

**UTTARAKHAND PUBLIC SERVICES TRIBUNAL,
DEHRADUN**

Present: Sri V.K. Maheshwari

----- Vice Chairman (J)

&

Sri D.K. Kotia

----- Vice Chairman (A)

CLAIM PETITION NO. 84/2008

Gajendra Singh Topal, S/o Late Sri D.S.Topal, Finance Officer
Incharge of the office of the District Education Officer, Pauri
Garhwal, Narendra Nagar, District Tehri Garhwal

.....Petitioner

VERSUS

1. State of Uttarakhand through the Principal Secretary,
Department of Finance, Subhash Road, Dehradun,
2. Additional Secretary to the Govt. of Uttarakhand, Department
of Finance, Subhash Road, Dehradun,
3. Uttarakhand Public Service Commission, Haridwar,
4. Shri Bhola Dutt Joshi, Retired Treasury Officer, Bageshwar,
5. Sri Sajjan Singh Gosain, Retired Finance Officer, Directorate
of Technical Education, Srinagar, Garhwal
6. Shri Phool Singh, Finance Officer, office of the
Commissioner, Sugarcane & Sugar Mills, Kashipur.

.....Respondents

Present: Sri J.P.Kansal, Counsel
for the petitioner

Sri Umesh Dhaundiyal, A.P.O.
for the respondents No. 1 & 2

JUDGMENT**DATE: MARCH 09, 2015****DELIVERED BY SRI D.K.KOTIA, VICE CHAIRMAN (A)**

1. The petitioner has sought the following relief in this claim petition:

“(a) It be deemed that the reservation of one post from Scheduled Caste in the Recruitment Year 2006-07 against which respondent No. 6 has been promoted to the Ordinary Grade is wrong, null and void being against law, rules and consequently the promotion of respondent No. 6, Shri Phool Singh against this vacancy as Scheduled Caste candidate be quashed and set aside and the said vacancy be ordered to be filled by General candidate;

(b) Office Memo dt. 14.08.2014 (Annexure-A15) be held as illegal, wrong, and against the principles of natural justice and be quashed and set aside,

(c) Issue orders and directions to the respondents to consider the petitioner for promotion in accordance with the criterion applicable during Recruitment Year 2004-05, 2005-06 and 2006-07 for the vacancy of respective year and promote the petitioner to the Ordinary Scale of Rs. 8000-275-1350/- w.e.f. the date his juniors have been promoted vide order dated 14.12.2006(Annexure-A1) with all consequential benefits,

- (d) to grant any other relief in addition to or in modification or substitution of the above, as the Hon'ble Tribunal deems fit and proper in the circumstances of the facts of the case to the petitioner against the respondents; and*
- (e) to allow costs of this petition Rs. 5000/- to the petitioner against the respondents."*

2. The facts in brief are that the petitioner was promoted to the post of assistant Treasury Officer in 1990. Though he had become eligible for promotion to the next higher post of Treasury Officer yet he was not promoted. He has claimed that he should have been promoted w.e.f. 14.12.2006, the date his juniors have been promoted (Annexure:A-1). The petitioner has stated in the claim petition that in spite of availability of vacancies and he being fit for promotion on the basis of merit as well as seniority, he was not promoted. The petitioner however, was promoted in 2010 and he retired in 2011.

3. Respondents No. 1 and 2 while admitting the availability of vacancies have stated in their written statement that the petitioner was not found fit for promotion by the DPC held by the Uttarakhand Public Service Commission (hereinafter referred as the Commission).

4. The petitioner filed the rejoinder affidavit. Respondents No. 1 & 2 filed additional W.S. The petitioner also filed additional rejoinder affidavit. These are merely

repetitions of points stated in the claim petition/w.s. The respondents No.1 and 2 have also filed documents and record of the DPC.

5. Private respondents No. 3 to 6 have not filed any written statements and it was decided to proceed ex-parte against them.

