

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Sri V.K. Maheshwari

----- Vice Chairman (J)

&

Sri D.K. Kotia

----- Vice Chairman (A)

CLAIM PETITION NO. 44/2012

Yogesh Kumar Mittal, S/o Late Sri S.P. Mittal, Assistant Commissioner, Commercial Tax, presently resident of 44, Mohit Nagar, Dehradun.

.....Petitioner

VERSUS

1. State of Uttarakhand through Principal Secretary, Finance Department, Subhash Road, Dehradun.
2. Principal Secretary to the Govt. of Uttarakhand, Department of Finance, Subhash Road, Dehradun.
3. Secretary to the Govt. of Uttarakhand, Department of Finance, Subhash Road, Dehradun.
4. Commissioner Tax Uttarakhand, Dehradun.
5. Sri S.P.Nautiyal, Deputy Commissioner,
6. Sri Brijmohan Pant, Deputy Commissioner,
7. Sri Surendra Singh Negi, Deputy Commissioner,
8. Sri Dharendra Singh Nabilal, Deputy Commissioner,
9. Sri Pan Singh Dungriyal, Deputy Commissioner,
10. Sri Arun Kumar, Deputy Commissioner,
11. Sri Rakesh Verma, Deputy Commissioner.

.....Respondents

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

Sri Umesh Dhaundiyal, A.P.O.
for the respondents No. 1 to 4

JUDGMENT**DATE: DECEMBER 03, 2015****DELIVERED BY SRI D.K.KOTIA, VICE CHAIRMAN (A)**

1. The present claim petition has been filed for seeking following relief:-

“(a) that the impugned order dated 04.05.2012 (Annexure:A5) be kindly held wrong, illegal, against law, rules, principles of natural justice, void, ineffective and accordingly the said order be kindly quashed and set aside.

(b) that the adverse remarks made in the Annual Confidential Reports for the year 2004-05, 2005-06 and 2006-07 Annexure: A2, Annexure: A3 and Annexure: A4 be kindly held in contravention of law, rules and orders/instructions, ought not to have been considered and will not be considered as adverse for the purpose of promotion, crossing of Efficiency Bar and for other service matters:

(c) the respondents be ordered and directed to promote the petitioner to the post of Deputy Commissioner with effect from 11.01.2010, the date of promotion of his 7 juniors to the post of Deputy Commissioner and to pay to the petitioner the difference of salary of the promoted post with all consequential benefits along with interest thereon @ 12% per annum from the date of accrual to the date of actual payments;

(d) any other relief in addition to or in modification of above, as the Hon’ble Tribunal deem fit and proper be kindly granted to the petitioner against the respondents; and

(e) Rs. 20,000/- as costs of this claim petition and special costs be awarded to the petitioner against the respondents, who have been dragging the petitioner into protracted vexatious litigation.”

2. The relevant facts in brief are that the petitioner was appointed as Sales Tax Officer Grade-II (now designated as Commercial Taxes Officer) in 1987. He was promoted to the post of Trade Tax Officer (now designated as Assistant Commissioner, Commercial Taxes) in 2003.

3. The petitioner was awarded 'Annual Adverse Entries' by the State respondents for the years 2003-04, 2004-05, 2005-06 and 2006-07. The petitioner was also given a 'severe warning' to be kept in the ACR for the year 2004-05. A reprimand entry was also awarded to the petitioner on 31.05.2005.

4. The Department of Commercial Taxes made further promotion from the post of Assistant Commissioner to the post of Deputy Commissioner for the recruitment year 2009-10 and for this purpose held the meeting of the Departmental Promotion Committee (DPC) on 08.01.2010. The criterion of promotion was 'seniority to the rejection of unfit'. The DPC after considering the 'Annual Confidential Entries' and other relevant record found the petitioner 'unsuitable' for promotion (Annexure: A14). The promotion order was issued on 11.1.2010 (Annexure: A1) and 7 officers who were junior to the petitioner were promoted.

5. The petitioner gave a representation against the promotion order dated 11.01.2010 on 23.04.2011 (Annexure: A16) and also sent a reminder on 20.09.2011 (Annexure: A17). A notice under section 4(6) of the U.P.Public Services (Tribunal) Act, 1976 dated 11.11.2011 (Annexure: A18) was also given by the petitioner to the State respondents. The representation of the petitioner was rejected on 04.05.2012 (Annexure: A5). Hence, the petition.

