



GAHC010200902017

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**THE GAUHATI HIGH COURT**  
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

**Writ Petition (Civil) no. 5369/2017**

Smti. Bahnisikha Dutta  
Wife of Sri Bidyut Dutta  
R/o BF 46 Nayan Cooperative  
Housing Society, Street No. 169 AA 1 New Town,  
Kolkata – 700156, West Bengal

.....Petitioner

**-Versus-**

1. The State of Assam  
represented by the Commissioner and Secretary  
to the Government of Assam, Personnel Department,  
Guwahati – 6
2. The Commissioner and Secretary to the Government of Assam, Finance  
Department, Dispur, Guwahati – 6
3. The Accountant General, Assam  
Beltola Maidamgaon
4. The Chief Executive Officer, Cachar, Silchar
5. The Treasury Officer, Cachar, Silchar

.....Respondents

**Advocates :**

For the Petitioner

Heard Mr. D.P. Borah

For the Respondent nos. 1 & 4

Mr. M.R. Adhikary, Additional Senior Government Advocate



For the Respondent no. 2 & 5

Mr. P. Nayak, Standing Counsel, Finance Department

For the Respondent no. 3

Mr. C. Baruah, Standing Counsel, Accountant General (A&E), Assam

Date of Hearing

25.02.2021

Date of Judgment & Order

19.03.2021

**BEFORE**

**HON'BLE MR. JUSTICE MANISH CHOUDHURY**

**JUDGMENT & ORDER (CAV)**

By this writ petition preferred under Article 226 of the Constitution of India, the petitioner has approached this Court seeking a direction to the respondent authorities for disbursement of her retirement benefits which the respondent authorities stated to have been withhold.

2. The background facts, in brief, which are necessary for the purpose adjudication of this writ petition are exposited as follows : the petitioner was a member of the Assam Civil Service (ACS) and she retired from service on 28.02.2013 on reaching the age of superannuation from the post of Chief Executive Officer (CEO) in the Cachar Zilla Parashid.

2.1. After the retirement of the petitioner on 28.02.2013, two criminal cases – Silchar Police Station Case no. 714/2013 and Silchar Police Case no. 776/2013 came to be registered in Silchar Police Station wherein the petitioner was named as one of the accused persons. Both the cases were registered on the basis of First Information Report (FIR)/complaint lodged by two different private persons.

2.2. One Sri Fokrul Islam Laskar, representing himself to be the General Secretary of a registered NGO filed a complaint before the learned Chief Judicial Magistrate, Cachar,

Silchar wherein he named four persons including the petitioner, as accused. The complaint was registered as Complaint Case no. 316/2013 and the learned Chief Judicial Magistrate, Cachar, Silchar forwarded the said complaint to the Officer In-Charge under Section 156(3), Code of Criminal Procedure, 1973 ('the Code', and/or 'CrPC', for short) to cause investigation after registering a case. On receipt of the said complaint and treating it as the FIR, the Officer In-Charge, Silchar Police Station registered a case being Silchar Police Station Case no. 714/2013 (G.R. Case no. 1257/2013) under Sections 120B/409/420/468/471/477-A/34, Indian Penal Code (IPC) on 07.04.2013 and initiated an investigation.

2.3. One Sri Muktadir Hussain Laskar, a resident of Cachar district also filed a complaint before the Court of learned Chief Judicial Magistrate, Cachar, Silchar naming four persons including the petitioner, as accused therein. On receipt of the said complaint, it was registered as Complaint Case no. 328/2013. The learned Chief Judicial Magistrate, Cachar, Silchar also forwarded the said complaint to the Officer In-Charge, Cachar, Silchar under Section 156(3), CrPC for registering a case and to cause investigation. On receipt of the same and treating it as the FIR, the Officer In-Charge, Silchar Police Station registered a case being Silchar Police Station Case no. 776/2013 (G.R. Case no. 1360/2013) for offences punishable under Sections 120B/406/408/409/419/ 420/466/468/34, IPC on 14.04.2013.

