

High Court Of himachal pradesh

C.W.P. No. 2183 of 2021

Judgment Date:

13-05-2021

Dinesh Gulati

..Petitioner

State Of H P And Others

..Respondent

Bench:

{Hon'ble Mr. Justice Vivek Singh Thakur }

Citation:

2021 (3) ShimLC 1238 ; LQ/HimHC/2021/170 ;

Vivek Singh Thakur, J. - Petitioner has approached this Court for quashing two even dated impugned orders dated 26.3.2021 (Annexures P-2 and P-3), whereby vide order Annexure P-2 petitioner, posted in District Institute of Education and Training (DIET) Nahan, District Sirmour, H.P., has been repatriated to his parent department i.e. Higher Education and has been ordered to be posed at GSSS Dhamwari, District Shimla, H.P. against vacancy as Lecturer/Lecturer School New (Mathematics) and vide separate even dated order (Annexure P-3) respondent No. 4, serving as Lecturer/Lecturer School New (Mathematics) in Higher Education Department and posted at GSSS Ludhiana, District Sirmour, has been transferred/posted in DIET Nahan, District Sirmour H.P. against resultant vacancy.

2. Petitioner has laid challenge to his repatriation and transfer order on the ground that he has been transferred on the basis of D.O. letter, but not for administrative exigency, despite the fact that since last 18 years he has been performing his duties to the best of his abilities in DIET Nahan and his repatriation and posting as well as transfer/adjustment of respondent No. 4, is in violation of norms notified by Education Department vide notification dated 10.10.2013 (Annexure P-4) issued as per National Council for Teacher Education (NCTE) guidelines.

3. Case advanced on behalf of the petitioner is that he had made complaints against Principal pointing out financial irregularities, whereupon Principal, being inimical to the petitioner, had started making complaints against petitioner and in the meanwhile respondent No. 4 approached Hon'ble Education Minister and in sequel thereto petitioner has been repatriated and transferred and respondent No. 4 has been accommodated despite the fact that there was ban on transfers, wherein transfers could not have been ordered, except on medical grounds or administrative exigency.

4. It is further case of the petitioner that in addition to his academic qualification to be appointed as a Lecturer Mathematics, petitioner has also done Master in Education (M.Ed.), which is essential qualification for appointment as a Lecturer in Education in DIET, which is evident from qualification prescribed against the category of



Lecturer in Education reflected in chart Annexure P-5 placed on record with the petition. It is case of the petitioner that petitioner was posted in DIET Nahan in the year 2002 and, now, after issuance of notification dated 10.10.2013, fresh induction, at any point of time, thereafter, shall be by centralized Selection Process at the level of Director Higher Education as provided in clause 5(ii) of this Notification, but in present case such procedure has not been followed and, therefore, impugned orders are not sustainable in the eye of law.

5. For submission on behalf of petitioner, respondents-Department was directed to file reply and also to produce the record. Respondent department has not chosen to file reply but has produced record. Learned Additional Advocate General at the time of production of record has stated that impugned orders have not been issued on the basis of D.O. letter, but Annexure P-2 has been issued for complaints against the petitioner and Annexure P-3 has also been issued on request of respondent No. 4 made to the competent authority, whereupon, in addition to other contentions raised on behalf of petitioner, learned counsel for the petitioner has also submitted that issuance of impugned orders on the basis of complaints against the petitioner is an act of malice in law, as a transfer on the basis of complaints, in lieu of punishment but without inquiry is not permissible and before transferring an employee on the basis of complaints, an employer is under obligation to hold an inquiry, may be preliminary. To substantiate his submissions, learned counsel for the petitioner has relied upon Somesh Tiwari Vs. Union of India & Others, 2009 2 SCC 592 and also judgments passed by the Division Benches of this High Court in CWP No. 8590 of 2014, titled Raj Kumar Vs. State of H.P. & others and CWP No. 2587 of 2019, titled Sh.Joginder Rao Vs. State of Himachal Pradesh and another.

6. In response, under instructions, learned Additional Advocate General has submitted that though notification dated 10.10.2013 has been issued by the Government of Himachal Pradesh, however, the same has not been implemented till date and procedure and process prescribed therein for induction of employees in DIETs is not in practice, rather employees are being deputed/transferred to and repatriated/transferred from DIET by way of transfer, but with consultation of State Project Director Samagra Shiksha Himachal Pradesh (respondent No. 3) and prior approval of competent authority, and the same procedure has been followed in present case also and, therefore, petitioner has not been singled out by following a different procedure for his repatriation/posting, rather the same procedure has been adopted for passing the impugned orders, which is in practice and is being followed in case of each and every similarly situated employee to be posted in and/or repatriated from DIETs and, therefore, process and procedure adopted for passing impugned orders is justified. It is further submitted by learned Additional Advocate General that after due verification of facts, keeping in view the continuous conduct of indiscipline of the petitioner, he has been repatriated and transferred on recommendation of respondent No. 3 State Project Director for smooth functioning of DIET and for maintaining peaceful and harmonious atmosphere in the Institution and the transfer of petitioner is not in lieu of punishment, as a separate Departmental inquiry to inquire the complaints against petitioner has been ordered by the Competent Authority.