6. Noticing some gaps in the information and inconsistencies in the petition/w.s., the Tribunal vide order dated 13.05.2014 directed the petitioner to make a detailed representation before the respondent No. 1 who would dispose of the same and the order passed by respondent No. 1 would be placed before the Tribunal. The petitioner made a representation before respondent no. on 23rd May, 2014 and the same was rejected by respondent No. 1 on 19.08.2014.

7. We have heard learned counsel for the petitioner and learned APO and also perused the record carefully.

8. Before we discuss the contentions, it would be useful to mention the legal position. The promotion to the post of Treasury Officer (ordinary grade) is governed by Rule 16 of the Uttarakhand Finance Service Rules, 2002 which reads as follows:

“16. Recruitment by promotion to the ordinary Grade in the Service shall be made on the basis of merit, in accordance with the Promotion by Selection in Consultation with the Public

Service Commission (Procedure) Rules, as amended from time to time.”

It is therefore, clear that the basis of promotion is “merit” and promotion is made in consultation with the Commission.

9. Learned counsel for the petitioner has argued that the Hon’ble High Court of Uttarakhand in a writ petition (No. 241 SB of 2003) filed by Shri Mahavir Prasad, Assistant Treasury Officer against the promotion to the post of Treasury Officer (ordinary scale) dated 27.04.2002 whereby Shri Mahavir Prasad was superseded, held in its judgment dated 02.03.2006 that in view of Rule 4 of the Uttaranchal Government Servant (Criterion for Recruitment by Promotion) Rules, 2004 (hereinafter referred as Rules of 2004), Shri Mahavir Prasad could not have been superseded on account of adverse entry. The relevant paragraph of the judgment reads as under:

“5. Since the petitioner was allowed to cross the efficiency bar on 18.10.1997 after the adverse entry awarded to him in the year 1992-93, therefore, the petitioner could not have been superseded on account of this adverse entry. Therefore, the persons junior to the petitioner could not have been promoted in view of the Rule-4 of the Uttaranchal Government Servants

(Criterion for recruitment by promotion)

Rules, 2004, which reads as under:

“4. Recruitment by promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay scale the maximum of which is Rs. 18,300/- or above shall be made on the basis of merit, and to the rest of the posts in all services to be filled by promotion, including a post where promotion is made from a non-gazetted post to a Gazetted post or from one service to another service, shall be made on the basis of seniority to the rejection of the unfit.”

6. *The Apex Court in the case of “Brij Nath Pandey Vs. State of U.P. & others, (2001) 9 Supreme Court Cases, 398” in which it has been held that adverse entries made earlier in the ACR could not come in the way of promotion when appellant was subsequently allowed to cross efficiency bar.*

7. *In view of the above, it is apparently clear the persons junior to the petitioner could not have been promoted on the basis of seniority to the rejection of the unfit. Therefore, the respondents are directed to consider the case of the petitioner for promotion ignoring the adverse entry awarded to him on 18.10.1997 for the year*

1992-93 within a period of 10 days from the date of production of certified copy of this order. It is further made clear that the promotion of the petitioner shall be given effect from the date from which the persons junior to the petitioner have been promoted.”

The contention of the learned counsel for the petitioner is that on the basis of the order of the Hon'ble High Court, the petitioner should also have been promoted on the basis of "Seniority to the rejection of the unfit". Learned APO has contended that the order of the Hon'ble High Court cannot be applied in case of the petitioner in view of Rule 16 of the Service Rules, 2002 (mentioned in para 8 of this order) and the Rule 4 of the Rules of 2004 is for promotion to the post where the consultation with the Commission is not required. It has also been contended by the learned APO that the issue before the Hon'ble High Court in above writ petition was that adverse entry made earlier in the ACR could not come in the way of promotion when an employee was subsequently allowed to cross efficiency bar. We find that in the case of above writ petition, the promotion order (which was challenged) was passed on 27.04.2002 and the Uttarakhand Finance Service Rules, 2002 (hereinafter referred as Rules of 2002) came into force w.e.f. 03.08.2002. Therefore, the case in hand is to be governed by the Rules of 2002. As per Rule 16 of the Rules of 2002, the promotion to the post of Treasury Officer

(ordinary grade) is to be made on the basis of the 'merit' and in consultation with the Commission. We are therefore, of the opinion that the judgment in the above writ petition does not provide any help to the petitioner in the case in hand.

