

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

Through Audio conferencing

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO.104/DB/2019

Mayan Pal Singh Verma, S/o Late Sri Amir Singh, presently working as Superintending Engineer, in the office of Engineer-in-Chief and Head of Department, Public Works Department, Yamuna Colony, Dehradun.

.....Petitioner.

vs.

1. State of Uttarakhand through Additional Chief Secretary, Public Works Department, Government of Uttarakhand, Secretariat, Subhash Road, Dehradun, Uttarakhand.
2. Engineer-in-Chief and Head of Department, Public Works Department, Yamuna Colony, Dehradun.

.....Respondents.

Present: Sri L.K.Maithani, Advocate for the petitioner
Sri V.P.Devrani, A.P.O., for the Respondents.

JUDGMENT

DATED: 20.07.2021

Justice U.C.Dhyani (Oral)

By means of present claim petition, petitioner seeks the following reliefs:

“i) To issue an order or directions to the respondents, in view of the judgments pronounced in the case of Devi Dutt vs. Union of India and others and Sukh Dev Singh vs. Union of India and others the uncommunicated “Uttam” Annual Confidential Reports of the year 2015-16 for the period (1) from 11.08.2015 to 31.03.2016 & of the year 2016-17 (1) for the period 01.04.2016 to 10.11.2016 (2) from 11.11.2016 to 31.03.2017 shall be treated as adverse. As per rule 5 of Rules of 2015 these uncommunicated “Uttam” Annual Confidential Reports shall not cause any hindrances (1) in further promotions, by future Departmental Promotional Committees, and

(2) all other service benefits of petitioner. As per Rule 6 of Rules of 2015 petitioner requests for Notional Promotion to the post of Chief Engineer Level-2 with effect from 23.10.2018, the date on which (1) Sri Aiyaz Ahmed (2) Sri V.N.Tiwari and (3) Sri Rajendra Goyal, were promoted to the post of Chief Engineer Level-2. All these 3 officers are junior to the petitioner, in the seniority list of feeding cadre of Assistant Engineer. Petitioner also prays for all other consequential benefits.

ii) To issue an order or directions to the respondents, to upgrade the uncommunicated "Uttam" Annual Confidential Reports of the year 2015-16 for the period 11.08.2015 to 31.03.2016 & of the year 2016-17 for the period 01-01.04.2016 to 10.11.2016 and 11.11.2016 to 31.03.2017 and treat these Annual Confidential Reports as upgraded Annual Confidential Reports in the future promotional exercises. Petitioner also prays for all other consequential benefits.

iii) Issue any other suitable order or directions which the Hon'ble Tribunal deems fit and proper in the circumstances of the case.

iv) Award the cost of the petition to the petitioner."

Petitioner's case:

2.1 Facts, giving rise to the present claim petition, are as follows:

2.2 The petitioner was initially appointed as Assistant Engineer in P.W.D., on 06.03.1990. He was, thereafter, promoted to the post of Executive Engineer (ExEn), on 06.09.1996 and to the post of Superintending Engineer (S.E.), on 14.05.2019. Presently, petitioner is working as S.E. in the office of Engineer-in-Chief-HoD, P.W.D., Dehradun.

2.3 The petitioner came to know that Annual Confidential Reports (ACRs) of the years 2015-16 (duration 11.08.2015 to 31.03.2016) & 2016-17 (duration 01.04.2016 to 10.11.2016, and 11.11.2016 to 31.03.2017) are downgraded 'Good' entries when he was not promoted in the Departmental Promotion Committee (DPC) dated 30.01.2018, held for promotions to the post of Superintending Engineer. Due to these ACRs being 'Good', the respondents disqualified the petitioner from promotion to the post of S.E. Petitioner has now reached a level where further promotions are possible only with ACR grading 'Very Good' or above. In the selection year, the DPC

can be convened at any time. The above noted ACRs will be hindrances for promotion of the petitioner in the forthcoming DPCs. According to the petitioner, these ACRs were not communicated to him hence, he has been deprived of fair opportunity of hearing against these ACRs.

2.4 As per Rule 5 of the Uttarakhand Government Servant (Communication & Disposal of representation against the Adverse, Good/Satisfactory, Very Good, Outstanding, Annual Confidential Reports and Allied Matters) Rules, 2015 (hereinafter referred to as 'Rules of 2015'), the ACRs which are not communicated or a representation has not been disposed of in accordance with Rule 4, of these Rules, such reports shall not be treated adverse for the purpose of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned.