7. Learned Counsel for respondent No. 4 endorsing the submissions made by learned Additional Advocate General, has further stated that in a recent case, Division Bench of this High Court in CWP No. 1997 of 2020, title Jagdish Chand Vs. State of H.P. and others, has upheld the transfer of petitioner therein from DIET to the office of Deputy Director (Elementary Education), which was ordered by following the same procedure, as has been adopted in present case and further that another Division Bench of this High Court in CWP No. 2871 of 2020, titled Sarita Sharma Vs. State of H.P. & others, has upheld transfer and posting of teacher/Lecturer in and from DIET, wherein the same procedure was followed, as has been followed in present case.

8. On perusal of record related to transfer/repatriation of petitioner and photocopies of other documents produced by the respondents, it has surfaced that petitioner was posted in DIET, Nahan on 7th November, 2002 and since then he was serving in the same Institution. On 3.12.2016, explanation was called from him by the then Principal for not submitting the question papers of his subject for house examination of D.El.Ed students till November, 2016, whereas session had started in April, 2016. In the year 2018, vide show cause notice dated 29.3.2020, explanation was called from the petitioner for proceeding on casual leave to monitor Primary Teacher Training without permission and also for leaving the Institution without any information and prior approval of the competent authority on 5.10.2018 and 6.10.2018. On conclusion of this enquiry, penalty of 'Censure' was imposed upon him by Director Higher Education which was maintained by Appellate Authority also as appeal preferred by petitioner was dismissed on 26.9.2020, by Secretary (Education), to the Government of Himachal Pradesh. In the

year 2018 itself, petitioner had faced another complaint before Sexual Harassment Committee which was withdrawn by the complainant on 23.10.2018 for undertaking given by the petitioner that he will not use such language in future.

9. It is further apparent from the record that petitioner was also having charge of Hostel Warden and vide orders dated 15.12.2018 and 2.1.2019, he was directed by the Principal to handover the complete charge of Hostel Warden to Deputy Hostel Warden, but petitioner had ignored the said orders of the Principal and the said information was submitted by the Principal to the State Project Director vide communication dated 4.1.2019. The matter does not end here, as petitioner did not vacate the accommodation occupied by him as Hostel Warden, the Principal was constrained to lodge a report with the Police and during that inquiry as evident from communication dated 16.2.2019 sent by SHO Police Station Nahan to Principal DIET petitioner had undertaken to vacate the accommodation occupied by him in the hostel immediately after handing over the charge of Hostel Warden, but the charge of Hostel Warden was not handed over by the petitioner, which lead to issuance of another letter dated 23.11.2020 by Principal to give complete charge of Hostel Warden including all registers and relevant records related to hostel, but again instead of handing over the charge, petitioner had submitted a reply on 1.12.2020 by raising some irrelevant objections with respect to matter related to Institution, whereupon Principal again vide letter dated 7.12.2020 had asked the petitioner to handover the complete charge of Hostel on or before 20.12.2020. It appears that till February, 2021, petitioner had not vacated the premises occupied by him which lead to issuance of office order dated 6.2.2021 by Principal DIET, Nahan, thereby constituting 11 members committee to take possession of rooms by preparing inventory of the articles lying in the rooms and to lock all the rooms of Hostel occupied by petitioner and thereafter handover the keys in the office of Principal for further allotment of those rooms to students.

10. It is also noticeable that petitioner had been staying in accommodation of Hostel despite direction/order of the Principal to handover the charge of the Hostel. Petitioner neither handed over the charge nor vacated the Hostel accommodation and despite continuing to enjoy Hostel accommodation, petitioner was neither paying rent nor electricity and water charges payable for retaining such accommodation since last about 4 years.

11. Vide communication dated 27.3.2021, Deputy Director Elementary Education Nahan, after receiving an information from Principal on this count vide communication dated 8.2.2021, had reported to Director Elementary Education about the continuous disobedience of orders/directions issued by the Principal as well as misconduct, misbehavior by the petitioner with Principal and higher authorities.