2.4. In the aforesaid two cases, two accused persons named therein which includes the petitioner, are common while the other two accused persons are different. All the accused persons were/are, however, employees under the Cachar Zilla Parishad. The allegations in both the FIRs are regarding alleged misappropriation, cheating, forgery, etc. in respect of huge amount of fund by the accused persons when the petitioner was serving as the Chief Executive Officer in the Cachar Zilla Parishad.

2.5. Another criminal case being Silchar Police Station Case no. 738/2013 (G.R. Case no. 1300/2013) came to be registered on 10.04.2013 on the basis of an FIR dated 09.04.2013 lodged at the instance of the Chief Executive Officer In-Charge, Cachar Zilla Parishad,

Silchar. The said case has been registered under Sections 120B/406/409/420/468/471, IPC read with Sections 7/13(1)(c)/13(1)(d)(ii)/13(2), Prevention of Corruption Act, 1988 wherein also allegations of misappropriation, cheating, forgery, criminal misconduct, etc. have been levelled against a number of employees of the Cachar Zilla Parishad including the petitioner.

2.6. Apprehending her arrest in connection with the aforesaid three criminal cases, the petitioner approached this Court by three applications – AB no. 1576/2013, AB no. 1578/2013 and AB no. 1579/2013 – seeking the benefit of pre-arrest bail under Section 438 of the Code. When by orders dated 15.05.2013 all the three applications were rejected, the petitioner approached the Hon'ble Supreme Court of India by three Special Leave to Appeals (Criminal) – SLP(CrI) no. 4841/2013, SLP(CrI) no. 4842/2013 and SLP(CrI) no. 4843/2013. The Hon'ble Supreme Court of India after having taken note of the facts and circumstances of the case, disposed of the three Special Leave to Appeals (Criminal) by a common order dated 02.09.2013 with the direction that in the event of her surrender or arrest within 4 (four) weeks from that date, the petitioner shall be enlarged on bail to the satisfaction of the arresting officer/the Court in seisin of the case, subject to the conditions as laid down under Section 438(2) of the Code.

2.7. Pursuant to the order dated 02.09.2013, the petitioner surrendered before the Court of learned Chief Judicial Magistrate, Cachar, Silchar on 19.09.2013 and she was released on bail in terms of the order dated 02.09.2013 on execution of bail bonds. But immediately after such release of the petitioner on bail, she was arrested in connection with another case, Silchar Police Station Case no. 2063/2013 (G.R. Case no. 3688/2013) registered under Sections 120B/406/409/420/468/471, IPC. The said case was registered on 19.09.2013. After such arrest, the petitioner approached this Court by an application, BA no. 2603/2013 seeking bail under Section 439, CrPC. This Court by an order dated 08.10.2013, allowed the bail application by observing that the allegations made in the FIR of Silchar Police Station Case no. 2063/2013 were substantially the same allegations made in the earlier three cases registered at the Silchar Police Station, referred above.

3. Heard Mr. D.P. Borah, learned counsel for the petitioner and Mr. M.R. Adhikary, learned Additional Senior Government Advocate for respondent nos. 1 and 4. Also heard Mr. P. Nayak, learned Standing Counsel, Finance Department for respondent nos. 2 and 5 and Mr. C. Baruah, learned Standing Counsel, Accountant General (A&E), Assam for respondent no. 3.

4. Mr. Borah has submitted that the petitioner retired from service on 28.02.2013 on reaching the age of superannuation and the writ petition was preferred on 24.08.2017, that is, after more than 4 years when pension and other retirements benefit were not released to the petitioner. An interim direction was also sought for grant of provisional pension. During the pendency of the writ petition, the provisional pension from January, 2017 to the petitioner was released on 24.11.2017.