2.5 After coming to know about the gist of ACRs from 2012-13 to 2016-17, from the broad sheet of ACRs submitted by the respondents in their C.A., in Claim Petition No. 28/DB/2019, which Claim Petition was filed on 28.09.2019, the petitioner obtained copies of ACRs of the year 2015-16 and of year 2016-17 under Right to Information Act, 2005 *vide* letter dated 21.06.2019(Annexure-A1).

2.6 In paragraphs No. (v) to (xv) of the claim petition, the petitioner has mentioned his achievements, as depicted in self-appraisal of ACR of duration 11.08.2015 to 31.03.2016 and has also mentioned the reasons why his entries should be upgraded.

2.7 According to the petitioner, the ACRs of the years 2015-16 and 2016-17 were never communicated to him and therefore, as per Rule 5 of the Rules of 2015, these ACRs should not be hindrances for further promotion and other service benefits to the petitioner. Classification of petitioner in 'Good' category on the basis of these uncommunicated downgraded ACRs, is wrong and illegal.

2.8 Rule 4(1) of Rules of 2015 provides that any entry in totality, whether it is 'adverse', 'satisfactory', 'good', 'very good' shall be

communicated to the concerned officer/employee, within 60 days after the entry is given. Rule 4(2) provides that the employee against whom adverse entry has been recorded is entitled to make a representation to the authority one rank above to the Accepting Authority within 45 days from the date of communication of the entry. Rule 4(3) provides that the competent authority after receiving the representation of the employee under the sub rule (2) & (3), shall send it within 7 days, for the comments/reports to the authority which wrote these adverse remarks. This adverse remark giving authority, should send his comments/reports to the Accepting Authority within 45 days after receiving the representation. Rule 4(5) provides that afterwards, within 120 days, the Competent Authority shall consider the representation of the employee and comments/reports of adverse remark making authority, and shall either (1) cancel the representation or (2) expunge the adverse report wholly or partially or (3) upgrade the satisfactory, good, and very good entry with a reasoned and speaking order. Rule 4(7) provides that order passed under sub rule (5) shall be communicated to the government servant.

2.9 Rule 5 of Rules of 2015 provides that where any adverse entry has not been communicated to the government servant or where the representation has not been decided as per Rule 4 then such adverse entry should not be treated as adverse for the purpose of promotion or other service benefits of the employee.

2.10 In *Dev Dutt vs. Union of India & others, (2008) 8SCC 775*, the Hon'ble Supreme Court has held that every entry in the ACR of public servant must be communicated to him, within a reasonable period, whether it is poor, average, good or very good. This affects the employees in two ways: (1) had the entry been communicated to him, he would know about the assessment of his work & conduct by his superiors, which would enable him to improve his work in future, and (2) he would have an opportunity of making a representation against the entry if he feels unjustified and prays for its upgradation. Hence, non-communication of an entry is arbitrary and

arbitrariness violates Article 14 of the Constitution. The Hon'ble Supreme Court also has held that non-communication of entries, certainly has civil consequences because it affects adversely employee's chances of promotion and other service benefits.

2.11 The judgment rendered in the case of Dev Dutt (*Supra*), has been affirmed by the Constitution Bench of Hon'ble Supreme Court in the decision of *Sukhdev Singh vs. Union of India, (2013) 9 SCC 566*. It has been held that every downgraded entry, whether it is poor, fair, average, good or very good may be adverse at the time of promotion. In para 10 of the decision of Dev Dutt (*Supra*), it was observed that the benchmark (i.e. essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' Annual Confidential Reports for the last 5 years. Thus, in the situation 'good' entry, is in fact an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having, which determines whether it is an adverse entry or not. It is thus the rigors of the entry which is important, not the phraseology. The grant of a 'good' entry is of no use to the incumbent, it makes him ineligible for promotion or has an adverse effect on his chances of promotions.

2.12 According to the petitioner, in the DPC dated 30.01.2018, held for promotions to the post of Superintending Engineer, due to uncommunicated 'Good' entries of the years 2015-16 and 2016-17, the petitioner was not found eligible for promotion. Thus the petitioner was deprived of the promotion on the basis of uncommunicated 'good' Annual Confidential Reports. As per above decision of the Hon'ble Apex Court, 'good' entries should have been treated as adverse, benefits of provisions of Rules of 2015 should have been given and the petitioner should have been promoted to the post of Superintending Engineer. Respondents did not do so. They will not do so in future DPCs also, for promotions to the post of Chief Engineer Level-2 and Chief Engineer Level-I. So, the respondents should

be ordered by Hon'ble Tribunal to follow above mentioned decisions of Hon'ble Apex Court and Rules of 2015 in future DPCs.

