

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
BENCH AT NAINITAL**

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. U.D.Chaube

-----Member (A)

CLAIM PETITION NO. 39/NB/DB/2015

Mahesh Chandra Pathak, S/o Late Sri Gopal Dutt Pathak, R/o Village Joguda Thal Post Office Thal Tehsil Berinag, District Pithoragarh, presently posted as Ahalmad/Junior Clerk, Sub Divisional Magistrate Office, Munsyari, District Pithoragarh.

.....Petitioner

VERSUS

1. State of Uttarakhand through Secretary, Revenue, Dehradun.
2. District Magistrate, Pithoragarh, District Pithoragarh.
3. Sub Divisional Magistrate, Munsyari, District Pithoragarh.

.....Respondents

Present: Sri Kishore Kumar, Ld. Counsel
for the petitioner

Sri V.P. Devrani, Ld. A.P.O.
for the Respondents

JUDGMENT

DATED: DECEMBER 08, 2016

(Hon'ble Mr. Ram Singh, Vice Chairman (J))

1. The petitioner has prayed for a direction to the respondents to treat his annual entries as upgraded on account of non-communication of the adverse entries, with a further direction to the respondents to hold review DPC to consider his case for promotion along with all consequential benefits w.e.f. 01.03.2014 taking into

account the relevant Government Order treating the non-ACRs as blank and evaluate the assessment of the petitioner as per available record and to give all consequential benefits w.e.f. the date from which his juniors were granted.

2. The facts giving rise to the petition are that the petitioner had joined his services as junior clerk on 14.02.2005 and was posted in the establishment of the respondents. While posted in District Pithoragarh, he was suspended and some departmental enquiry was initiated on the ground of his so called absence from duty on 06.05.2013, to which he replied and justified his absence. The enquiry officer issued a charge sheet to him vide order dated 22.07.2013, which was replied by him. The request of the petitioner to supply the papers was not met out and in violation of the rules, the enquiry was conducted. The enquiry report was submitted in February, 2014 to the respondent no. 2 and a punishment of stoppage of one increment for one year was passed against the petitioner on 11.03.2014. The statutory appeal against the same was rejected vide order dated 02.03.2015.

3. When the petitioner was facing the said departmental proceedings, in the mean time, the respondents started promotional exercise on the post of senior assistant in the year 2014, for which a Departmental Promotion Committee was constituted on 01.03.2014. The committee proceeded with the records of the eligible candidates. The Departmental Promotion Committee vide its recommendation dated 01.03.2014 recommended the names of the persons junior to the petitioner and when this fact came into the knowledge of the petitioner, he requested the respondent no. 2 on 06.02.2015 to supply the copy of the DPC held on 01.03.2014, which was not given to him.

4. When on 20.05.2015, the petitioner sought information under RTI Act, the copy of the seniority list was received by him in which he was shown at sl. No. 25. He was shown at top of the list of the junior clerks and the Departmental Promotion Committee proceeding of 01.03.2014, was received by the petitioner. After perusal of the report of the committee, the petitioner, for the first time on 22.06.2015, got knowledge about his downgraded entries for the year 2010-11 in his ACRs and also got the information about the blank entries for the year 2008-09 and 2012-13. The petitioner has submitted that the aforesaid adverse entries was never communicated to him and due to non-communication of the entries, the petitioner could not represent against the same.

5. Thereafter, the petitioner vide representation dated 24.07.2015, requested the respondent no. 2 to consider his case for promotion to the post of senior clerk in view of the seniority, but till date, the same is pending for consideration and he was orally informed that he was awarded an adverse entry for the year 2010-11. The petitioner has also submitted that he was punished on the basis of alleged sham show enquiry and vague charges by the enquiry officer, which is against the rules. The petitioner even being senior, eligible and meritorious candidate, was deprived from his promotion to the post of senior clerk and ignoring his seniority and taking cognizance of so called downgraded entry, he was not promoted.