6. The main ground on the basis of which the petitioner has challenged the promotion order dated 11.01.2010 is that the

adverse entries given to him ought to have been ignored while considering his promotion as all the annual adverse entries given to him were in violation of the Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002.

7. State Respondents (Nos. 1 to 4) have opposed the claim petition and stated in their joint written statement that the promotion to the post of Deputy Commissioner has been made as per Rules and the petitioner was duly considered for promotion but due to adverse annual entries of the petitioner, he was not found suitable and, therefore, he was not promoted and the officers, junior to the petitioner, who were found suitable were promoted to the post of Deputy Commissioner vide order dated 11.01.2010. It has further been stated in paragraph 1(iii) of the written statement that the representations of the petitioner against the adverse annual entries for the years 2004-05, 2005-06 and 2006-07 were rejected vide order dated 04.05.2012 (Annexure: A5). It has also been stated in paragraph 4(23) of the written statement that the representation of the petitioner dated 23.04.2011 (Annexure: A16) against the promotion order dated 11.01.2010 was also rejected after due examination vide order dated 04.05.2012 (Annexure: A5). The state respondents have, therefore, pleaded to dismiss the claim petition.

8. Private respondents (Nos. 5 to 11), in spite of service and sufficient opportunity, have not filed any written statement. It was, therefore, decided to proceed ex-parte against them.

9. The petitioner has filed the rejoinder. The same averments made in the claim petition have been reiterated in it.

10. We have heard both the parties and perused all the record carefully.

11. Before we discuss the matter, it would be appropriate to look at the Rule Position related to the Adverse Entries. The relevant Rules are Rule 4 and Rule 5 of the Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 (for short Rules of 2002) which are reproduced below:

Rule-4

“ 4.Communication of adverse report and procedure for disposal of representation--

(1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 90 days from the date of recording the report and a certificate to this effect shall be recorded in the report.

(2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under sub-rule (1) represent in writing directly and also through proper channel to the authority one rank above the accepting authority hereinafter referred to as the competent authority, and if there is no competent authority to the accepting authority itself, against the adverse report so communicated :

Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation.

(3) The competent authority or accepting authority, as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority,

who has recorded the adverse report, for his comments, who shall, within a period not exceeding 45 days from the date of receipt of the representation furnish his comments to the competent authority or the accepting authority, as the case may be :

Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

(4) The competent authority or the accepting authority, as the case may be, shall, within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3) consider the representation alongwith the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders--

(a) rejecting the representation; or

(b) expunging the adverse report wholly or partly as he considers proper.

(5).....

(6).....

(7).....

(8).....

(9).....

Explanation--”.

Rule-5

“5. Report not to be treated adverse-- Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Hand-book, Volume-II, Parts-II to IV where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned”.

12. It is clear from the perusal of Sub-Rule 3 and Sub-Rule 4 of Rule 4 of the Rules of 2002 above that the total period prescribed for the disposal of the representation against the annual

adverse entry is 165 days (45 days under Sub-Rule 3 + 120 days in Sub-Rule 4).

13. It is also clear from the perusal of Rule 5 of the Rules of 2002 that where a representation against an adverse report has not been disposed of in accordance with Rule 4 of the Rules of 2002, such report shall not be treated adverse for the purpose of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned.

14. The main argument of the learned counsel for the petitioner is that the representations of the petitioner against the adverse entries have not been disposed of within the time limit prescribed under Sub-Rule 4 of Rule 4 of the Rules of 2002 and, therefore, according to Rule 5 of the Rules of 2002, such adverse reports shall not be treated adverse for the purpose of promotion.

15. The only issue before us is to examine whether representations of the petitioner against the adverse reports have been disposed of within the time limit prescribed under Sub-Rule 4 of Rule 4 of the Rules of 2002 or not. We discuss the year-wise adverse entry below:

(i) Annual Adverse Entry for the year 2003-04

While considering promotion by the DPC on 08.01.2010, in the chart of annual entries placed before the DPC (Annexure: A14), the annual entry of the petitioner for the year 2003-04 has been shown as 'adverse'. This annual adverse entry was under challenge before this Tribunal at that time. The Tribunal decided the matter on 21.1.2010 vide claim petition No. 99/2009 (Annexure: A10). The Tribunal held that the representation of the petitioner dated 08.05.2006 against the adverse entry was decided by the state respondents on 20.08.2007. As the Sub-Rule 4 of Rule 4 of the Rules of 2002 was not followed; the representation against

the adverse entry was disposed of after more than one year, the Tribunal set aside the adverse entry and held that the entry will not be treated as adverse under Rule 5 of the Rules of 2002. The State Government accepted the order of the Tribunal dated 21.1.2010 and expunged the adverse entry of the petitioner for the year 2003-04.

