

GOVERNMENT OF HIMACHAL PRADESH
FINANCE (REGULATIONS) DEPARTMENT

No. Fin(C)B(15)-11/2022-Loose dated Shimla-2

शिक्षा निदेशालय उच्चतर शिक्षा

25th April, 2023

06 JUN 2023

OFFICE MEMORANDUM

Subject: Regarding CWP No. 7359 of 2021-titled as Amita Gupta Vs. State of Himachal Pradesh & Ors.

The undersigned is directed to forward herewith a copy of judgment dated 01.12.2022 passed by the Hon'ble High Court of Himachal Pradesh in CWP No. 7359 of 2021-titled as Amita Gupta Vs. State of Himachal Pradesh & Ors. It is advised that the said judgment may be kept in view and the relevant cases, as and when received, may be examined and settled accordingly.

2. These instructions may please be brought to the notice of the all concerned.

By Order

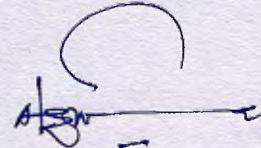
Directorate of Hr. Education
Himachal Pradesh

Akshay Sood
Secretary (Finance) to the
Government of Himachal Pradesh

Endst. No. EDN-HE (1)B(15)1/2008-Miscl. Dated Shimla-171001 June, 2023

Copy for information alongwith a copy of judgment CWP No.7359 of 2021-titled as Amita Gupta Vs. State of Himachal Pradesh is forwarded to:-

1. The Branch officers / Superintendents, Establishment branches of Directorate of Higher Education Himachal Pradesh, Shimla.
2. P.S. to the Director of Higher Education H.P.
3. All the Deputy Directors of Higher Education H.P.
4. The Branch officer/ T.O., IT/ Computer Cell, Directorate of Higher Education H.P. kindly uploaded the same on the departmental website.
5. Guard file.



(Dr. Amarjeet K. Sharma)
Director Higher Education
Himachal Pradesh.

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Akshay Sood
Secretary (Finance) to the
Government of Himachal Pradesh

To

All the Administrative Secretaries to the
Government of Himachal Pradesh.

Endst. No. Fin(C) B(15)-11/2022-Loose dated Shimla-2 25th April, 2023

Copy forwarded to:

1. The Ld. Addl. Advocate General, State of HP with the request to bring the same into the notice of Ld. Advocate General, State of HP w.r.t. the above mentioned judgment.
2. All the Heads of Departments in Himachal Pradesh.


25/04/2023
(Rajender Sharma)
Joint Secretary (Finance) to the
Government of Himachal Pradesh

**IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA**

C.W.P. No. 7359 of 2021

Reserved on : 22.11.2022

Date of decision : 01.12.2022

Amita Gupta ..Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

Coram : The Hon'ble Mr. Justice A.A. Sayed, Chief Justice**The Hon'ble Ms. Jyotsna Rewal Dua, Judge**Whether approved for reporting ? **Yes**

For the Petitioner : Mr. Shrawan Dogra, Senior Advocate,
with Mr. Pradeep K. Gupta and Mr.
Deepak Sharma, Advocates.

For the Respondents: Ms. Ritta Goswami, Additional
Advocate General.

Jyotsna Rewal Dua, Judge

Actual monetary benefits admittedly due to the petitioner towards revised leave encashment, on account of re-fixation of her pay in higher pay-scale from a retrospective date after her superannuation, are not being released by the respondents. Hence, the writ petition.

Whether reporters of Local Papers may be allowed to see the judgment ? Yes

2. Facts

2(i) On attaining age of superannuation, the petitioner retired from service on 30.09.2020 from the post of Senior Architect.

2(ii) The Finance Department issued a letter on 14.11.2014 to the effect that the Government had re-introduced the process of granting two tier pay scale in the revised pay structure by granting the corresponding revised pay structure to the category of Architects in the Public Works Department (in short PWD) as per the schedule appended to the Himachal Pradesh Civil Services (Revised Pay) Rules 2009 with immediate effect. Keeping in view the decision taken in the Finance Department letter dated 14.11.2014, a further decision was taken by the Finance Department on 21.09.2020 (Annexure P-1) to allow the two tier pay scale in respect of the Architects of P.W.D. on notional basis w.e.f. 27.08.2009 (without grant of arrears) and on actual basis w.e.f. 14.11.2014.