6. No opportunity of hearing to represent against the downgraded entry was granted to the petitioner, which is in violation of Article 14 and 16 of the Constitution of India and also against the law laid down by the Hon'ble Apex Court in **Devi Dutt Vs. Union of India, 2008(8) SCC and Sukhdev Singh Vs. Union of India and others (2013)9 SCC, 566**. The petitioner has also submitted that the Uttarakhand Government Order regarding the procedure to be followed for promotion was also ignored and non-availability of his

ACRs, were not taken as per the relevant Government Order, which prescribes the time schedule for recording the ACRs. Further Government order dated 30.09.2010 also categorises the entries to be given to the employees and in view of that, his recorded entries must be treated higher to the scale recorded in his record. The petitioner has become a victim of hostile discrimination of the respondents. His fundamental rights for promotion have been violated. Hence this petition.

7. The petition has been opposed by the respondents with the contention that the DPC held on 01.03.2014 did not find the petitioner eligible for promotion because of the reasons that the ACRs for the year 2010-11 were found adverse and the entries for the year 2009-10, 2011-12 were not made available and entries for the year 2012-13 and 2005 to 2009 were not made available due to not discharging proper duties in these particular financial years. The criteria for promotion is seniority cum merit subject to rejection of unfit and the past entries for five years have been taken into account and the DPC has correctly assessed the bad/adverse entry for the year 2010-11 earned by the petitioner and the subjective satisfaction of the DPC cannot be disputed before this Court. No bias has been alleged against the DPC. The ruling cited by the petitioner has no retrospective effect, hence, the petitioner cannot take benefit of the same. The petitioner has challenged the entry awarded for the year 2009-10 and 2010-11 after a lapse of about three years delay, without explaining the laches. Hence the petition being time barred is liable to be dismissed. The petitioner was punished by the competent authority by stoppage of one increment for one year, so he was not granted promotion. His candidature was considered by the DPC and after perusal of the record, the promotion was rightly denied. The DPC has specifically recorded that due to his suspension and adverse entry for the year 2010-11, he was found unsuitable for promotion.

The non-availability of the entry cannot be treated as higher entries and the DPC has rightly taken a notice of the same. No relief to quash the said entry can be asked by the petitioner now. The present claim petition is devoid of merit and is liable to be dismissed.

8. The petitioner has submitted rejoinder affidavit reiterating the facts which have been stated in the claim petition.

9. We have heard learned counsel for the parties and perused the record carefully.

10. By way of the petition, the petitioner has raised two points for consideration, firstly, that he was denied his promotion on the basis of the adverse entry for the year 2010-11 which was never communicated to him and he was not granted opportunity to represent against the same and second point, he has raised that for some years, his entries were not made available to the DPC as it was shown blank and he was denied promotion on this account for which he is not responsible because as per the Government Order, it is the duty of the reporting as well as accepting authorities to maintain the records and the Government order prescribes that if the entries were not available then promotion should be made on the basis of available entries and employee cannot be punished on account of this failure.

11. The record of the DPC clarifies that the petitioner was senior most in his cadre when he was considered for promotion and this fact was recorded by the DPC that he is at sl. No. 1 in the seniority list and he was denied promotion on account of his suspension and on account of adverse entry for the year 2010-11. The record of DPC also clarifies that for the year 2008-09 and 2012-13, his ACRs were not placed before the DPC and it was shown blank. For the year 2009-10, his entries was 'उत्तम', for the year 2011-12, it was shown 'अच्छा' and for the year 2010-11, it was recorded 'खराब'. The petitioner has raised his defence that for the year 2010-11 and for other years, bad entry was

never communicated and he was not afforded any opportunity to represent against the same.

12. The Hon'ble Apex Court in the case of **Dev Dutt Vs. Union of India & others, JT 2008 (7) SC 463** has laid down the law that not only the adverse entry but all the entries must be communicated to the employees within a reasonable period so that employee may submit his representation for upgradation of his entries.

13. The Uttarakhand Government has also framed the rules known as the Uttaranchal Government Servants (Disposal of Representation Against Annual Confidential Reports & Allied Matters) Rules, 2002 (hereinafter referred to as the Adverse Entries Rules, 2002), which prescribes the procedure for recording of entries and communication of adverse entry as well as its disposal. The Rule 4(1) of the aforesaid Adverse Entries Rules, 2002, provides as under:

“(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.”