2.13 It is submitted by learned Counsel for the petitioner that in the Rules of 2015, time limit has been prescribed for communication of the Annual Confidential Reports and for disposal of the representation. This is mandatory under these Rules. The downgraded entries of the year 2015-16 & 2016-17 were never communicated to the petitioner. So, the opportunity of representation within prescribed time limit was not given to him. Thus, now these entries shall not be treated and deemed as downgraded in all the forthcoming DPCs for future promotions. Therefore, the 'good' entries of the petitioner for the years 2015-16 & 2016-17, as per Rule 5 of the Rules of 2015, cannot cause hindrances in promotions and all other service benefits of the petitioner. Also, Rule 6 of the Rules of 2015, states that- where after deciding representation on 'Achcha/Santoshjanak, 'Good', 'AttiUttam', entries of the government servant, Competent Authority orders for ungradation of such entries, then if the Government Servant was found unsuitable, for promotion due to such entries or was deprived of any other service benefit due to such entries, then after upgradation of such entries, the Government, shall again review promotion and other service benefits of the government servant, and if now he is found suitable, then he shall be given notional promotion and other service benefits from the date of promotion of junior persons. Petitioner, as per this Rule, requests for notional promotion to the post of Chief Engineer Level-2, with effect from 23.10.2018, the date of on which (1) Sri Aiyaz Ahmed (2) Sri V.N. Tiwari and (3) Sri Rajendra Goyal were promoted to the post of Chief Engineer Level-2. All these three officers are junior to the petitioner, in the seniority list of feeding cadre of Assistant Engineers.

2.14 According to the petitioner, he is fully entitled and deserves for upgradation of these uncommunicated 'good' entries of the years 2015-16 & 2016-17. Petitioner should, accordingly, be given notional promotion to the post of Chief Engineer Level-2 and all other service benefits *w.e.f.*

23.10.2018, the date of promotion of his juniors. These uncommunicated 'good' Annual Confidential Reports should also not cause any hindrances (1) in further promotions, by future DPCs, and (2) all other service benefits, to the petitioner.

Counter version:

3.1 In the W.S./C.A. which has been filed by Sri Ashok Kumar, Senior Staff Officer (S.E.), PWD, Dehradun, it has been mentioned that the petitioner came to know of his ACRs when he filed claim petition No. 28/DB/2019 before this Tribunal on 28.08.2019. In para 3 of the C.A., grading of the petitioner has been indicated in the ACRs of 2015-16, 2016-17 and 2017-18 [At present, Tribunal is not examining- whether the petitioner was rightly assessed or wrongly assessed]. In rest of the paras of C.A./W.S., an effort has been made to justify the grading of the petitioner.

3.2 In para 17 of the C.A., the deponent has stated that since the ACRs of the petitioner for the years 2015-16 & 2017-18 were not adverse therefore, the same were not communicated to the petitioner. In para 18 of the C.A., it has been indicated that in the year 2010-11, the petitioner was categorized as bad employee and his integrity was withheld for the year 2011-12. In last sub-para of para 18 of C.A., it has been indicated that since the ACR of the year 2015-16 was not downgraded therefore, the same was not communicated to the petitioner. In para 20 of the C.A., it has been averred that petitioner was not promoted because he got adverse entries in the years 2010-11 and 2011-12. He was found unfit for promotion in the meeting of DPC. The criteria was 'seniority-subject to-rejection of unfit'. As per para 22 of the C.A., the petitioner was not entitled to promotion for a period of 5 years (due to adverse entries for the years 2010-11 and 2011-12). The petitioner was granted promotion to the post of S.E. on 14.05.2019 (Copy Annexure-CA8) in the selection year 2018-19. The question of granting him notional promotion on the post of Chief Engineer Level-II *w.e.f.* 23.10.2018, therefore, does not arise.

4. R.A. has been filed by the petitioner in support of his claim petition. Supplementary affidavit has also been filed on behalf of the petitioner to reiterate the averments made in the claim petition.

