

**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. 94/2010

Subhash Chandra Saxena, S/o Late Sri K.C.Saxena, C/o Shri D.S.
Rawat, Block B-1, Saraswati Vihar, Ajabpur Khurd, Dehradun.

.....Petitioner

VERSUS

1. State of Uttarakhand through Principal Secretary (Finance),
Uttarakhand, Dehradun,
2. Secretary, Finance, Section-9, State of Uttarakhand,
Dehradun,
3. Commissioner Tax, Uttarakhand (Entertainment Tax) 405,
Indira Nagar, Dehradun,
4. S.S. Valdiya, Deputy Secretary, Finance, Section-9,
Uttarakhand,
5. (Deleted)
6. Shivraj Singh Bohra, Assistant Entertainment Tax
Commissioner, Udham Singh Nagar.

.....Respondents

Present: Sri V.P. Sharma, Counsel
for the petitioner
Sri Umesh Dhaundiyal, A.P.O.
for the respondents No. 1, 2 and 3
Sri M.C.Pant, Counsel
for the respondent no.6

JUDGMENT**DATE: FEBRUARY 20, 2015****DELIVERED BY SRI D.K.KOTIA, VICE CHAIRMAN (A)**

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

“i. The promotion of Shri S.S.Bohra granted by impugned order dated: 04-10-2010 may pleased be cancelled.

ii. That notional promotion may pleased be granted to the petitioner w.e.f. 07-07-2010, when the DPC was constituted with all consequential benefits.

iii. That the appropriate payment for mental agony and harassment may kindly be awarded to the petitioner.

iv. The cost of this petition may kindly be awarded to the petitioner.”

2. The petitioner has mentioned the following in the claim petition in regard to the “cause of action.”

“The cause of action arose firstly on 07.07.2010 when the DPC was constituted and subsequently on the date when the impugned promotion order dated 04.10.2010 was passed.”

3. The petitioner in the claim petition has also challenged the promotion of S.C. Pokhariya and impleaded him as one of the parties (respondent No. 5). On application of respondent no.5, the Tribunal by its order dated 07.02.2012 directed the petitioner to delete the name of S.S.Pokhariya, respondent No. 5. Thereafter, the petitioner deleted his name from the array of respondents. As per the “relief sought” and “arising of the cause of action”, we are of the view that the petitioner has grievance against the promotion of Shivraj Singh Bohra, respondent No. 6 only and therefore, the

question of promotion of S.S.Pokhariya made in 2005 cannot be adjudicated upon in this petition.

4. The brief and relevant facts as stated in the claim petition are that the petitioner served in the Entertainment Tax Department and was promoted to the post of District Entertainment Officer in 1989. As per the seniority list, he was the senior most and placed at Sl. No. 1 in the list. Four vacancies of Assistant Commissioner, Entertainment occurred in 2007-08 but the promotions were delayed and the meeting of the Departmental Promotion Committee (DPC) was finally held on 07.07.2010 to consider the promotion from the post of the District Entertainment Officer to the post of Assistant Commissioner, Entertainment. On the basis of the recommendation of the DPC, Shivraj Singh Bohra (respondent No. 6) was promoted vide order dated 04.10.2010 (Annexure-I), who was junior to the petitioner. The petitioner retired on 31.08.2010 before the order of the promotion of Shivraj Singh Bohra was issued on 04.10.2010.

5. The petitioner has challenged the proceedings of the DPC dated 07.07.2010 mainly on the following grounds:

- (i) The name of Shivraj Singh Bohra (respondent No. 6) was recommended for the promotion ignoring the seniority of the petitioner.
- (ii) The required number of annual confidential entries were not available in respect of Shivraj Singh Bohra (respondent No. 6) in accordance with Rule 5 of the "The Uttarakhand Procedure of Selection For Promotion in the State Services (Outside the Purview of the Public Service Commission) on the basis of

“Seniority” and “Merit” subject to the Rejection of Unfit, (Procedure), Rules, 2009 (hereinafter referred to as Rules of 2009)

- (iii) The Constitution of the DPC was not in accordance with Rule 4(b) of the “The Uttarakhand Constitution of Departmental Promotion Committee (For Posts Outside the Purview of the Public Service Commission) Rules, 2002” (hereinafter referred to as the Rules of 2002). According to this Rule 4(b), no member of the DPC should have been below the rank of Additional Secretary but in the DPC, two officers were included who were below the rank of Additional Secretary.