Hence, the Government Rules specifically provide that in case of any adverse entry, the whole report should be communicated in writing to the government servant concerned within a period of 90 days from the date of recording of such report. Not only this, a certificate to this effect about communication is also required to be recorded in the report. But, in the present case, the

petitioner was never communicated of his adverse entries, hence, he could not submit his representation.

14. Rule 5 of the Adverse Entries Rules, 2002 also prescribes that adverse report, which is not communicated to the employees or the representation of the employees against the adverse report has not been disposed of in accordance with Rule 4, the such report will not be treated adverse for the purpose of promotion, crossing efficiency bar and other service matters. Hence in view of Rule 5, the adverse entry, which was not communicated to the petitioner must not be taken into account by the DPC as per the Rule 5 of the Adverse Entries Rules, 2002. The non-communication of the said entries is also against the law laid down by the Hon'ble Apex Court. Hence, on the basis of the said entries for the year 2010-11, which was not communicated to the petitioner, promotion cannot be denied.

15. The second point raised by the petitioner is that DPC has not taken notice of relevant G.O. about non-availability of his ACRs.

16. The Uttarakhand Government vide its G.O. Karmik Anubhag-2 No. 1801/Karmik-2/2002-Dehradun dated 23.06.2003 (Annexure: 5) has prescribed the procedure for appointment/promotion on the government post. The procedure for the selection by way of promotion has been prescribed from clause-8 to 51 and the procedure to be followed before conducting DPC has been prescribed from Clause-24 to 39. The clause 28 of the said government order reads as under:

“28- यदि पात्रता सूची के किसी कार्मिक की कुछ अवधि/वर्षों की वार्षिक प्रविष्टि प्राप्त/उपलब्ध न हों, तो अप्राप्त/अनुपलब्ध वार्षिक प्रविष्टियों को ब्लैक दर्शाया जाये एवं उपलब्ध प्रविष्टियों/अभिलेखों के आधार पर (औसत के आधार पर)चयन समिति द्वारा उस कार्मिक के विषय में समुचित मूल्यांकन किया जाय।”

17. Another Government Order of the personnel department dated 18.12.2003 (Annexure: 6) prescribes the procedure for recording the annual confidential remarks. As per Clause-7, a time schedule has been prescribed for recording the such entries , which reads as under:

“(1) अराजपत्रित कर्मचारियों की वार्षिक प्रविष्टि हर हालत में दिनांक 31 अगस्त तक पूरी कर ली जाये। जिनमें दो स्तर निर्धारित हों, इनमें प्रतिवेदक अधिकारी 31 जुलाई तक स्वीकर्ता प्राधिकारी को अपनी संस्तुति उपलब्ध करा दें।

(2) ऐसे राजपत्रित अधिकारियों जिनके प्रतिवेदक अधिकारी, समीक्षक अधिकारी और स्वीकर्ता अधिकारी विभागाध्यक्ष अथवा उनसे निम्न स्तर के अधिकारी हैं, उनके अधीनस्थ अधिकारियों की वार्षिक प्रविष्टियाँ निश्चित रूप से दिनांक 31 अगस्त तक पूर्ण करी ली जायें।

(3) ऐसे राजपत्रित अधिकारी जिनके समीक्षक अधिकारी और स्वीकर्ता अधिकारी शासन स्तर के अधिकारी हैं। की वार्षिक प्रविष्टि विभागाध्यक्ष द्वारा शासन के सम्बन्धित प्रशासनिक विभाग को दिनांक 31 अगस्त तक भेज देनी चाहिए और शासन के सम्बन्धित विभाग इन प्रविष्टियों को दिनांक 30 सितम्बर तक पूर्ण करा लेंगे।

(4) ऐसे राजपत्रित अधिकारी जिनके प्रतिवेदक अधिकारी, समीक्षक अधिकारी एवं स्वीकर्ता अधिकारी शासन स्तर के अधिकारी हैं, की वार्षिक प्रविष्टियाँ निम्न समय सारणी के अनुसार की जायेगी:—