Preliminary objection of Limitation:

5.1 An application for rejection of the claim petition was filed by learned A.P.O. on 11.09.2019 to dismiss the claim petition on the ground of delay and laches. An affidavit of Sri Pankaj Agarwal, A.E., PWD, Dehradun was filed with the averment that since the petitioner has challenged the uncommunicated 'good' ACRs of the years 2015-16 and 2016-17, after delay of more than two years, hence, claim petition is barred by limitation. Learned A.P.O. vehemently opposed the claim petition on the ground of maintainability arguing that the claim petition is barred by limitation in view of section 5 of the Uttar Pradesh Public Services (Tribunal) Act, 1976.

5.2 Section 5 provides for limitation in respect of claim petitions filed before this Tribunal, which runs as below:

“5. Powers and procedure of the Tribunal- (1) (a) The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (Act 5 of 1908), or the rules of evidence contained in the Indian Evidence Act, 1872 (Act 1 of 1872), but shall be guided by the principles of natural justice, and subject to the provisions of this section and of any rules made under Section 7, the Tribunal shall have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private):

Provided that where, in respect of the subject-matter of a reference, a competent court has already passed a decree or order or issued a writ or direction, and such decree, order, writ or direction has become final, the principle of res judicata shall apply;

(b) The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to the reference under Section 4 as if a reference were a suit filed in civil court so, however, that-

(i) notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) in computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his

conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded.

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 may be made within the period prescribed by that Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985 whichever period expires earlier: Provided further that nothing in this clause as substituted by the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985, shall affect any reference made before and pending at the commencement of the said Act.

(2)

(3).....”

[Emphasis supplied]

5.3 According to learned A.P.O., the claim petition should have been filed within one year, which has not been filed. We are unable to subscribe to the view of learned A.P.O., for the reason that the petitioner came to know of some of his downgraded entries only when he was not promoted to the post of S.E. Such fact came to his knowledge only on 21.06.2019, when the copies of ACRs were obtained by him under RTI. The claim petition was filed on 28.08.2019, which is within a year of receipt of copies of ACRs under RTI.

5.4 Further, the deponent himself has used the words ‘uncommunicated entries’ in the preliminary objections. How can the period of limitation begin to run from a date of non-communication? Period of limitation shall begin to run only from a date when the entry was communicated. When the law provides that every entry should be communicated to the employee, the period of limitation shall begin to run only from the date when such entry is communicated. In the instant case, ‘good’ entries were never communicated to the petitioner. He has obtained such information from other sources, like RTI etc.

Hence, the claim petition is held to be within limitation.

Discussion on Merits:

6.1 Earlier, the petitioner had filed claim petition No. 28/DB/2019, which was decided by this Tribunal on 05.07.2019 (copy Annexure: A2), as follows:

“16. Respondents are, therefore, directed to convene a review DPC of DPC dated 30.01.2018 for considering the promotion of the petitioner on the post of SE, as per the old criteria of ‘seniority-subject to- rejection of unfit’, at an earliest possible, in accordance with law. If the review DPC finds that the petitioner is fit to be promoted on the post of SE, then he should be given notional promotion from the date his junior was promoted.”

6.2 Petitioner has filed present claim petition, for which liberty was granted to him, while deciding his earlier claim petition.

6.3 Learned A.P.O. submitted that the criteria for promotion to the post of Chief Engineer Level-II is ‘merit-cum-seniority’. When petitioner was posted as Executive Engineer, he had filed a Claim Petition No. 28/DB/2019 in this Tribunal earlier. The Tribunal in its order dated 05.07.2019 has held that the promotion of petitioner shall be considered on the basis of old rules of ‘seniority-subject to-rejection of unfit’. Accordingly, DPC was held for considering promotion of the petitioner, and on the recommendations of the DPC, the petitioner was promoted as Superintending Engineer. Learned A.P.O. pointed out that when the petitioner was so promoted as Superintending Engineer, the criteria was ‘seniority-subject to-rejection of unfit’ as per this Tribunal’s order, but, the consideration for promotion to the post of Chief Engineer Level-II is different and is ‘merit-cum-seniority’.