Therefore, the petitioner has stated in the petition that the proceedings of the DPC are illegal and in place of Shivraj Singh Bohra (respondent No. 6), the petitioner should have been promoted. The petitioner has prayed that since he has retired on 31.08.2010, he should be promoted notionally after the cancellation of the promotion of respondent No. 6.

6. The claim petition has been opposed on behalf of respondents No. 1, 2 and 3. It has been mainly stated by the respondents No. 1, 2 and 3 in their written statement that the proceedings of the DPC are in accordance with the Rules and the petitioner though senior to the respondent No.6, was found “unfit” by the DPC and therefore, he has not been promoted and respondent No. 6 though junior to the petitioner was found “fit” and therefore, he has been promoted as per Rules. It has been stated that the petitioner is not entitled for any relief and the petition is liable to be dismissed.

7. By way of a separate written statement filed on behalf of private respondent No. 6, it has been mainly stated that the petitioner was not found fit for promotion. Therefore, he was not promoted. There is no illegality or irregularity in his (respondent No.6) promotion. Hence, the petition has not force and is liable to be dismissed.

8. Two separate rejoinder affidavits have been filed by the petitioner and mainly the facts stated in the claim petition have been reiterated.

9. We have heard all the parties and perused all the material available on record carefully.

10. Learned counsel for the petitioner argued that the promotion in question was to be made on the basis of the “Seniority to the rejection of the unfit.” For the sake of clarity, Rule 4 of “The Uttarakhand Government Servants (Criterion for Recruitment by Promotion) Rules, 2004 is reproduced below:”

“4. Criterion for Recruitment by Promotion— 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.”

It has been further contended by the learned counsel for the petitioner that the petitioner was senior to the respondent No. 6 and therefore, the promotion of respondent No. 6 ignoring the seniority of the petitioner is illegal. While accepting the criterion as given in Rule 4 above and also the seniority of the petitioner, learned A.P.O. on behalf of respondent No. 1, 2 and 3 as well as learned counsel on behalf of respondent No. 6 have contended that the petitioner was found “unfit” by the DPC and therefore applying the criterion of “Seniority to the rejection of the Unfit”, he was denied the promotion.

11. The question before us is to examine whether the petitioner has been rightly found “unfit” by the DPC as per Rules or not. The relevant Rule is Rule 3 of the Rules of 2009 which reads as under:

“3. Procedure of selection on the basis of Seniority—

(1) The Departmental Promotion Committee shall consider the names of the candidates, included in the eligibility list, prepared under the provisions of Rule 5 of the Uttaranchal Promotion By Selection (On Posts Outside the Purview of Public Service Commission) Eligibility List Rules, 2003, for promotion on the basis of ‘Seniority’ or ‘Seniority-Cum-Merit’, subject to rejection of unfit. First of all, the name of the senior most officer shall be considered and after declaring him/her ‘fit’ or ‘unfit’, followed by the second and third officer and so on till required number of suitable officers are available for promotion against the vacancies.

When the desired officers for promotion become available, the names of the officers thereafter need not to be considered.