(क) प्रतिवेदक अधिकारी— दिनांक 3 जुलाई तक

(ख) समीक्षक अधिकारी— दिनांक 31 अगस्त तक

(ग) स्वीकर्ता अधिकारी— दिनांक 30 सितम्बर तक।”

18. In clause 8 of the said G.O., it is also prescribed that the officer, who is responsible to record the entry of his subordinate, if fails to record such entry then adverse entry in his ACRs must be recorded. In clause-9, the grading which can be recorded have been prescribed. Clause 17 to 20 specifically cast a responsibility to communicate the such entries and the Government Order prescribes that all the proceedings should be completed within a specified period.

19. It was argued by learned counsel for the petitioner that the petitioner is not responsible in any manner to make available his ACRs to DPC and it is the responsibility of the Reporting as well as Accepting Authorities and his higher authorities to maintain such record and if it is adverse, he should be communicated for the same. The court found that the argument of the learned counsel for the petitioner is correct because of the reasons that the Government Order has specifically provided that if the entries of any particular year is not available then the promotional exercise should be taken on the basis of entries available before the committee. In the case of the petitioner, this procedure was not followed and the court is of the view that the DPC had not taken the proper notice of the Government order, Rules and the concerned law laid down by the Hon'ble Apex Court.

20. When this issue was raised by the petitioner that he was never communicated about the adverse entry, the respondent was having an opportunity to file the record of such communication, if any, which was not filed before the court, which shows that the contention of the petitioner about non-communication of adverse entry, is correct.

21. The respondents have also taken a plea of delay and latches that the petitioner has challenged his adverse entry after a long lapse of time. The court is of the view that this ground is not sustainable because the petitioner came to know about this fact only after receiving information under RTI Act and thereafter, when the petitioner has submitted his representation, his representation was not disposed of and on account of inaction of department, this petition was filed and delay is condoned.

22. The petitioner has also referred to the Government Orders dated 30.09.2010, which was issued in continuation of the G.O. dated

18.12.2003 (Annexure; 6) and vide G.O. dated 30.09.2010, it has been prescribed that instead of five, now the entries would be recorded only in four categories now i.e. उत्कृष्ट (Outstanding), अति उत्तम (Very Good), उत्तम (Good), खराब/असंतोषजनक (Bad/Unsatisfactory). Hence, अच्छा/संतोषजनक (Good/Satisfactory) has been abolished and that should be treated as 'Good' and the Government Order specifically prescribes for the same that अच्छा/संतोषजनक will be treated as उत्तम (Good) and higher marking should be made accordingly. The petitioner was awarded अच्छा/संतोषजनक in the year 2011-12, which will be treated as उत्तम (Good) in view of the said G.O. dated 30.09.2010. Hence, accordingly, out of the petitioner's five years entries, two years blank entries cannot be treated against him. The entries for the year 2011-12 would be treated उत्तम (Good) and the entries for the year 2010-11 cannot be treated as a bar in his promotion accordingly.

23. In view of the above finding, the court is of the view that the petitioner was denied his promotion on the ground, which is against the rules and law. It is admitted to the respondents that he was senior most in his feeding cadre of junior clerk. It is also admitted that the criteria for promotion is seniority subject to rejection of unfit and the ground of his rejection on the basis of adverse entry, was wrongly taken into account because of non-communicating adverse entry, which cannot debar an employee from his promotion.

24. In view of the above, the petition deserves to be allowed with the following orders.

ORDER

The claim petition is allowed. The respondents are directed to hold a review DPC within a period three months and to consider the case of the petitioner for promotion to the post of Senior Assistant on the basis of his eligibility and merit, treating his entries as referred above and to evaluate the assessment of the petitioner

as per available record and to consider him for the promotional post, and if found fit, he should be granted all consequential benefits from the date from which his juniors were granted promotion. No order as to costs.

(U.D.CHAUBE)
MEMBER (A)

(RAM SINGH)
VICE CHAIRMAN (J)

DATE: DECEMBER 08, 2016
NAINITAL

KNP