(ii) Annual Adverse Entries for the years 2004-05 and 2005-06

Annual Adverse Entries for the years 2004-05 and 2005-06 were communicated to the petitioner on 26.07.2008 (Annexure: A5). The petitioner made representation against these adverse entries on 15.10.2008 (Annexure: A12). The representation of the petitioner was rejected on 04.05.2012 as mentioned in Paragraph 1(iii) of the joint written statement (filed on behalf of the state respondents No. 1 to 4). The said paragraph 1(iii) is reproduced below:

“प्रस्तर संख्या-1 (iii) इस प्रस्तर में प्रस्तुत विवरण स्वीकार योग्य नहीं हैं। वादी द्वारा वर्ष 2004-05, 2005-06 व 2006-07 की प्रतिकूल प्रविष्टि के सम्बन्ध में प्रत्यावेदन प्रस्तुत किया गया। वादी द्वारा प्रस्तुत प्रत्यावेदन के समस्त तथ्यों पर विचार करते हुये एवं अभिलेखों को दृष्टिगत रखते हुये कार्यालय ज्ञाप संख्या- 409 दिनांक 4.5.2012 द्वारा अस्वीकार किया गया है जो कि पूर्णतः विधिअनुसार एवं नियमानुसार है।”

It is clear that the representation of the petitioner dated 15.10.2008 (Annexure: A12) against the adverse entries for the year 2004-05 and 2005-06 was decided by the state respondents after more than 3 years. The disposal of representation is not in accordance with the time limit prescribed under Sub-Rule 4 of Rule 4 of the Rules of 2002 and, therefore, these adverse entries under Rule 5 of the Rules of 2002 cannot be treated adverse for the purpose of promotion.

(iii) Annual Adverse Entry for the year 2006-07

The two adverse entries for the year 2006-07 from 12.04.2006 to 12.12.2006 and from 13.12.2006 to 31.03.2007 were communicated to the petitioner on 29.05.2008 and 09.04.2008 respectively (Annexure: A13). The petitioner made representation against these adverse entries on 28.01.2009 (Annexure: A13). The representation of the petitioner was rejected on 04.05.2012 as mentioned in Paragraph 1(iii) of the joint written statement (filed on behalf of the state respondents No. 1 to 4) reproduced in Paragraph 15(ii) above. It is clear that the representation of the petitioner against the adverse entries for the year 2006-07 was decided by the State respondents after more than 3 years. The disposal of representation is not in accordance with the time limit prescribed under Sub-Rule 4 of Rule 4 of the Rules of 2002 and, therefore, these entries for the year 2006-07 under Rule 5 of the Rules of 2002 cannot be treated adverse for the purpose of promotion.

16. State respondents (No. 1 to 4) have also stated in their joint written statement about the adverse entries given to the petitioner for the years 2003-04, 2004-05, 2005-06 and 2006-07 and the dates of disposal of the representations of the petitioner against adverse entries of these years. The relevant paragraph of the written statement is reproduced below:

“प्रस्तर संख्या-4 (24) वर्ष 2003-04, 2004-05, 2005-06 व 2006-07 की प्रतिकूल वार्षिक प्रविष्टियों के विरुद्ध याचिकाकर्ता द्वारा प्रस्तुत प्रत्यावेदन दिनांक 15.10.2008, 28.01.2009 एवं 15.01.2011 को कमशः मुख्यालय के पत्र संख्या- 6272 दिनांक 30.3.2011, 3959 दि० 13.2.2009 एवं 4355, दिनांक 24.1.2011 द्वारा शासन को प्रेषित किया गया। जिन्हें कमशः शासन के कार्यालय ज्ञाप, दिनांक 4.5.2012, 14.9.2009 एवं 4.5.2012 द्वारा अस्वीकार किया जा चुका है।”

Perusal of above paragraph reveals that there are some discrepancies in the dates compared to the dates mentioned in paragraph 15(i), in paragraph 15(ii) and in paragraph 15(iii) of

this order. In spite of that, the dates mentioned in paragraph 1(iii) and in paragraph-4 (24) of the joint written statement clearly show that the representations of the petitioner against the adverse entries for all these years were disposed of violating the time limit prescribed under Sub-Rule 4 of Rule 4 of the Rules of 2002 and all these entries, therefore, cannot be treated adverse under Rule 5 of the Rules of 2002 for the purpose of promotion.