- (2) *For the purpose of this procedure, the available up to date entries of the concerned officers for the period of last ten years service on the post just below the promotional post shall be considered and if the entries of less than 10 years only are available, all the available entries shall be considered.*
- (3) *If five or more entries out of the preceding '10' years entries in the character roll of a candidate, included in the field of eligibility are classified as 'Good' or 'Higher' Category and the entries of two years immediately preceding the year of consideration are not adverse, such candidate shall be declared 'fit' for promotion by the Departmental Promotion Committee.*
- (4) *If in the annual confidential entry in any year or by special adverse entry, the integrity of any candidate is mentioned as doubtful, such candidate shall not be considered eligible for promotion upto 5 years from the year, in which such entry has been made.*
- (5) *In case of promotion to be made as above, the candidate can not claim his promotion purely on the basis of seniority as a matter of right. If he is proved to be unfit for the post in accordance with the above criterion, the Selection Committee may recommended the employee junior to him/her for promotion.*
- (6) *After considering the eligible candidates by the Departmental Promotion Committee and declaring them as 'fit' or 'unfit', the candidate declared 'fit' shall be recommended for promotion in order of his/her seniority."*

12. The "Annual Confidential Entries" of the petitioner for 10 years as shown by the respondents No. 1,2 and 3 on

page 3 of their Written Statement and which are undisputed are as given below:

Serial No.	Year	Grading of ACR
1.	2000-01	प्रमाणपत्र
2.	2001-02	शपथ पत्र/आदेश संख्या 2908 दिनांक 24.10.2001 द्वारा निन्दा करते हुए भर्त्सना। शासन द्वारा प्रत्यावेदन भी निरस्त
3.	2002-03	शपथ पत्र
4.	2003-04	शपथ पत्र
5.	2004-05	उत्कृष्ट/ आदेश सं01481 दिनांक 28.6.04 द्वारा परनिन्दा
6.	2005-06	अति उत्तम (आदेश सं0 2664 दिनांक 16.1.06 द्वारा कड़ी भर्त्सना)
7.	2006-07	अति उत्तम
8.	2007-08	अति उत्तम
9.	2008-09	उत्कृष्ट (दि0 17.8.08 से 31.10.08) अति उत्तम (दि0 1.11.08 से 31.3.09)
10.	2009-10	अति उत्तम

13. Rule 3(3) of the Rules of 2009 provides two essential conditions to declare a candidate fit for promotion which are as given below:

- (i) Five or more entries out of preceding 10 years' entries are classified as 'Good' or 'Higher' Category; and
- (ii) The entries of two years immediately preceding the year of consideration are not adverse.

Undisputedly, entries of the petitioner for two immediately preceding years are not adverse therefore, the condition (ii) above is clearly met by the petitioner.

14. In so far as condition (i) above in Para 13 is concerned, the entries of the petitioner for the years 2006-07, 2007-08, 2008-09 and 2009-10 (4 years) are undisputedly higher than the 'Good' category. The fifth entry of the

petitioner in respect of the years 2005-06 needs further examination. This entry is shown as given below:

<u>Year</u>	<u>Grading of ACR</u>
2005-06	अति उत्तम (आदेश स० 3664 दिनांक 16.01.06 द्वारा कड़ी भर्त्सना)

Learned A.P.O. on behalf of respondent Nos. 1,2 and 3 has contended that because of “कड़ी भर्त्सना” entry given to the petitioner on 16.01.2006 as special adverse entry during the year 2005-06, he was not found fit for the promotion and declared unfit by the DPC.

15. It is admitted to the respondents No. 1, 2 and 3 that the grading of petitioner’s entry for the year 2005-06 is “अति उत्तम” (Very Good) and the same was awarded to the petitioner after the end of the year 2005-06. But as the petitioner was given a special adverse entry of “कड़ी भर्त्सना” during the course of the year 2005-06 on 16.01.2006, his annual entry was considered “adverse” by the DPC and he was not found fit as he did not have five entries having good or higher category. The question now to be examined is whether the annual entry “Very Good” for the year 2005-06 is nullified by the special adverse entry “कड़ी भर्त्सना” on 16.01.2006 no not.