7. In para 4 of a decision rendered by Honble High Court of Uttarakhand on 29.08.2016 in WPSB No. 237 of 2016, *Kailash Prakash Joshi vs. State of Uttarakhand & others*, the Hon’ble Court, observed thus:

“4. There is no dispute that for the years 2010- 11 and 2011-12, while the Reporting Officer entered “very good” in the A.C.R. of the petitioner, the same has been downgraded to “good” by the Accepting Officer. In the light of the decision in Writ Petition (S/B) No. 95 of 2016, which is brought to our notice, we see no reason to take a different view. Accordingly, the writ petition is disposed of as follows:

We direct the first respondent to constitute a review D.P.C. and the review D.P.C. will consider the case of the petitioner for promotion to the post of Chief Engineer Grade-II and, as far as uncommunicated remarks are concerned, a decision will be taken in the light of the judgment of Hon’ble Apex Court in ‘Dev Dutt Vs. Union of India and others’, reported in (2008) 8 SCC 725, Sukhdev Singh vs. Union of India and ors.’, reported in 2013 (9) SCC 566 and ‘Prabhu Dayal Khandelwal Vs. Chairman, UPSC and others’, reported in 2015 (6) Supreme 692 in accordance with law, and the order of promotion of the party respondent will be subject to the decision of the review D.P.C. The review D.P.C. shall be held and be culminated within a period of three weeks from the date of production of a certified copy of this judgment.”

[Emphasis supplied]

8. In WPSS No. 1370 of 2019, *Bhola Dutt Sharma vs. State of Uttarakhand & others*, Hon’ble High Court observed that-if the entries as made in the ACRs, are not communicated, they cannot be read against the delinquent employee and would not create any impediment in grant of service benefits. Hon’ble Court also observed that the Annual Confidential Entries are mandatorily required to be communicated to an employee against whom the entries are made in order to enable the employee to get his grievance redressed against the adverse entries by filing the representation, which is statutory in nature, in accordance with “The Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2015”.

9. The observations of Hon’ble Apex Court in *Dev Dutt vs. Union of India (supra)* in paras 47 and 48 of the decision assume significance. These observations are reproduced herein below for guidance:

“47. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the 'good' entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the 'good' entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

48. We, therefore, direct that the 'good' entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.”

[Emphasis supplied]

10. The observations of the Hon'ble Apex Court in Sukhdev Singh vs. Union of India (*supra*), are also important and are reproduced herein below for convenience:

“8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We,

accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.

10. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing more is required to be done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law.”

[Emphasis supplied]

11. In Civil Appeal No. 6227 of 2008, *Abhijit Ghosh Dastidar vs Union of India & Ors*, decided on 22.10.2008 by Hon’ble Apex Court, the following was observed:

“4.Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

5. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. Therefore, the appellant also be deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retrial benefits as per rules”.

[Emphasis supplied]

12. In *Prabhu Dayal Khandelwal vs. Chairman, Union Public Service Commission and others*, AIR 2015 SC 3057, the Hon’ble Apex Court has held as under:

“7. In the above view of the matter, we are satisfied that the impugned order passed by the High Court, deserves to be set aside, inasmuch as, the claim of the Appellant could not be ignored by taking into consideration, uncommunicated Annual Confidential Reports for the years 1995-1996, 1996-1997 and 1998-1999, wherein the Appellant was assessed as “good”. In the absence of the aforesaid entries, it is apparent, that the remaining entries of the Appellant being “very good”, he would be entitled to be considered fit for the promotion, to the post of Chief Commissioner of Income Tax, on the basis the then prevailing DoPT guidelines, and the remaining valid Annual Confidential Reports.”

[Emphasis supplied]

13. Rule 5 of the Rules of 2015 reads as under:

***“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.”*

14. The first relief sought by the petitioner is to treat his uncommunicated ‘Uttam’ entries as adverse. While ‘Uttam’ category is not an ‘adverse’ entry *per-se* but, if it is causing an adverse effect on the promotion of the petitioner then, it can be covered under the ambit of Rule 5 of the Rules of 2015 inasmuch as the petitioner has not got an opportunity to represent against the same which could have led to the upgradation of the respective ACR after due consideration of the competent authority. The case laws cited in Dev Dutt (*Supra*), Sukhdev Singh(*supra*) and Prabhu Dayal Khandelwal (*supra*), lay down the requirement of communication of entries to the employees so that they can make timely requests for upgradation of the same and if the employee is deprived of such opportunity, such entries though, they may not be adverse as such, but being of lower grade can affect the service prospects of the employee. Learned Counsel for the petitioner has also filed two judgments of Hon’ble High Court of Uttarakhand passed in