5. The learned counsel for the petitioner has submitted that no departmental proceeding was initiated against the petitioner prior to her retirement on 28.02.2013. All the criminal cases, mentioned above, have been instituted against the petitioner on dates subsequent to her retirement and in none of the cases, the police after completion of investigation has submitted any charge sheet against the petitioner till date. The provisions in Rule 21 of Assam Services (Pension) Rules, 1969 does not empower the State Government to withhold pension and other retirement benefits of an employee unless it is established in a departmental proceeding or in a judicial proceeding that the employee is guilty of grave misconduct during the period of his/her service. Since the petitioner has not been found guilty of any grave misconduct or negligence during the period of her service, the petitioner is entitled to receive the pension and other retirement benefits from the date immediately after the date of retirement and the action on the part of the State respondents in withholding the same is *ex facie* illegal and arbitrary. Drawing attention of the Court to the documents annexed to the writ petition, the learned counsel for the petitioner has submitted that the husband of the petitioner had undergone kidney transplantation and open heart surgery while the petitioner herself is suffering from serious ailments like insulin - dependent diabetes, osteoporosis and vertigo. The authorities in the Silchar Medical College have found permanent physical disability of the petitioner to the

extent of 20% and certifying to that effect the Medical College has issued a certificate. The petitioner and her husband are in need constant medical attention. Because of non-disbursal of the retirement benefits of the petitioner, the family of the petitioner is undergoing severe financial stress. In support of his submissions, he has placed reliance in the decisions of the Hon'ble Supreme Court of India in *State of Jharkhand and others vs. Jitendra Kumar Srivastava and another*, reported in (2013) 12 SCC 210, and of this Court in *Birendra Rajbangshi vs. State of Assam and others*, reported in 2016 (4) GLT 920.

6. In reply, the learned State counsel has submitted that although the petitioner had retired on superannuation on 28.02.2013, the allegations regarding financial improprieties allegedly committed by the petitioner had surfaced subsequently with the lodgement of the FIRs, mentioned above. Since the amount alleged to be misappropriated by the accused persons of the said criminal cases are huge, the State respondents, he submits, are justified in not releasing the pension and other retirement benefits to the petitioner since she is one of the accused persons therein. It is his submission that when the allegations of misappropriation of fund of the State Exchequer are being investigated, it is well within the authority and jurisdiction of the State respondents to withhold pension and other retirement benefits in respect of an employee against whom such grave charges are levelled. He has also, like the learned counsel for the petitioner, drawn reference to the provisions of Rule 21 of the Assam Services (Pension) Rules, 1969 to justify the action of withholding the pension and other retirement benefits of the petitioner. With his submission, he has sought to contend that since FIRs have been lodged against the petitioners, the Government under powers conferred by Rule 21 of the Assam Services (Pension) Rules, 1969 can withhold the pension and other retirement benefits. He has extensively referred to the averments made in the affidavit-in-opposition filed on behalf of the respondent no. 1 in support of his submissions.

7. The learned Standing Counsel appearing for respondent no. 3 has submitted that no pension proposal in connection with the petitioner has been received at the end of the Accountant General (A&E), Assam. The learned counsel for the respondent nos. 2 and 5 has also submitted in similar manner.



8. I have duly considered the rival submissions of the learned counsel for the parties and also perused the materials made available through the pleadings of the parties.

9. It is an admitted position that the petitioner was a member of the Assam Civil Service and she retired from service on 28.02.2013 on reaching the age of superannuation. Prior to her such retirement on superannuation, the petitioner was serving as the Chief Executive Officer in the Cachar Zilla Parishad.