2(iii) In furtherance of the decision taken on 21.09.2020, the respondent PWD issued a notification on 15.12.2020 (Annexure P-2) releasing the two tier pay scale to the petitioner. She was found eligible for the pay scale of Rs. 37400-67000+8600 Grade Pay with initial start of Rs. 46,000/- after 14

years of service. Petitioner was held entitled to this pay scale on notional basis w.e.f. 01.01.2013 and on actual basis w.e.f. 14.11.2014. Consequent upon recommendations of the screening committee dated 15.12.2020, the petitioner's pay was refixed in the higher pay scale of Rs. 37400-67000+8600 Grade Pay after completion of 14 years regular service vide Annexure P-3 on 31.12.2020. Pay of the petitioner was fixed on notional basis for the period 01.01.2013 to 13.11.2014 and on actual basis from 14.11.2014 onwards.

2(iv) Pursuant to re-fixation of petitioner's pay, revised sanction was accorded in her favour for payment of leave encashment of 300 days of un-utilized earned leave. The order in this regard was passed by the respondent department on 10.02.2021 (Annexure P-4). The amount of leave encashment already paid to the petitioner at the time of her retirement was Rs. 13,93,520/-. The amount of revised leave encashment in light of re-fixation of her pay, post retirement was worked out at Rs. 14,78,530/-. The balance leave encashment amount due to the petitioner was thus Rs. 85,010/-. This amount, however, was not released to the petitioner by the State Treasury for the following reasons/objection(s) dated 20.01.2021 contained in Annexure P-5 :-

- (1) *The amount seems wrong in sanction order*
- (2) *Kindly follow instructions No. Fin(C)A(3)-1/2008, dated 13th August, 2013.*

2(v) Regarding payment of balance leave encashment to the petitioner, the matter was followed up by the Chief Architect, HP PWD (respondent No. 3). On 07.04.2021, he wrote to the Engineer-in-Chief HP PWD (respondent No. 2) justifying the payment of balance leave encashment amount to the petitioner in view of revision of her pay scale post her retirement. In his communication at Annexure P-7 dated 07.04.2021, he was of the view that pay of the petitioner was fixed on actual basis w.e.f. 14.11.2014 and she had been paid the arrears on that basis after her superannuation, hence balance leave encashment amount ought to be paid to her. Request was accordingly made to issue necessary clarification in the matter. Some correspondence was exchanged on the subject between the respondents. Finally on 22.09.2021 (Annexure P-11), respondent No. 2 turned down the case of the petitioner for balance payment of revised leave encashment with following observations :-

"To

*The Chief Architect,
HP. PWD, Nigam Vihar Shimla-2.*

Subject: Regarding payment of Leave Encashment.

Sir,

I am to refer to your office letter No. PW-Arch-Misc-2021-1250 dated 25.08.2021 on the subject cited above.

In this connection, it is intimated that the subject cited matter has been re-examined in this office and it has been found that as per clarification conveyed vide Special Secretary (Finance) to the Govt. of Himachal Pradesh, Notification No. Fin (C)A(3)-1/2008 dated 13.08.2013, the benefit of leave encashment is not a part of retirement benefit and the same is regulated under separate set of Rules i.e. CCS (Leave) Rules, 1972 as such instructions issued by the Finance (Pension) Department vide O.M. dated 12.03.2013 shall not be applied in such case. Moreover, in terms of rule 39(2)(b) of the CCS (Leave) Rules, 1972, the leave encashment shall be payable in one lump sum as one time settlement.

The applicant may be informed accordingly please.

Encl: As above

Yours faithfully,
Sd/-
(Er. Dara Singh Dehal),
Engineer-in-Chief,
Himachal Pradesh, PWD,
Shimla-2"

2(vi). The above decision of the respondents not to pay revised (balance) leave encashment amount has led the petitioner to institute the present writ petition for grant of following substantive reliefs :-

- "A. A writ or direction or order in the nature of mandamus and/or any other appropriate writ quashing Annexure P-11 ;
B. Directions or orders to respondents to pay Rs. 85,010/- with interest towards difference in leave encashment on account of pay drawn at Rs. 58,440/- on 30.09.2020."

3. Contentions:-

We have heard learned Senior Counsel for the petitioner as well as learned Additional Advocate General for the respondents.