16. The issue raised in para 15 above has been examined by the Government of Uttarakhand and a Government Order (G.O.) has been issued on 08.01.2003. Learned counsel for the petitioner has contended that according to this G.O., the entry of the petitioner for the year 2005-06 should have been

treated as “Very Good” by the DPC. The G.O. is reproduced below:

“प्रेषक,

संख्या 1625/कार्मिक-2/2002

आलोक कुमार जैन,
सचिव,
उत्तरांचल शासन।

सेवा में,

- 1- समस्त प्रमुख सचिव/सचिव/अपर सचिव,
उत्तरांचल शासन।
- 2- समस्त विभागाध्यक्ष/कार्यालयाध्यक्ष,
उत्तरांचल।
- 3- समस्त मण्डलायुक्त,
उत्तरांचल।

कार्मिक अनुभाग-2

देहरादून : दिनांक 08 जनवरी, 2003

विषय- राज्याधीन सेवाओं में राजपत्रित अधिकारियों की गोपनीय पंजिका में चेतावनी, निन्दा, भर्त्सना, असन्तोष आदि के रखे जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निदेश हुआ है कि समय-समय पर राज्याधीन सेवाओं में कार्यरत समूह 'क' तथा समूह 'ख' के अधिकारियों के वार्षिक गोपनीय प्रविष्टियों के सम्बन्ध में यह प्रश्न उठाया जाता है कि कौन-कौन से अभिलेख वार्षिक गोपनीय प्रविष्टियों में सम्मिलित किये जायें। इस सम्बन्ध में शासन द्वारा सम्यक् विचारोपरान्त निम्नलिखित निर्णय लिये गये हैं :-

- (1) अनुशासनिक कार्यवाही के फलस्वरूप लिये गये निर्णय के अनुसार जारी निन्दा (सेन्सर), चेतावनी (वार्निंग), असन्तोष (डिसप्लीजर) या भर्त्सना (रिप्रीमेन्ड) आदि से सम्बन्धित पत्रों को अधिकारी की चरित्र पंजी पर रखा जायेगा।
- (2) शासन स्तर से जारी चेतावनी, असन्तोष या भर्त्सना सम्बन्धी पत्रों को भी सम्बन्धित अधिकारी की चरित्र पंजी पर रखा जायेगा।
- (3) अधिकारी की वार्षिक प्रविष्टि अंकित करने हेतु प्राधिकृत प्रतिवेदक/समीक्षक/स्वीकर्ता अधिकारियों द्वारा दी गयी चेतावनी अधिकारी की चरित्र पंजिका पर केवल उस स्थिति में रखी जायेगी, जब वार्षिक प्रविष्टि अंकित करने हेतु प्राधिकृत अधिकारी द्वारा यह उल्लेख किया जाय कि सम्बन्धित अधिकारी को चेतावनी दी गयी थी। यदि किसी उच्च अधिकारी द्वारा अपने अधीनस्थ अधिकारी को चेतावनी दी जाती है अथवा असन्तोष अथवा भर्त्सना सूचित की जाती है तो उसे उस अधिकारी की व्यक्तिगत पत्रावली में रखा जायेगा। वर्ष के अन्त में प्रतिवेदक अधिकारी प्रविष्टि अंकित करते समय इस पर विचार करेंगे और यदि उस अधिकारी में सुधार पाया जाता है तो उस चेतावनी अथवा असन्तोष या भर्त्सना का उल्लेख प्रविष्टि में नहीं किया जायेगा। यदि

सुधार नहीं पाया जाता है तब उस चेतावनी अथवा असन्तोष या भर्त्सना को चरित्र पंजिका में रखते हुए वार्षिक प्रविष्टि में उसका उल्लेख किया जायेगा।

(4) शासन से भिन्न प्राधिकारियों जिसमें सांविधिक प्राधिकारी (कॉन्सटीट्यूशनल अथॉरिटी) भी सम्मिलित हैं द्वारा जारी की गयी चेतावनी आदि को सम्बन्धित अधिकारी की चरित्र पंजी पर रखने के सम्बन्ध में शासन द्वारा समस्त परिस्थितियों को दृष्टिगत रखते हुए सावधानीपूर्वक विचार कर यह निर्णय लिया जायेगा कि इसे चरित्र पंजी पर रखा जाय अथवा नहीं।