10. The learned counsel for the petitioner as an alternative argument contended that the proceedings of the Commission to recommend the promotion for the selection years 2005-06 and 2006-07 in the meeting of the DPC on 17.11.2006 using criteria for determining the 'merit' contained in its letter dated 21.08.2006 is bad in the eye of law because it has no approval of the competent authority and it could not have been given retrospective effect. Learned APO contended that the Commission is empowered to lay down its criteria to assess the 'merit' independently and therefore, the working /procedure of the Commission cannot be questioned. We also find that the Uttar Pradesh State Public Service Commission (Regulation of Procedure) Act, 1985 (which is applicable in Uttarakhand) empowers the Commission for the regulation of its procedure. We are therefore, of the opinion that in the absence of any specific provisions in the Service Rules of 2002, laying down the criteria to determine the 'merit' is within the competence of the Commission.

11. In so far as contention of the learned counsel for the petitioner that the letter of the Commission dated 21.08.2006 laying down the criteria to assess the 'merit' cannot be given retrospective effect for the Selection Years

2005-06 and 2006-07, we find that the meeting of the DPC was held by the Commission on 17.11.2006 to consider the promotion for selection years 2005-06 and 2006-07 and in this meeting the criteria to determine the merit, were used as provided in the said letter. All eligible candidates were assessed on the basis of criteria laid down in this letter. Since the letter of 21.08.2006 has been taken into account after its issuance in the DPC held on 17.11.2006, in our view, it cannot be said to be a retrospective application of the letter to assess the 'merit' of the eligible candidates.

12. Learned counsel for the petitioner has also contended that vacancies for different selection years were not calculated correctly and vacancies for various selection years were also clubbed. Learned APO has refuted this. As the issue of vacancies has not affected the promotion of the petitioner and not finding him 'fit' for promotion as per 'merit' was the issue, we do not find it necessary to go into the issue of vacancies and therefore, we are not deliberating upon it.

13. The counsel for the petitioner has filed the following case laws in support of his contentions:

- i. 2006(5) ALJ, 678, R.S.Garg Vs. State of U.P. & others,
- ii. 2007(4)SLR-Supreme Court, 227, Vijay Singh Charak Vs. Union of India & others,
- iii. (2008)2 Supreme Court Cases (L&S), 771, Dev Dutt Vs. Union of India and others,
- iv. AIR 2007, Supreme Court, 2840, P.Mohanan Pillai Vs. State of Kerala & others,

- v. 2003 LAB. I.C. Supreme Court, 3679, State of Punjab and others Vs. Manjit Singh and others,
- vi. (2009)1 Supreme Court Cases (L&S), 893, Mohd. Altaf (2) and others Vs. U.P. Public Service Commission,
- vii. [2003(52)ALR, 633]Bijendra Singh Vs. State of U.P. & others,
- viii. 2014(1) SLR, 763(S.C.), Chief Secretary, Premlata Joshi Vs. State of Uttarakhand & others.

We have gone through these cases and reach the conclusion that these do not provide any help to the case of the petitioner.

14. Before we conclude, we would like to make an observation regarding the ACR of the petitioner for the year 2000-2001. It was adverse originally but was expunged on 08.03.2004. We find that while assessing the ACRs of the petitioner for 10 years as laid down in the letter of the Commission dated 21.08.2006, this ACR has also been considered. The DPC, of course, has not treated this entry as adverse but it has been assessed as “सन्तोषजनक/अच्छा” and ‘zero’ mark has been assigned to it. We are of the view that to consider an expunged ACR by the DPC is not in accordance with the Government Orders. We would like to reproduce the following G.O. in this regard:

“संख्या-25 / 3 / 80-कार्मिक-2

प्रेषक,

श्री त्रिभुवन प्रसाद,
मुख्य सचिव,
उत्तर प्रदेश शासन।

सेवा में,

शासन के समस्त सचिव,
समस्त विभागाध्यक्ष तथा प्रमुख कार्यालयाध्यक्ष,
उत्तर प्रदेश।

कार्मिक अनुभाग-2

लखनऊ, दिनांक 7

मई, 1981

विषय— अवलोपित प्रतिकूल प्रविष्टि के स्थान पर नई प्रविष्टि अंकित किए जाने के विषय पर।

महोदय,

मुझे यह कहने का निदेश हुआ है कि अवलोपित प्रतिकूल प्रविष्टि के स्थान पर नई प्रविष्टि अंकित किए जाने के प्रसंग पर अक्सर शासन को सदंर्भ प्रस्तुत होते हैं। इस विषय पर कोई सामान्य आदेश जारी नहीं है और न ही कोई सर्वव्यापी प्रणाली ही लागू कराई जा सकती है।

2. शासन द्वारा प्रविष्टियों के निष्पक्ष मूल्यांकन हेतु सदैव बल दिया जाता रहा है। फिर भी यदि कोई दोषपूर्ण प्रतिकूल प्रविष्टि अंकित ही कर दी जाय और उसे सक्षम प्राधिकारी द्वारा अवलोपित किये जाने का निर्णय लिया जाय तो अवलोपित प्रविष्टि के स्थान पर नए सिरे से कोई नई प्रविष्टि देने का सामान्यतः औचित्य नहीं है, क्योंकि ऐसी प्रविष्टि तो उसी अधिकारी द्वारा दी सकती है जिसने सक्षम होने के साथ-साथ प्रविष्टि अर्जित करने वाले अधिकारी/कर्मचारी का काम निर्धारित तीन माह की न्यूनतम अवधि तक देखा हा।

3. किन्तु यदि अवलोपन का निर्णय लेते समय ऐसे तथ्य सामने आते हैं जिन्हें कि प्रविष्टिकर्ता प्राधिकारी द्वारा प्रविष्टि अंकित करते समय ध्यान में लेना चाहिए था, और उनका उल्लेख करना चाहिए था, पर ऐसा किया नहीं, तो सक्षम प्राधिकारी उनके अंकित किए जाने के बारे में अलग से निदेश दे सकते हैं।

4. अनुरोध है कि शासन के उपर्युक्त निर्णय से अपने सम्बन्धित सभी अधिकारियों को अवगत कराने की कृपा करें।

भवदीय,
त्रिभुवन प्रसाद,
मुख्य सचिव।”

The perusal of above G.O. makes it clear that no new or separate entry can be given in place of an expunged

entry. Under these circumstances, we are of the view that the ACR of the petitioner for the year 2000-2001 should have been ignored and an ACR of previous year should have been considered to make total ACRs for 10 years as per the criterion laid down in the letter of the Commission dated 21.08.2006. The Government has expressed this intention from time to time. It would be worthwhile to reproduce another G.O. which reads as under:

“संख्या-145/XXX/(2)/2010

प्रेषक,

दिलीप कुमार कोटिया,
प्रमुख सचिव,
उत्तराखण्ड शासन।

सेवा में।,

1-समस्त प्रमुख सचिव/सचिव 2-समस्त विभागाध्यक्ष/कार्यालयाध्यक्ष
उत्तराखण्ड शासन। उत्तराखण्ड शासन।

3- मण्डलायुक्त
गढवाल/कुमायूँ

4- समस्त जिलाधिकारी
उत्तराखण्ड

कार्मिक अनुभाग-2

देहरादून, दिनांक 30 सितम्बर, 2010

विषय- विभागीय पदोन्नति के समय विलोपित प्रतिकूल प्रविष्टि के प्रभाव के सम्बन्ध में ।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निदेश हुआ है कि पदोन्नति के समय कार्मिकों की वार्षिक गोपनीय प्रविष्टि में अंकित श्रेणियां यथा उत्कृष्ट, अतिउत्तम, उत्तम, अच्छा/संतोषजनक, प्रतिकूल प्रविष्टि के आधार पर पदोन्नति हेतु कार्मिकों की प्रविष्टि का आंकलन करने की व्यवस्था की गयी है। इसके अतिरिक्त उत्तर प्रदेश शासन कार्मिक अनुभाग-1 के अर्द्ध 0शा 0 पत्र संख्या-13/15/91-का -1/1993, दिनांक 20 अगस्त, 1993 के द्वारा यह भी स्पष्ट किया गया है कि जिस वर्ष की प्रविष्टि उपलब्ध न हा, उसे ब्लैक पढ़ा जाय।