12. State Project Director vide communication dated 1.3.2021 had communicated to Director of Higher Education that his office had received various complaints and counter complaints with regard to affairs of DIET, Nahan, District Sirmour and prima facie it was found that petitioner was creating indiscipline in the said DIET and, therefore, in order to maintain sanctity and discipline of education Institution, it was considered necessary to repatriate the petitioner. It was also informed through this communication that proposal regarding repatriation of the petitioner, sent to the Government, had been approved and, therefore, it was requested to repatriate the petitioner from the DIET in the public interest.

13. It is submitted by learned Additional Advocate General that as available on record that in December, 2020 a complaint pointing out the conduct of the petitioner, was also submitted by guardians of students undergoing training in DIET, to the Education Minister, which was marked on 29.12.2020 to the Director Higher Education for putting up with factual position. Thereafter, the concerned Branch had placed entire facts and circumstances before the Director, Higher Education on 6.2.2021, whereupon Director Higher Education on 8.2.2021, had proposed appropriate action to be taken against the petitioner and also to transfer him and then to conduct an inquiry through Deputy Director Higher Education, whereupon Joint Director (Education) on 16.2.2021 had referred the matter to Branch Officer of Transfer Branch of Directorate of Higher Education. In the meanwhile recommendation dated 1.3.2021, of State Project Director (respondent No. 3) was also received in the office of Director Higher Education on 3.3.2021, which was dealt by the concerned Branch, i.e. Inquiry and Transfer Cell, on 4.3.2021. Respondent No. 3, after taking into consideration material before him, prima facie, it had found that petitioner was creating indiscipline in the DIET and thus in order to maintain sanctity of and discipline in the Institution, had proposed to repatriate the petitioner. In the recommendation it was also conveyed that proposal of repatriation of petitioner, sent to Government had also been approved.

14. In the aforesaid facts and circumstances a note was prepared by the Dealing Assistant on 15.3.2021, which was placed before various authorities and finally on 25.3.2021, was approved by the competent authority as proposed after discussion with Hon'ble the Chief Minister and resultantly impugned orders were issued on 26.3.2021.

15. It is evident from the aforesaid facts and circumstances that transfer of petitioner has not been ordered on the basis of D.O. note or to punish him or to accommodate respondent No. 4, but on proposal of concerned authority in the interest of Institution. It is pertinent to note that the instances of indiscipline reported by Principal DIET against the petitioner are not the incidents occurred during the tenure of one Principal only, but different Principals. Otherwise also, the Principal against whom allegations of enmity have been leveled on behalf of petitioner is neither party nor any such averments have been made in the petition to that effect.

16. It is not a case where transfer order has been issued on the basis of complaint but without verification of facts and without application of mind. It has come on record that concerned authorities have applied their mind to the facts at various levels and thereafter on verification of facts; petitioner has been repatriated and transferred in administrative exigency to maintain discipline in the Institution. For transferring an employee, on receiving a complaint, it is not necessary that inquiry to be conducted by the Employer/Authority must be a regular departmental inquiry. However, some sort of inquiry, fact verification or preliminary inquiry must be there, before taking an administrative decision of transfer in such eventuality. The Authority/Employer cannot be made to wait till finalization of Departmental Regular Inquiry for transferring an employee for administrative reasons. Preliminary inquiry or verification of fact are mandatory exercise to be undertaken by the Employer/Authority before transfer of an employee in pursuance to the complaint so as to ensure that employee must not be transferred for bogus or baseless complaint. Transfer or repatriation of an employee is right of the Employer/Authority and transfer or repatriation, in itself is not a punishment but incidence of service. No employee has a vested right for his posting at a particular place or portfolio.

17. An employee is not only expected but is bound to follow any lawful command of his superiors and in case an employee is aggrieved by any order/direction of his superior, he has to opt a legal and proper course against such order/direction but never expected and be permitted to defy an order/direction of superior without such course.

18. In present case petitioner had been directed to handover the charge of Hostel Warden to the Deputy Warden and to vacate the accommodation years before but petitioner neither handed over the charge nor vacated the accommodation till February, 2021 and he also deserted from paying rent, electricity and water charge of the premises in his occupation. Competent Authorities have undertaken exercise for verification of facts with respect to conduct of the petitioner and after application of mind at various levels a prudent decision to repatriate and transfer the petitioner has been taken, which warrants no interference.

19. Another issue raised is related to transfer of respondent No. 4 to the DIET. Record pertaining to transfer of respondent No. 4 indicates that the said respondent had approached the Secretary (Education) to the Government of Himachal Pradesh for his transfer against the post of Lecturer Mathematics in DIET Nahan, which was marked to S.O. (Education Branch) and thereafter it was dealt with by the Dealing Hand and it was submitted by S.O. (Education-B) to the Deputy Secretary (Higher Education) who had placed it along with his comments to the Secretary (Education) with proposal to put up it before competent authority i.e. Hon'ble Education Minister for relaxation of ban and Secretary (Education) has placed it as such for consideration and approval and it was approved on 4.3.2021 and resultantly communication to that effect was sent from Secretary (Education) to the Director Higher Education vide communication dated 5.3.2021. Thereafter, in sequel thereto respondent No. 4 has been transferred/posted in DIET, Nahan vide order dated 26.3.2021. Thus transfer of respondent No. 4 is not on the basis of D.O./U.O Note.