(5) चरित्र पंजी पर उपरोक्तानुसार रखी गयी चेतावनी, भर्त्सना, असन्तोष आदि को प्रतिकूल प्रविष्टि के रूप में माना जायेगा और तदनुसार अग्रेतर कार्यवाही की जायेगी।

अनुरोध है कि कृपया उक्त निर्णय से अपने अधीनस्थ समस्त कर्मचारियों को अवगत कराने का कष्ट करें।

भवदीय,
आलोक कुमार जैन,
सचिव।”

17. It is clear from para 3 of the G.O. above that after the end of the year 2005-06 while recording annual entry, the reporting office had to consider “कड़ी भर्त्सना” entry given during the course of the year 2005-06 on 16.01.2006. After due consideration, “कड़ी भर्त्सना” entry could either be ignored or could be made a part of the “annual entry.” If consequence of “कड़ी भर्त्सना” entry is to be taken then, it is necessary to mention the same in the annual entry. It is clear from the above G.O. that any adverse entry given during the course of the year merges into the annual entry. The annual entry of the petitioner for the year 2005-06 was given after considering the “कड़ी भर्त्सना” entry given during the course of the year on 16.01.2006 and he was graded as “Very Good” for the year 2005-06. As a result, the “कड़ी भर्त्सना” entry given during the course of the year loses its value and cannot be made a ground to treat the annual entry for the year 2005-06 as an adverse entry when the annual entry for the year 2005-06 for the petitioner was graded as “Very Good”.

18. In view of discussion in paragraphs 11 to 17 above, we are of the clear view that the petitioner's annual entry for the year 2005-06 is "Very Good" and he had in all five entries classified higher than "Good" category and his entries of two years immediately preceding the year of consideration were not adverse and therefore, he fulfills the conditions laid down in Rule 3(3) of the Rules of 2009 and therefore, the petitioner was "fit" for the promotion.

19. Learned A.P.O. and counsel for the respondent No. 6 have also contended that the petitioner has also received special adverse entries on 20.05.1997, 24.10.2001 and 28.06.2004. Learned counsel for the petitioner contended that these adverse entries were either not communicated or representation against the same were not decided. We do not find it necessary to examine these adverse entries as finding in respect of this would not affect the decision in this case in the light of Rule 3(3) of the Rules of 2009 as irrespective of above adverse entries, the petitioner already has five entries (2009-10, 2008-09, 2007-08, 2006-07 and 2005-06) higher than the "Good" category and he is therefore, fit for the promotion.

20. Learned A.P.O. and learned counsel for the respondent No. 6 have also contended that as per the letter of the Commissioner, Entertainment, Uttar Pradesh dated 21.03.2005, two departmental enquiries one pertaining to the year 2003 and another relating to the year 2004 are pending against the petitioner. Learned counsel for the petitioner has denied this. It is surprising that respondents are relying on a

communication received by them nearly 10 years ago. Learned A.P.O. could not demonstrate the status of these departmental inquiries as to whether these inquiries have been finalized or these are still pending. Learned A.P.O. could not demonstrate as to whether this information was provided to the DPC or not. It is also well established that in case departmental proceedings are pending, the procedure of sealed envelope is adopted. Perusal of the minutes of the DPC does not reveal any information in this regard. The respondents have failed to provide details of these departmental inquiries and their effect on promotion proceedings. Under these circumstances, we do not find that these so-called old inquiries are relevant to be considered for deciding the promotion of the petitioner specially when the petitioner fulfils the condition of Rule 3(3) of the Rules of 2009.