समय-समय पर यह तथ्य संज्ञान में आया है कि कतिपय कार्मिकों की वार्षिक गोपनीय प्रविष्टि में अंकित प्रतिकूल प्रविष्टि पूर्णतः अथवा अंशतः विलुप्त तो कर दी जाती है, किन्तु तदक्रम में प्रविष्टि का नये सिरे से अंकन नहीं कराया जाता अथवा आंशिक उपलब्ध/अवशेष प्रविष्टि में श्रेणी अंकित नहीं होती है। शासन द्वारा ऐसे मामलों के सम्बन्ध में कोई स्पष्ट निर्देश न होने के कारण पदोन्नति के अवसर पर विलोपित प्रविष्टियों के सम्बन्ध में मूल्यांकन सम्बंधी संशय बना रहता है।

2- अतः इस सम्बन्ध में सम्यक विचारोपरान्त शासन द्वारा यह निर्णय लिया गया है कि यदि किसी कार्मिक की किसी वर्ष की प्रविष्टि प्रतिकूल हो किन्तु बाद में उस प्रतिकूल प्रविष्टि को नियमानुसार पूर्णतः अंशत विलोपित कर दिया गया हो और ऐसी विलोपित प्रविष्टि के स्थान पर नवीन प्रविष्टि अंकित न कराई गई हो अथवा अंशतः उपलब्ध प्रविष्टि में कोई श्रेणी भी अंकित न हो तो उस स्थिति में उस वर्ष/वर्षों की प्रविष्टि/प्रविष्टियां जिस वर्ष में प्रविष्टि विलोपित कर दी गयी हो, छोड़कर जितने वर्ष की प्रविष्टि विलोपित की गयी है, उतने वर्ष के पीछे की प्रविष्टियों को पदोन्नति हेतु विचार श्रेत्र में रखते हुए पदोन्नति की कार्यवाही की जायेगी। उदाहरण के लिए यदि चयन वर्ष 2010-11 में प्रस्तावित चयन में पात्रता सूची में सम्मिलित किसी कार्मिक की वर्ष 2005-06 की प्रतिकूल प्रविष्टि विलोपित की गयी हो किन्तु अंशतः उपलब्ध प्रविष्टि में श्रेणी अंकित न हो तथा उसकी पदोन्नति के लिए वर्ष 2000-2001 और उसके बाद की प्रविष्टियों पर विचार किया जा रहा हो तो ऐसी स्थिति में उस कार्मिक की वर्ष 2005-06 के स्थान पर 1999-2000 की प्रविष्टि को भी पदोन्नति हेतु विचार क्षेत्र में रखा जायेगा।

3. कृपया उपरोक्त निर्देशों का अनुपालन सुनिश्चित करने का कष्ट करें।

भवदीय,
(दिलीप कुमार कोटिया)
प्रमुख सचिव,"

15. In the light of the discussion in para 14 above, we are of the opinion that the promotion of the petitioner needs to be reconsidered and a review DPC be held to re-assess the petitioner for promotion. In case, the petitioner is found

fit for promotion in any selection year as per criteria laid down by the Commission ignoring the ACR of 2000-2001 and taking into account ACR of previous year in its place, the petitioner should be given notional promotion from that time with all consequential benefits.

ORDER

The claim petition is partly allowed. In the light of the observations made in this order, the Respondent No. 1 is directed to reconsider the promotion of the petitioner by holding a review DPC within a period of three months. No order as to costs.

Sd/-

V.K.MAHESHWARI
VICE CHAIRMAN (J)

Sd/-

D.K.KOTIA
VICE CHAIRMAN (A)

DATE: MARCH 09, 2015
DEHRADUN

KNP