20. In view of aforesaid circumstances, case law referred by the petitioner is not applicable in present case. However, certain observations of Division Bench of this High Court in Raj Kumar's case supra, the judgment relied upon by the petitioner, are relevant, which read as under:-

"5. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has

unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

6. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by malafides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

7. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

8. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The court is competent to ascertain whether the order of transfer is passed bonafide or as a measure of punishment."

21. The transfer in present case evidently has not been effected on the basis of U.O. or D.O Note or as a punishment for complaints received against the petitioner as an independent inquiry has been ordered by the Director (Higher Education) to inquiry into the complaints. As apparent from the records, referred supra, the transfer of the petitioner has been effected in an administrative exigency and in the larger interest of the public after due verification of facts. Otherwise also, petitioner was serving at one place for last 18 years and he has no vested right to continue as such. For the facts and circumstances, it cannot be inferred that power by competent authority has been exercised discriminately, malafide, unreasonably or irrationally, rather it appears to have been exercised in public interest in right manner.

22. Plea of learned Additional Advocate General, that notification dated 10.10.2013 has not been implemented yet, appears to be correct, particularly in view of cases considered by the Division Benches of this High Court in CWP Nos. 1797 of 2020 and 2871 of 2020. But such state of affair is deprecable. Either notification should be withdrawn or it should be given due effect. It is expected from the State to set its house in order at the earliest. However, this notification does not preclude respondent authority from repatriating and transferring the petitioner from DIET Nahan by issuing impugned transfer order. Thus any lapse related to this notification cannot be basis for retaining petitioner in the DIET.

23. By referring photocopy chart Annexure P-5, it has been alleged that respondent No. 4 is not eligible for his posting as Lecturer in DIET. In Annexure P-5, qualification prescribed has been mentioned against each post in DIETs. However, there is nothing therein to indicate that who has published this document and it also does not indicate that in case a person is not having the exact qualification prescribed therein, he shall not be eligible for

appointing as Lecturer in DIET. Leaving apart authenticity and source of Annexure P-5, even otherwise, in case respondent No. 4 is not having prescribed qualification for his posting as a Lecturer (Education) in DIET, then also it does not give any right to the petitioner to continue in DIET. For that respondents-Department is directed to look into the matter and take appropriate decision with respect to the eligibility of respondent No. 4 for his posting as a Lecturer (Education) in the DIET and in case he is not eligible to be posted, then repatriate him from the post of Lecturer (Education) immediately and to post a person eligible to be appointed against the said post. At this stage it is also apt to record that from the chart, it is also noticeable that in the DIET, Nahan there are two posts of Lecturer (Mathematics). Respondent No. 4 had requested to post him Lecturer (Mathematics) in the DIET, Nahan and in the impugned order also respondent No. 4 has not been posted against the post of Lecturer (Education), but he appears to have been transferred as a Lecturer/Lecturer School New (Mathematics) from GSSS Ludhiana, District Sirmour, to DIET and his posting is further subject to the condition of fulfilling the requisite qualification which definitely means that in case he is not fulfilling the requisite qualification for posting in DIET, he shall be liable to be repatriated. So far as eligibility for Lecturer (Mathematics) is concerned, it is only M.A./M.Sc. in Mathematics along with B.Ed. There is no condition of having qualification of M.Ed for posting as Lecturer (Mathematics) in the DIET. Be that as it may be, as directed supra, respondents No. 1 to 3 are directed to take appropriate action/decision with respect to posting/repatriation of respondent No. 4, considering his eligibility for posting to the post against which he has been ordered to be transferred/posted.

Accordingly, the Writ Petition is disposed of in aforesaid terms, so also pending application(s), if any.

Disclaimer: Legitquest has made all efforts to avoid any omission and/or mistake in publishing this document and adding editorial and other enhancements. Legitquest would not be liable in any manner whatsoever by reason of any omission or mistake in the published document or any action or advice rendered or accepted on the basis of the document or any editorial or other enhancements like idraf/infographics/Note/Notebook/Acts/Rules/Regulations/Bills/Notifications/Circulars/News/Interviews/Columns/Treaties/LawCommission Reports/Constituent Debates and/or any material or feature added by us. All disputes will be exclusively dealt with the Courts/Tribunals at Delhi only. It is advised to check the authenticity of all published document from the original source.