The Chief Architect (respondent No.3) in his correspondence with the other respondents had vouched for the entitlement of petitioner to the difference in leave encashment amount on account of revision of her pay scale after retirement. However, in the common reply filed by all the respondents, the impugned action of denying the revised leave encashment to the petitioner has been defended. The respondents in their reply have justified denying the claim of the petitioner on the basis of a notification of Finance Department dated 13.08.2013 and the Central Civil Services (Leave) Rules, 1972. Whereas contention raised for the petitioner is that it is petitioner's right to have the leave encashment which is otherwise permissible to her in terms of re-fixation of her pay ordered after her retirement. It has further been submitted that the interpretation given by the respondents to the CCS (Leave) Rules for denying the revised leave encashment to the petitioner is incorrect. That the notification issued by the Finance Department on 13.08.2013 cannot deprive the petitioner of her right to claim due and admissible leave encashment.

4. Observations:-

The stand taken by the respondents to deny the revised leave encashment to the petitioner defies even common sense logic. We observe so on following counts :-

4(i) It is not in dispute that on attaining the age of superannuation, the petitioner retired on 30.09.2020 as Senior Architect from the State PWD. About a week before her retirement i.e. 21.09.2020, the Government had decided to allow two tier pay scale structure to the category of petitioner. This revised pay structure was ordered to be paid on notional basis w.e.f. 27.08.2009 and on actual basis w.e.f. 14.11.2014. Thus the approval to release two tier pay structure to the category of the petitioner had been accorded by the State even before petitioner's superannuation.

4(ii) As per State Government decision dated 21.09.2020, the screening committee recommended releasing two tier pay scale in favour of the petitioner. The recommendation of the screening committee was accepted by the State on 15.12.2020. Order was accordingly passed on 31.12.2020 re-fixing petitioner's pay in the higher pay scale. On completion of 14 years regular service as on 01.01.2013, petitioner's pay in the revised scale was fixed on notional basis for the period 01.01.2013 to 13.11.2014. Her pay was fixed in the revised scale on actual basis w.e.f. 14.11.2014.

4(iii) Pursuant to re-fixation of petitioner's pay, the leave encashment due and admissible to her was worked out at Rs. 14,78,530/-. Revised sanction of leave encashment was

accordingly granted. Since she had already been paid leave encashment amount of Rs. 13,93,520/- on the basis of her old pay scale, hence the balance amount due to her was worked out at Rs. 85,010/-. This amount was admittedly due to the petitioner in light of upward revision of petitioner's pay-scale carried out after her retirement.

4(iv) For denying the payment of revised leave encashment to the petitioner, the respondents have taken shelter of a notification issued by the Finance Department on 13.08.2013 as well as Rule 39 of the CCS (Leave) rules, 1972. The Office Memorandum dated 13th August, 2013 issued by the Finance Department is as under :-

"OFFICE MEMORANDUM"

Subject:- *Counting of notional pay for pensionary benefits in respect of Government employees who are allowed promotion/financial up-gradation etc. on notional basis as a result of Government decisions or Court orders – clarification regarding leave encashment of un-utilized earned leave.*

The undersigned is directed to refer to Finance Department O.M. No. Fin (Pen) A (3) -12/2010 dated 12th March, 2013 vide which it has been decided by the State Government that in cases where pay of the Government employees are fixed on notional basis due to promotions/financial upgradations etc. as a result of Government decisions or due to final Court orders, the notional pay so fixed shall be taken into account for calculation of pensionary benefits under Rule-33 and Rule-34 of the CCS (Pension) Rules, 1972.

2. The references are being received in this Department from various quarters seeking clarification as to whether the pay fixed on notional basis shall be counted for leave encashment or not. It is clarified that since the benefit of leave encashment is not a part of retirement benefit and the same is regulated under separate set of Rules i.e. CCS (Leave) Rules, 1972 as such instructions issued by the Finance (pension) Department vide O.M. dated 12.03.2013 shall not be applied in such cases. Moreover, in terms of rule 39(2) (b) of the CCS (Leave) Rules, 1972, the leave encashment shall be payable in one lump sum as one time settlement.

