial benefits attached to the post.

Paras 8 and 9 of the judgment read as under:-

“8. Now, the Court has to advert to the second limb of argument of Mr. Dilip Sharma. According to him, his client was permitted to discharge the duties of Superintending Engineer. This order was passed by the Registrar of the respondent-University on 03.03.1994, whereby the petitioner was invested with the powers of Superintending Engineer and was to function as overall Incharge of the three engineering wings (Construction, Design & Architectural) of the respondent-University. He made representation seeking benefit of the services, he had

rendered as Superintending Engineer on 09.09.1997. The Vice-Chancellor on 11.09.1997 as per his endorsement stated as follows:

“Allowed if it is on record that Sh. S.D. Kataria has performed the duties of S.E. for more than 3 years.”

9. It is not denied by the respondents in the reply that the petitioner has not worked as Superintending Engineer. The objection raised by the respondent-University is that firstly it was made clear to the petitioner that he will not get any financial benefits as per office order dated 03.03.1994 and secondly, the Vice-Chancellor had no jurisdiction/authority under the Himachal Pradesh University Ordinances to pass orders on 11.09.1997. According to the respondent-University, the competent authority in the case of category-B is the Executive Council of the University and not the Vice-Chancellor. It is true that to take a decision with regard to appointment, suspension, removal from office, fixing of salary, control or any other kind of matter, as far as employees of categories ‘A’ and ‘B’ are concerned, the competent authority was the Executive Council. The petitioner was also informed on 03.03.1994 that he will not be entitled to any financial benefits. However, fact of the matter is that petitioner has worked for more than three years as Superintending Engineer and an endorsement was also made by the Vice Chancellor on 11.09.1997 in favour of the petitioner. An employee cannot be deprived of his right to get higher salary if he discharges the duties of higher office. In this case, the petitioner was permitted to work as Superintending Engineer. Superintending Engineer is a higher post and the post of Executive Engineer is in feeder category. **A person, who performs the duties of higher office, must get the salary of the same post. He cannot waive of his fundamental/legal right to get the higher salary, even if an endorsement was made in the office order that the petitioner will not get the monetary benefits. Petitioner is also entitled to get the salary of the post of Superintending Engineer on the well recognized principle of “equal pay for equal work”.** The Executive Council no doubt is the competent authority to take decisions with regard to ‘A’ and ‘B’ categories of employees, governing their conditions of service, but once the endorsement has been made by the Vice-Chancellor, the matter was required to be taken before the Executive Council. The respondent-University in its own wisdom has not taken up the matter with the Executive Council. **The petitioner was permitted to discharge the duties of the post of Superintending Engineer. The Court has also taken note of the fact that even though the post of Superintending Engineer was not available, however, the petitioner was still invested with the powers as were exercised by the Superintending Engineer of H.P.P.W.D. In view of this,**

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the petitioner cannot be denied the salary of the post of Superintending Engineer for working more than three years as Superintending Engineer.”

LPA No.100 of 2010, preferred by the respondent-University against the above judgment, was dismissed vide judgment dated 27.10.2015. Learned Standing Counsel for the respondent has not disputed the fact that the above judgment has since attained finality and stands implemented. The ratio of the above judgment applies to the facts of the instant case as well. Here also the petitioner had admittedly discharged the duties of the higher post of Planning & Development Officer w.e.f. 12.11.2014 till his superannuation on 31.03.2015. This was pursuant to an order passed by the respondent in terms of the decision taken by the Competent Authority.

The post of Planning & Development Officer lying vacant w.e.f. 21.07.2014, was a higher post in line of promotion from the post of Deputy Registrar substantively held by the petitioner. Therefore, following the dictum of Shiv Dayal Kataria’s case, *supra*, in the facts and attending circumstances of the case, petitioner deserves to be granted the pay scale attached to the said post.

No other point was urged by either of the parties.

In view of above discussion, petitioner's claim for retrospective promotion to the post of Planning & Development Officer w.e.f. 01.09.2014 is held to be not tenable. However, respondent-University is directed to release the pay and allowances alongwith consequential benefits to the petitioner for discharging the duties of Planning & Development Officer w.e.f. 12.11.2014 to 31.03.2015, within a period of six weeks from today.

The writ petition is disposed of in the above terms. Pending miscellaneous application(s), if any, also stand disposed of.

Jyotsna Rewal Dua
Judge

May 05, 2021

Mukesh

High Court of
Uttaranchal