

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

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. D.K.Kotia

-----Vice Chairman (A)

CLAIM PETITION NO. 17/DB/2015

Man Singh S/o Late Sri Harsi Ram, presently serving as Accountant, Parvatiya Depot, Dehradun, Uttarakhand Transport Corporation, Dehradun.

.....**Petitioner**

VERSUS

1. Managing Director, Uttarakhand Transport Corporation, Head Office, 1-Rajvihar, Chakrata Road, Dehradun.
2. General Manager (Administration) Uttarakhand Transport Corporation, Dehradun.
3. Deputy General Manager (Personnel) Uttarakhand Transport Corporation, Head Office, 1- Rajvihar, Chakrata Road, Dehradun.
4. Regional Manager (Operation) Uttarakhand Transport Corporation, Dehradun.
5. Lavkesh Kumar, Senior Accountant, Uttarakhand Transport Corporation, Headquarter, Dehradun.
6. Shushil Sharma, Senior Accountant, Uttarakhand Transport Corporation, Depot, Dehradun.
7. Neeta Gaur, Senior Accountant, Uttarakhand Transport Corporation, Office of Regional Manager, Dehradun.
8. Nand Lal, Senior Accountant, Uttarakhand Transport Corporation, Haldwani Depot, Nainital.

9. Manohar Singh Surmal, Senior Accountant, Uttarakhand Transport Corporation, Gramin Depot, Dehradun.
10. Leela Lohani, Senior Accountant, Uttarakhand Transport Corporation, Kathgodam Depot, Nainital.
11. Ajeet Singh, Senior Accountant, Uttarakhand Transport Corporation, Haridwar Depot, Haridwar.
12. Vinay Kumar, Senior Accountant, Uttarakhand Transport Corporation, Headquarters, Dehradun.
13. Sanjay Pandey, Senior Accountant, Uttarakhand Transport Corporation, in the office of Regional Manager, Kathgodam, Nainital.
14. State of Uttarakhand through Secretary, Transport, Secretariat, Uttarakhand.

.....**Respondents.**

Present: Sri M.C.Pant, Ld. Counsel
for the petitioner
Sri Umesh Dhaundiyal, Ld. A.P.O.
for the respondent No.14
Sri Indrajeet Singh, Counsel
for the respondents No.1 to 4.

JUDGMENT

DATED: MARCH 08, 2018

(HON'BLE MR. D.K.KOTIA, VICE CHAIRMAN (A))

1. The petitioner has filed present claim petition seeking following reliefs:

“(i) To set aside the impugned order dated 27.08.2014 (Annexure A-1) passed by the respondent no. 1.

(ii) To direct the respondents to give promotion to the petitioner on the post of Accountant w.e.f. 13.03.2013 i.e. the date when the juniors to the petitioners were promoted pursuant to DPC dated 02.03.2013 alongwith all consequential benefits.

(iii) Any other relief which the court deem fit and proper in the circumstances of the case.

(iv) Cost of the petition be awarded to the petitioner.”

2. The petitioner was appointed on 01.05.1989 in the State Road Transport Corporation. The petitioner was promoted on the post of Accountant in the Corporation on 24.02.2010.

3. The Accountants are further promoted to the posts of Senior Accountants in the Corporation. The criterion for promotion from the post of Accountant to the post of Senior Accountant is seniority subject to rejection of unfit.

4. The promotions from the post of Accountant to the post of Senior Accountant are governed by the उत्तराखण्ड (लोक सेवा आयोग की परीधि के बाहर) राज्याधीन सेवाओं में पदोन्नति के लिए चयन प्रक्रिया नियमावली, 2013 (hereinafter referred as Promotion Rules of 2013).

5. The Promotion Rules of 2013 provide that for determining the suitability of a person for promotion, annual entries of 5 years preceding the relevant recruitment year are to be considered. The Promotion Rules of 2013 also provide that when the criterion for promotion is seniority subject to rejection of unfit, a person will be declared fit for promotion when he has minimum 4 out of 5 annual entries as 'good' or above 'good'.