3. These orders may be brought to the notice of all concerned."

4(iv)(a) Leave encashment becomes payable at the time of retirement and is calculated in accordance with Rule 39(2) (b) of CCS (Leave) Rules, 1972. Portion of this Rule relevant to the context runs as under :-

"39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service

(1) No leave shall be granted to a Government servant beyond-

(a) the date of his retirement, or

(b) the date of his final cessation of duties, or

(c) the date on which he retires by giving notice to Government or he is retired by Government by giving him notice or pay and allowances in lieu of such notice, in accordance with the terms and conditions of his service, or

(d) the date of his resignation from service.

(2)(a) Where a Government servant retires on attaining the normal age prescribed for retirement under the terms and conditions governing his service, the authority competent to grant leave shall, suo motu, issue an order granting cash equivalent of leave salary for both earned leave and half pay leave, if any, at the credit of the

Government servant on the date of his retirement subject to a maximum of 300 days;

(b) The cash equivalent of leave salary under Clause (a) shall be calculated as follows and shall be payable in one lumpsum as a one-time settlement,—

(i)	Cash equivalent for earned leave	Pay admissible on the date of retirement plus Dearness Allowance admissible on that date = _____ x 30	Number of days of unutilized earned leave at credit subject to the total of earned leave and half pay leave not exceeding 300 days
(ii)	Cash payment in lieu of half pay leave component	Half pay leave salary admissible on the date of retirement plus Dearness Allowance admissible on that date = _____ x 30	Number of days of half pay leave at credit subject to the total of earned leave and half pay leave at credit not exceeding 300 days

NOTE.— The overall limit for encashment of leave including both earned leave and half pay leave shall not exceed 300 days.

(c) To make up the shortfall in earned leave, no commutation of half pay leave shall be permissible.

(3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him on conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any.....”

Leave encashment is the amount of money paid to an employee on account of his unutilized paid leaves standing to his credit at the time of his retirement. Rule 39 of CCS (Leave)

Rules, 1972 provides calculating the leave encashment *inter-alia* on the pay and dearness allowance admissible on the date of retirement. Leave encashment is thus paid at the time of retirement. Its computation depends *inter-alia* upon the availability of earned leave to the credit of the employee as well as pay and dearness allowance etc. admissible to him at the time of his retirement. While interpreting provision of the Rajasthan Non Government Educational Institutions Act 1989, Hon'ble Apex Court in **(2005) 10 SCC 346 State of Rajasthan and another Versus Senior Higher Secondary School, Lachhmangarh and others**, held 'leave encashment is nothing but salary for the unavailed leave to the credit of the employee'. The decision was reiterated and followed by the Apex Court in **Civil Appeal No. 6953 of 2022 (Jagdish Prasad Saini and others versus State of Rajasthan and others)**, decided on 26.09.2022.

4(iv) (b) Respondents' argument that under Rule 39(2)(b) of CCS (Leave) Rules 1972, the leave encashment is payable only in one lump sum as one time settlement and, therefore, revised leave encashment cannot be paid to the petitioner, is clearly misconceived and based upon misinterpretation of applicable Rules. The office memorandum issued by the Finance Department on 13.08.2013 to the extent it pertains to leave

encashment is not in consonance with law and Rules. Amount of leave encashment by necessary implication becomes payable in one lump sum at the time of retirement. However, Rule 39(2) (b) cannot be interpreted to mean that Government servants who have been paid leave encashment in one lump sum at the time of retirement cannot be paid more leave encashment amount even if there is any increase in their pay/dearness allowance etc., post retirement. Here is a case where pay of the petitioner was re-fixed in higher pay scale after her retirement. The pay re-fixation order and the notification on the basis of which pay was re-fixed clearly provided that petitioner was to be granted notional benefit of re-fixation of pay upto a particular date and actual monetary benefits were to be released to her w.e.f. 14.10.2014. The petitioner was granted actual monetary benefit from a retrospective date (w.e.f. 14.10.2014) after her superannuation on 30.09.2020. The actual monetary benefits (arrears) on the basis of revised pay fixation order had already been released in favour of the petitioner. She was definitely entitled to the revised leave encashment worked out on the basis of her re-fixed pay structure.