21. Learned counsel for the petitioner has also contended that the DPC has not been constituted as per Rules. Rule 4 of the Rules of 2002 reads as under:

“4. Notwithstanding anything contrary contained in any other Rules or Orders, the Selection Committee shall be constituted as follows:-

(a) For the post of Head of Department and Additional Head of Department in the departments:

<i>(1) Chief Secretary</i>	<i>Chairman</i>
<i>(2) Secretary, Karmik</i>	<i>Member</i>
<i>(3) Principal Secretary/ Secretary of the Department concerned</i>	<i>Member</i>

(b) For the promotion quota of the posts belonging to Group ‘A’ and ‘B’ as classified by Government from time to

time, where no Departmental Selection Committee for promotion is prescribed in any other Rules:

(1) Principal Secretary or Secretary to Government of the concerned department;

(2) Secretary Karmik or his nominee, not below the rank of Additional Secretary to Government;

(3) Head of the department of the concerned department and where there is no Head of the department such officers not below the rank of Additional Secretary to Government nominated by the Secretary of department. The senior most member shall be the Chairman of the committee.”

However, the DPC was constituted consisting of the following members:

1. Secretary, Finance;
2. Additional Secretary, Social Welfare;
3. Joint Secretary, Department of Personnel; and
4. Deputy Commissioner, Entertainment Tax (as representative of the Commissioner, Entertainment Tax).

Learned counsel for the petitioner in his arguments objected inclusion of officers at No. 3 and No. 4 above as they were officers below the rank of Additional Secretary to Government. Learned APO has admitted this deficiency but has stated that due to shortage of officers, sometimes officers below the rank of Additional Secretary are nominated. Though we find that the DPC has not been constituted strictly as per Rules yet under the circumstances we are of the view that it would not be fair and just to disturb the constitution of the DPC at this stage as the deficiency revealed by the petitioner can be termed merely an irregularity and it does not amount illegality.

22. Learned counsel for the petitioner has also contended that the required number of entries were not available regarding Shivraj Singh Bohra, respondents No. 6. He has pointed out Rule 5 of the Rules of 2009 which reads as under:

“5. Availability of minimum annual entries for the selection on the basis of ‘merit’ and “Seniority subject to the rejection of unfit.”

Annual entries of at least 06 years out of the last ten years entries during the period of service on the post just below the promotional post must be available.”

It has been contended by learned counsel for the petitioner that the post just below the promotional post is “District Entertainment Officer” and only 5 annual entries of respondent No. 6 on this post were available. Learned APO has contended that the minimum length of service required for promotion from the post of District Entertainment Officer to the post of Assistant Commissioner, Entertainment is 3 years. Respondent No. 6 had completed 5 years of service on the post just below the promotional post and therefore, all 5 annual entries of this post and earlier 5 annual entries on lower post i.e. 10 annual entries in all were considered by the DPC which is as per Rules. He also pointed out the Rule 3(2) of the Rules of 2009 which reads as under:

“3. Procedure of selection on the basis of Seniority

(1).....

(2) For the purpose of this procedure, the available upto date entries of the concerned officers for the period of last ten years service on the post just below the promotional post shall be

considered and if the entries of less than 10 years only are available, all the available entries shall be considered.”

Keeping in view that minimum 3 years of the service on the post just below the promotional post is required for promotion and the Rule 5 read with Rule 3(2) of the Rules of 2009, we do not find any illegality in considering the promotion of the respondent No. 6 by the DPC on the basis of all 5 annual entries on the post just below the promotional post and 5 earlier annual entries on lower post.

23. For the reasons stated above, we reach the conclusion that the petitioner was senior and fit for the promotion to the post of Assistant Commissioner, Entertainment. Since he has already retired, he is entitled to be promoted notionally.

ORDER

The petition is partly allowed. Respondents No. 1, 2 and 3 are directed to promote the petitioner notionally (since the petitioner has already been retired) to the post of Assistant Commissioner, Entertainment with all consequential benefits within a period of three months from today. No order as to costs.

Sd/-

V.K.MAHESHWARI
VICE CHAIRMAN (J)

Sd/-

D.K.KOTIA
VICE CHAIRMAN (A)

DATE: FEBRUARY 20, 2015
DEHRADUN

KNP