10. A perusal of the contents of the FIRs/complaints of the afore-mentioned criminal cases registered at Silchar Police Station against the petitioner and other accused persons goes to show that the allegations are with regard to misappropriation, cheating, forgery, criminal misconduct, etc. in respect of fund allotted to Cachar Zilla Parishad and such financial irregularities were stated to have been committed just before or on the date of retirement of the petitioner when she was serving as the Chief Executive Officer in the Cachar Zilla Parishad. The respondent no. 1 in support of its action of withholding the pension and other retirement benefits like death-cum-retirement gratuity (DCRG), has relied on a report submitted by the Deputy Commissioner, Cachar to the Principal Secretary to the Government of Assam, Panchayat and Rural Development Department on 08.04.2013. In the said report, the Deputy Commissioner after making an enquiry, had reported that there were deliberate negligence in maintenance of books of accounts in the Cachar Zilla Parishad and the involvement of the then CEO, Cachar Zilla Parishad i.e. the petitioner could not be ruled out in defalcation of government money. It appeared to him that the defalcation of the government money could be possible in collusion with the other employees of Cachar Zilla Parishad. By forwarding the report, the Deputy Commissioner had sought for a high level enquiry to unearth the complete details of financial irregularities for taking necessary action against the erring employees. The respondent no. 1 has also referred to another enquiry report submitted by the Deputy Commissioner, Cachar on 28.03.2013 wherein also allegations of financial irregularities were reported.

11. The respondent no. 1, in the affidavit-in-opposition, has stated that the petitioner had

submitted her pension papers on 11.01.2013. On receipt of the same, the pension papers were processed for onward transmission to the office of the Accountant General (A&E), Assam for finalization of the petitioner's pension and gratuity. It has been further stated that even a letter under memo no. AAJ.50/77/Pt/320-A dated 25.04.2013 (Annexure-3 to the affidavit-in-opposition) was prepared by the Personnel Department for forwarding the pension papers to the office of the Accountant General (A&E), Assam but the Principal Secretary to the Government of Assam, Panchayat and Rural Development Department vide his letter no. PDA.113/201/16 dated 17.05.2013 (Annexure-5 to the affidavit-in-opposition) requested the Personnel Department to withhold the pension and other retirement benefits in respect of the petitioner on the ground that the matter had been referred to the Vigilance and Anti-Corruption. It is further stated that when the Pension and Public Grievances Department was moved by the Personnel Department, the Pension and Public Grievances Department had advised not to forward the pension papers of the petitioner to the office of the Accountant General (A&E), Assam for finalization and also to withhold the DCRG and Leave Encashment Benefits till the finalization of the cases and to draw departmental proceeding against the petitioner, since retired. The stand of the respondent no. 1 is that due to such advice, the pension papers of the petitioner have not been forwarded to the office of the Accountant General (A&E), Assam for finalization of her pension and DCRG.

12. In the affidavit-in-opposition of the respondent no. 1, it has also been stated that the provisional pension has been sanctioned to the petitioner w.e.f. 01.03.2013 till the issuance of the final Pension Payment Order (PPO) by the Personnel Department on 18.05.2013. It has been further stated that the Leave Encashment Benefits have also been sanctioned to the petitioner by the Personnel Department on 30.03.2013. For payment of General Provident Fund (GPF), the requisite application along with relevant papers had been forwarded to the office of the Accountant General (A&E), Assam by the Personnel Department on 22.12.2014. The matter regarding GIS has not been finalized as the petitioner did not submit the requisite application.

13. From the stand taken by respondent no. 1 in its affidavit-in-opposition, it is noticed



that the pension and the DCRG have not been sanctioned and released in favour of the petitioner till date in view of the advice made by the Panchayat and Rural Development Department as well as by the Pension and Public Grievances Department, as have been noted above.

14. In the aforesaid fact situation, the question that has arisen for consideration is whether it is permissible on the part of the State Government to withhold the aforesaid retirement benefits by invocation of the provisions of the Assam Services (Pension) Rules, 1969. In this connection, the provisions contained in Rule 21 of the Assam Services (Pension) Rules, 1969 is of import and relevance. For ready reference, the relevant parts of Rule 21 is extracted hereunder :

“21. The Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if, in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement provided that –

(a) such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the officer, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service ;

Explanation - The continuation of the proceeding after the final retirement of the officer shall be automatic under sub-rule (a) of Rule 21 and no fresh decision of the Governor and/or the Appointing Authority nor any show-cause notice to the person concerned shall be necessary.