17. The proceedings of the DPC dated 08.01.2010 (Annexure: A14) also shows in the chart of Annual Entries of eligible candidates that the petitioner was given a 'severe warning' to be kept in the ACR for the year 2004-05. The contention of the learned counsel for the petitioner is that the same was re-considered and modified vide order dated 14.11.2006 by the Principal Secretary, Finance, Government of Uttarakhand (Annexure: A15) and the same was converted into "सचेत" to be kept in the personal file of the petitioner. We have perused Annexure: A15 and find that the contention of the learned counsel for the petitioner is correct. After the order of the Principal Secretary, Finance, Government of Uttarakhand dated 14.11.2006 (Annexure: A15), the 'severe warning' to be kept in ACR for the year 2004-05 no more exists and it, therefore, could not be placed before the DPC for considering the promotion of the petitioner.

18. The proceedings of the DPC dated 08.01.2010 (Annexure: A14) also shows in the chart of Annual Entries of eligible candidates that the petitioner was given a 'reprimand' entry on 31.05.2005. The petitioner in the claim petition in para 4(25) has mentioned the following in respect of this adverse remark:

"That the DPC had also considered order dated 31.05.2005 of 'Reprimand' (निन्दित) mentioned in the particulars of 'Confidential Entries of 10 years' though the said order was

not conveyed to the petitioner and the petitioner had no opportunity to represent there against.”

Thus, the contention of the petitioner is that he was not conveyed such ‘reprimand’ and, therefore, he did not get an opportunity to represent against it. The state respondents have given the following reply to the para 4(25) of the claim petition:

“प्रस्तर संख्या-4 (25) निर्देश याचिका के प्रस्तर 4 (25) में प्रस्तुत विवरण स्वीकार योग्य नहीं है। याचिकाकर्ता द्वारा प्रस्तुत प्रत्यावेदनों का निस्तारण शासन द्वारा नियमानुसार किया गया है जो पूर्णतः विधिअनुकूल एवं उचित है।”

The above reply of the State respondents is vague and unclear. The respondents have not clarified whether the said ‘adverse’ entry was given or not. They have also not replied whether this adverse entry was communicated to the petitioner, if at all it was given. Respondents have also not mentioned if the said entry was given and communicated, whether the representation of the petitioner against it was received or not and if the representation was received whether it was disposed of or not. If it was disposed of, when it was accepted or rejected. The state respondents have failed to explain this adverse entry dated 31.05.2005 in their written statement in para 4(25) above and, therefore, it cannot be established that this so called adverse entry was communicated to the petitioner.

19. In the light of discussion in paragraphs 15 and 16 above, we are of the view that the Annual Adverse Entries for the years 2003-04, 2004-05, 2005-06 and 2006-07 cannot be treated adverse for the purpose of promotion of the petitioner. The ‘severe warning’ for the year 2004-05 (shown in the chart of Annual Entries placed before the DPC) no more exists as explained in

paragraph 17 above and, therefore, it could not be considered for the promotion of the petitioner. Similarly, the 'reprimand' entry dated 31.05.2005 as shown in the chart of Annual Entries placed before the DPC could not be considered for the promotion of the petitioner as the state respondents could not demonstrate that the same was communicated to the petitioner as explained in paragraph 18 above.

20. For the reasons stated above, we reach the conclusion that since the correct material with regard to ACRs was not placed before the DPC and as a result the petitioner was not considered for promotion in lawful manner and, therefore, the petition deserves to be allowed.

ORDER

The petition is, hereby, allowed. The Annual Adverse Entries for the years 2003-04, 2004-05, 2005-06 and 2006-07 and also special adverse entries given in 2004-05 and on 31.05.2005 shall not be treated adverse for the purpose of promotion. The matter of promotion of the petitioner from the post of Assistant Commissioner to the post of Deputy Commissioner for the recruitment year 2009-10 shall be reconsidered as per rule and law by holding a 'Review' DPC within a period of three months from the date of this order. No order as to costs.

V.K.MAHESHWARI
VICE CHAIRMAN (J)

D.K.KOTIA
VICE CHAIRMAN (A)

DATE: DECEMBER 03, 2015
DEHRADUN

KNP