6. It is pertinent to mention here that there are 5 grades in which annual entries are given to the employees:

- i. उत्कृष्ट (Excellent)
- ii. अतिउत्तम (Very Good)
- iii. उत्तम (Good)
- iv. अच्छा/सन्तोषजनक (Satisfactory)
- v. प्रतिकूल (Adverse)

7. The Corporation initiated promotion of Accountants on the post of Senior Accountants in 2013. The DPC was held on 02.03.2013. The promotion order was issued on 13.03.2013 in which while the name of the petitioner was not there as he was not found suitable according to the criterion mentioned above in paragraph 5, the names of 4 other persons who are junior to the petitioner were included.

8. Respondents No. 1 to 4 in their written statement, opposing the claim petition, have stated that as per Promotion Rules of 2013, the DPC considered annual entries for 5 years from 2007-08 to 2011-12. While the entries of the petitioner for the years 2007-08, 2010-11 and 2011-12 are of category 'good', the annual entries for the years 2008-09 and 2009-10 are 'satisfactory'. Thus, the petitioner has 3 annual entries as 'good' and 2 entries below 'good'. Since the Promotion Rules of 2013 provide that there should be minimum 4 annual entries of 'good' category in relevant 5 years, the petitioner was not found suitable for want of minimum 4 'good' annual entries. In spite of sufficient service, the Private Respondents No. 5 to 13 have not filed any W.S. and it was decided to proceed ex-parte against them.

9. The petitioner has contended that his entries for all the 5 years are 'good' / 'satisfactory' and he was never awarded any adverse entry. He has not been promoted in spite of the fact that there was no adverse entry during the relevant 5 years. The petitioner has also submitted that he was not communicated his entries pertaining the years 2007-08 to 2011-12.

10. Respondents No. 1 to 4 have stated that according to the Uttarakhand Government Servants (Disposal of Representations against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 only the adverse annual entry is required to be communicated to the employees. Since, the petitioner had not been given any adverse entry, the entries were not needed to be communicated to the petitioner.

11. The contention of the petitioner is that according to law framed by the Hon'ble Supreme Court, it was mandatory on the part of the respondents to communicate annual entries irrespective of the fact whether these were adverse or not. Since the petitioner was never communicated 'satisfactory' entries in respect of the years 2008-09 and 2009-10, he did not get any opportunity to represent against the same. Petitioner has also stated that he had also given a representation for not promoting him on 13.03.2013 but the same has been rejected by the respondents by impugned order dated 27.08.2014 (Annexure: A1).

12. The petitioner has also referred following Hon'ble Supreme Court case laws:

- i. Dev Dutt vs. Union of India and others
- ii. Sukhdev Singh vs. Union of India & others.

13. The issue of non-communication of non-adverse ACRs has been dealt with by the Hon'ble High Court at Nainital and the Hon'ble Supreme Court and the law has been laid down in this respect. We would now like to take up the leading case-laws pertaining to this issue.

14. In the case of **Sukhdev Singh Vs. Union of India (UOI) and Ors.(2013)9 SCC 566, the three judges bench** has held as under:----

"3.....in the case of **Dev Dutt v. Union of India and Ors.** (2008) 8 SCC 725, this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two Judge Bench on elaborate and detailed consideration of the matterconcluded that every entry in the ACR of a public servant must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 & 18 of the report in Dev Dutt (2008) 8 SCC 725 at page 733:

In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair,

average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; *(2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its up-gradation.* **Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi v. Union of India (supra) that arbitrariness violates Article 14 of the Constitution,**

Thus it is not only when there is a benchmark but in all cases that **an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice.** Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

5. In paragraphs 37 & 41 of the report, this Court then observed as follows:

We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period.....

In our opinion, **non-communication of entries in the Annual Confidential Report of a public servant**, whether he is in civil, judicial, police or any other service (other than the military), certainly **has civil consequences because it may affect his chances for promotion** or get other benefits (as already discussed above). Hence, such non-

communication would be arbitrary, and as such violative of Article 14 of the Constitution.

7. 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.....”