Writ Petition (S/S) No. 1370 of 2019, Bholu Dutt Sharma vs. State of Uttarakhand and others, decided on 23.07.2020 and in *Writ Petition (S/B) No. 237 of 2016, Kailash Prakash Joshi vs. State of Uttarakhand & others*, decided on 29.08.2016, laying down the same principle. He has also filed copy of the minutes of the DPC dated 29.12.2015 in which Sri K.P.Joshi was not promoted having been put in 'Uttam' category while his juniors having 'Atti Uttam' category were promoted. Subsequently in compliance of the Hon'ble High Court's order dated 29.08.2016, on Sri K.P. Joshi's writ petition, quoted above, a review DPC was held on 05.10.2016, copy of whose minutes has also been filed, which shows that this review DPC ignored 'Uttam' entries of 2010-11 and 2011-12 and, on the basis of remaining entries, he was classified in 'Atti Uttam' category and recommended for promotion on the basis of this classification. The same should also be done in the case of present claim petitioner by ignoring his uncommunicated entries and classifying him on the basis of the entries of other years.

15. We, however, cannot agree to the prayer of the claim petitioner to upgrade the uncommunicated 'Uttam' ACRs as the consideration for the same could have been done only by competent authority after representation for the same was submitted by the petitioner. It would however be in the interest of justice, to afford an opportunity to the petitioner now to give representations for the upgradation of these entries to the competent authority within a period of 45 days who shall take suitable decision on the same within the further period as prescribed in the Rules of 2015.

16. Petitioner has also prayed for his notional promotion as per Rule 6 of the Rules of 2015 to the post of Chief Engineer Level-II w.e.f. the date on which juniors were promoted. Rule 6 of the Rules of 2015 reads as:

6.The effect of upgradation of Fair/Satisfactory, Good, Very Good Reports-Where after considering the representation against the Fair/Satisfactory, Good, Very Good report the competent authority passes the order to upgrade such entry then, if where at the time of promotion due to such reports the

concerned employee has been found ineligible or deprived from any other service benefits, then after upgradation of entries, he shall be reconsidered for promotion and other service benefits and if found eligible the notional promotion and other service benefits shall be provided from the date of the promotion of his juniors.

In respect of change of category of entry the competent authority shall pass speaking orders.

The above Rule presupposes that the petitioner shall give representation against the entries and after considering the representation, if the competent authority upgrades such entries, the concerned employee shall be reconsidered for promotion and other service benefits and if found eligible, the notional promotion and other service benefits shall be provided from the date of promotion of his juniors.

17. We have been given to understand that the petitioner has been considered for promotion to the post of Chief Engineer Level-II in earlier DPCs, in which he has not been found to fulfill the requisite criteria of merit. In the light of the above, a review DPC needs to be held in his case but, before the same, the petitioner has to indicate whether he wants to give representations against the uncommunicated 'good' entries or not. If he submits representations for upgradation of such entries, then after the competent authority 's decision on the same, the review DPC may be held and the entries may be read in the modified form after such decision. If the petitioner prefers not to furnish any representations for upgradation of such entries, then these uncommunicated entries are required to be ignored by the review DPC for consideration of his notional promotion to the post of Chief Engineer Level-II from the date of promotion of his juniors. The claim petition is accordingly disposed of with the following directions:

- (i) The uncommunicated 'Uttam' Annual Confidential Reports (ACRs) cannot be upgraded unless the petitioner submits representations

for upgradation of the same and the representations are duly decided by the competent authority.

- (ii) The petitioner is hereby given an opportunity to represent for upgradation of the uncommunicated '*Uttam*' entries within 45 days from today to the competent authority, who shall consider the same and take suitable decisions on the representations within the period as specified in the Rules of 2015. After such decisions have been taken, the review DPC for consideration of promotion of the petitioner to the post of Chief Engineer Level-II shall be held in which such entries shall be read and acted upon along with modifications, if any, done by the competent authority after decisions on his representations.
- (iii) If the petitioner opts not to give any representation for upgradation of above uncommunicated '*Uttam*' entries, the same shall be ignored while considering his promotion to the post of Chief Engineer Level-II by the review DPC, which may be convened shortly after such option of the petitioner.
- (iv) In the review DPC, if the petitioner is found fit for promotion on the criteria of 'merit-cum-seniority', he shall be given notional promotion to the post of Chief Engineer Level-II from the date his juniors were promoted on such post.

In the circumstances, no order as to costs.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: JULY 20, 2021.

DEHRADUN

KNP