The powers under Rule 21 shall be exercisable not only in case of causing pecuniary loss to Government but also in all other cases.

(b) such departmental proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment –

(i) shall not be instituted save with the sanction of the Governor of Assam;

(ii) shall not be in respect of any event which took place more than 4 years before such institution ; and

(iii) shall be conducted by such authority and in such place as the Governor of Assam may direct and in accordance with procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service ;

(c) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or an event which took place more than 4 years before such institution only;

(d) the Assam Service Commission shall be consulted before final orders are passed.

Explanation – For the purpose this rule-

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the officer or pensioner, or if the officer has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted-

(i) in the case of a criminal proceeding, on the date on which the complaint or report of police officer, on which the Magistrate takes cognizance, is made, and

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the Court.”

15. From Rule 21, quoted above, it is evident that the State Government is empowered to withhold or withdraw a pension or a part of it of a government employee, permanently or for a specified period and also to recover the whole or part of any pecuniary loss caused to the government from the pension only in the event the pensioner is found guilty of grave misconduct or negligence during the period of his service in a departmental proceeding or in a judicial proceeding. Rule 21 has also prescribed in clear terms that if a departmental proceeding is not instituted while the government employee was in service and before his retirement, then the departmental proceeding shall not be instituted in respect of a cause of action which arose or any event which took place more than 4 years before such institution. By the Explanation (a) provided thereto, it has been explained that a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the government employee or pensioner or if the government employee has been placed under suspension from an earlier date, on such date. By Explanation (b), it has, *inter-alia*, been explained that a judicial proceeding shall be deemed to be instituted in the case of

a criminal proceeding, on the date on which the complaint or report of police officer, on which the Magistrate takes cognizance, is made.

16. This Court on 19.02.2021 had made a query to the learned State counsel to inform as to whether any departmental proceeding is pending against the petitioner. The learned State counsel has placed before the Court a communication dated 23.02.2021 of the Department of Personnel, issued under hand of the Joint Secretary to the Government of Assam, wherein it is stated that no departmental proceeding is pending against the petitioner. In the FIRs of Silchar Police Station Case no. 714/2013, Silchar Police Station Case no. 738/2013, Silchar Police Station Case no. 776/2013 and Silchar Police Station Case no. 2036/2013, allegations were made of commission of financial improprieties by the petitioner during her service period while she was in service as the CEO in the Cachar Zilla Parishad. The petitioner retired from service on 28.02.2013 on superannuation. Admittedly, the allegations of financial improprieties are related to events that occurred more than 4 years earlier prior to the date of filing of the writ petition i.e. 24.08.2017. Thus, it is not permissible on the part of the State respondents to initiate any departmental proceeding regarding any cause of action which arose or any event alleging financial improprieties on the part of the petitioner at this distant point of time when more than 4 years have elapsed in the meantime.

17. Though investigations were initiated in respect of the aforesaid four criminal cases against the petitioner as an accused but till date, none of the said criminal cases has culminated into a report under Section 173 of the Code finding a *prima facie* case of commission of any offences alleged against the petitioner. From the meaning ascribed to judicial proceeding by Explanation (b) to Rule 21 for the purpose of the said rule, the date of institution of a criminal proceeding which comes under the purview of judicial proceeding, is the date on which the report of the police officer is made and on which the Magistrate takes cognizance. Section 190(1), CrPC contains the provision for taking cognizance of offences by the Magistrate. Sub-clause (b) of Section 190(1), CrPC has specifically provided for taking of cognizance of any offence by the Magistrate upon a police report of such facts. As per definition provided in Section 2(r) of the Code, 'police report' means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173, CrPC. A police report

under Section 173(2) is forwarded to a Magistrate when upon completion of investigation, any offence appears to have been committed and against such accused by whom such offence appears to have been committed. Such police report is also known interchangeably as charge sheet. Nothing has been placed/brought on record by the State respondents to indicate that police report/charge sheet has been submitted by police in any of the cases registered against the petitioner, mentioned above. As no police report/charge sheet has been filed in any of the said criminal cases, the question of finding the petitioner guilty of grave misconduct or negligence does not arise as on date since the same will be relevant only when the final verdict(s) is/are delivered in any of those cases after trial(s) by a court of law.