Though in this case the petitioner after her superannuation was granted actual monetary benefits on account of re-fixation of her pay, however, even if she had not been

granted the actual monetary benefits or had received only notional benefits, still the fact remains that her pay had been re-fixed after her retirement. Under Rule 39 of the CCS (Leave) Rules 1972, it is the pay and dearness allowance 'admissible' to the petitioner at the time of her retirement that are to be taken into consideration for computing her leave encashment. In case the pay and dearness allowance admissible to the petitioner at the time of retirement had undergone change post her date of retirement, then definitely the leave encashment amount was required to be re-worked out and to be paid accordingly. It will also be beneficial to refer to a clarification issued under G.I.D.P. & A.R., O.M. No. P.14028/11/81-Estt (L), dated the 8th March, 1982. This clarification was issued as number of references were received in the Dept. of Per. & A.R., as to whether any increase in DA/ADA sanctioned by the Government with retrospective effect will be admissible to those Government servants, who had already been paid leave salary in one lumpsum as one-time settlement at the time of their retirement. Whether the words "payable in one lump sum as one time settlement" occurring in the Rules should or need not be taken to mean that if any increase in DA/installment of ADA is allowed after the final settlement, but with retrospective effect, it should be denied to the

employee who was in service on the date from which such increase was made applicable. The clarification to these references was that if any increase in DA/ADA is sanctioned by the Government with retrospective effect and the Government servant concerned was eligible for the same on the date of his retirement/quitting service, then the difference between the leave salary already paid and leave salary payable according to the new rates will be admissible to the Government servant concerned, notwithstanding the fact that one-time settlement had already been made prior to the date of issue of orders regarding the increase in DA/ADA, etc. Relevant portion of clarification is extracted herewith :-

DA/ADA increase with retrospective effect also admissible.-

Reference is invited to Rules 39, 39-A and 39-B of the CCS (Leave) Rules, 1972, wherein it has been provided that the cash equivalent of leave salary which becomes payable on retirement at the time of finally quitting the service is to be paid in one lumpsum as one-time settlement.

2. *A number of references have been received in the Dept. of Per. & A.R., seeking clarification as to whether any increase in DA/ADA sanctioned by the Government with retrospective effect will be admissible to those Government servants, who have already been paid leave salary in one lumpsum as one-time settlement. The words "payable in one lumpsum as one-time settlement" occurring in the Rules should or need not be taken to mean that if any increase in Dearness Allowance/installment of ADA is allowed after the final settlement, but with retrospective effect, it should be denied to the employee who was in service on the date from which such increase was made applicable. It is hereby clarified that if any increase in DA/ADA is sanctioned by the Government with retrospective effect and the Government servant concerned was eligible for the same on the date of his*

retirement/quitting service, then the difference between the leave salary already paid and leave salary payable according to the new rates will be admissible to the Government servant concerned, notwithstanding the fact that one-time settlement had already been made prior to the date of issue of orders regarding the increase in DA/ADA, etc.

[G.I., D.P. & A.R., O.M. No. P. 14028/11/81-Estt. (L), dated the 8th March, 1982]

Thus, once the revised DA/ADA is to be taken into consideration for revising the payable leave encashment at the time of retirement, then certainly revised pay of an employee re-fixed from a retrospective date prior to his retirement is also to be taken into consideration for revising leave encashment.

5. Conclusion

Viewing from any angle, the stand taken by the respondents in denying payment of revised leave encashment to the petitioner cannot be countenanced. For all the aforesaid reasons, the petition is therefore, allowed. Respondents are directed to implement the Office Order dated 10.02.2021 (Annexure P-4). The balance amount of leave encashment due to the petitioner in terms of office order dated 10.02.2021 be paid to her within a period of four weeks from today. The petitioner shall also be entitled to costs of Rs. 25,000/- to be paid to her by the respondents alongwith the due balance leave encashment amount within the aforesaid period. We also clarify that in case

this amount is not paid within a period of four weeks, the same shall also carry interest @ 5% per annum from the due date.

The writ petition stands disposed off in the aforesaid terms, so also the pending applications, if any.

Having come across several cases where revised leave encashment amount due to the employees is being denied on the analogy of stand adopted by the respondents in the instant case, we direct the office of learned Advocate General to bring this judgment to the notice of the State Finance Department for its onward circulation to all the concerned departments to avoid unnecessary litigation on the subject.

(A.A. Sayed)
Chief Justice

1st December, 2022 (K)

(Jyotsna Rewal Dua)
Judge