18. A *pari materia* provision contained in Rule 43(b) of the Bihar Pension Rules, 1950, like Rule 21 of the Assam Services (Pension) Rules, 1969, came up for consideration before the Hon'ble Supreme Court of India in *Jitendra Kumar Srivastava* (supra). The Hon'ble Supreme Court after consideration of the *pari materia* provision contained in Rule 43(b) in *Jitendra Kumar Srivastava* (supra), has observed as under :-

“11. From the reading of the aforesaid Rule 43(b), following position emerges:

(i) The State Government has the power to withhold or withdraw pension or any part of it when the pensioner is found to be guilty of grave misconduct either in a departmental proceeding or judicial proceeding.

(ii) This provision does not empower the State to invoke the said power while the departmental proceeding or judicial proceeding are pending.

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13. A reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension, etc. **only** when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the Rules for withholding of the pension/gratuity when such departmental proceedings or judicial proceedings are still pending.”

19. The decision in *Birendra Rajbangshi* (supra) which is in the context of Rule 21 of the Assam Services (Pension) Rules, 1969, has been rendered following *Jitendra Kumar Srivastava* (supra).

20. It is no longer *res-integra* that the right to receive pension has been held to be a right to property protected under Article 300-A of the Constitution of India which says that no person shall be deprived of his property save by authority of law. The pension is payable to the government employee because of long, continuous and dedicated period of service and it is not to be treated as a bounty payable at the will and pleasure of the Government. The right to receive pension and other retirement benefits is a valuable right vested in a government servant. The matters of pension and the DCRG in the case in hand, are regulated and governed by the provisions of the Assam Services (Pension) Rules, 1969 made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India. The rules made under the proviso to Article 309 of the Constitution of India are legislative in character and are constitutional rules, though made by the executive. Thus, the pension and the DCRG are rights and the payment of these do not depend upon the discretion of the Government but those are governed by the rules and a government servant coming within the said rules is entitled to claim pension and the DCRG. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the employee not because of any such order but by virtue of the rules. Thus, it is not permissible to withhold the disbursement of pension as well as the gratuity payable to the petitioner in terms of the provisions of the Assam Services (Pension) Rules, 1969 merely by any executive decision of the Panchayat and Rural Development Department and/or the Pension and Public Grievances Department, as have been sought to be done in the present case, prior to any finding reached by a Court of law in a judicial proceeding holding the petitioner guilty of grave misconduct or negligence. Until proved guilty, the service career of the petitioner cannot be held to a blemished one.

21. In the light of the above discussion, this Court is of the considered view that the



decision to withhold the pension and other retirement benefits of the petitioner, on the ground cited for such withholding, is illegal and unsustainable. In such view of the matter, this writ petition stands allowed with the direction to the State respondents to take all the necessary steps forthwith to process the pension papers of the petitioner which were received by them as far back as on 11.01.2013 and thereafter, to finalize and make payment of the pension and other retirement benefits as may be found due to the petitioner. The entire exercise shall be completed within a period of 3 (three) months from the date of receipt of the certified copy of this order. If any further formalities are required to be done at the end of the petitioner the same shall be informed to the petitioner immediately and the petitioner on being so informed, shall comply accordingly in the interregnum period.

22. It is made clear that since the investigations of the afore-mentioned criminal cases against the petitioner are pending as on date, it shall not be understood that this Court has made any opinion as regards the cases (supra) registered at Silchar Police Station where allegations of financial improprieties are made against the petitioner and it is for the State Government to take such further action against the petitioner permitted by law depending of the outcome of the criminal proceedings arising therefrom.

22. The writ petition stands allowed to the extent indicated above. There shall, however, be no order as to cost.

**JUDGE**

**Comparing Assistant**