15. Apart from the paragraphs which have been quoted in **Sukhdev Singh** judgment above, it would also be appropriate to quote paragraph 12 also from the judgment of **Dev Dutt Vs. Union of India and Others:-**

“12. Learned Counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. **The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.**”

16. **The Hon’ble Supreme Court in the case of Prabhu Dayal Khandelwal Vs. Chairman, UPSC and Others 2015 (14) SCC 427 decided on 23.07.2015 has held as under:-**

5. In so far as the issue of non-consideration of the claim of the Appellant is concerned, we are satisfied that the proposition of law relevant for the controversy in hand, was declared upon by this Court in **Abhijit Ghosh Dastidar v. Union of India and Ors. (2009) 16 SCC 146**, wherein a three-Judge Division Bench of this Court, held as under:

“8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion, admittedly the entry of "good" was not communicated to the Appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the Annual Confidential Report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision [Dev Dutt v. Union of India and Ors. (2008) 8 SCC 725] relied on by the Appellant.....”

17. **The Division Bench of Hon’ble High Court at Nainital in the case of Jeewan Chandra Joshi writ petition (SB) No. 95 of 2016 decided on 17.06.2016 has also held as under:-**

“2. Briefly put the case of the petitioner is as follows:

Petitioner was appointed as Assistant Engineer in the year 1982; promoted as Executive Engineer in the year 2010 and given notional promotion in 2004 as such. Subsequently, he was promoted as Superintendent Engineer w.e.f. 31.05.2013 and notionally promoted as such w.e.f. 24.06.2010. Though there was a DPC held in the year 2009, the petitioner could not be selected. A DPC, however, was held on 05.01.2016 and it recommended four persons and the four persons were promoted by order dated 25.02.2016. Subsequently, it came to know that two junior persons, namely, the respondent nos. 3 & 4 have been recommended for promotion, but petitioner was not recommended. He came to know from the DPC that he has been placed in the second category of ‘good’ in terms of Rule 4(v) of the Procedure for Promotion Rules, 2013. Petitioner, on

coming to know about the facts, filed an application under the Right to Information Act for copy of the ACRs of 05 years. According to him, he was rated 'very good' for four reporting years. For the year 2010-11, though the Superintending Engineer, which was reporting officer, rated as 'outstanding', but the reviewing authority downgraded it by two steps, namely, 'good' without recording any reason. The petitioner filed representation claiming promotion, disregarding the adverse entry in view of judgment of Hon'ble Supreme Court in the case of 'Dev Dutt Vs. Union of India and others', reported in (2008) 8 SCC 725. Not meeting the desired response, petitioner is before us."

9. Mr. Pradeep Joshi, learned Standing Counsel for **the State would submit that in this case, a counter affidavit has been filed on behalf of the State and there is no dispute that the entry was not communicated. In the light of this, we would think that there must be a review DPC held** and, depending on the result of the review DPC the orders of promotion will either stand or be liable to be revised.

10. Accordingly, we dispose of the writ petition as follows:

We direct the first respondent to constitute a review DPC and the review DPC will consider the case of the petitioner for promotion 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 orders of promotion of the respondents will be subject to the decision of the review DPC. The review DPC shall be held and be culminated on or before 31.07.2016."

18. Again, the **Division Bench of Hon'ble High Court at Nainital in the case of Amar Nath Singh Bisht Vs. State of Uttarakhand and Ors. Writ Petition (SB) No. 101 of 2016** decided on 02.09.2016 has also reiterated the stand taken in the case referred in paragraph 17 above.

19.1 In the case-laws described in paragraphs 14 to 18 above, the law is laid down. It is now settled legal position that every annual entry of an employee is to be compulsorily communicated and an opportunity must be provided to the employee to represent against it.

19.2 In the case in hand, admittedly the entries for the years 2008-09 and 2009-10 were not communicated to the petitioner and, therefore, he could not get an opportunity to represent against the same.

19.3 The non-communication of the ACRs have adversely affected the petitioner's chances for promotion and non-communication of ACRs is arbitrary and as such violative of Article 14 of the Constitution.

19.4 By not communicating ACRs to the petitioner and thereby not providing opportunity to the petitioner to make a representation against these entries, there is violation of the principle of fairness, which is the soul of natural justice.

19.5 In view of the judgments described in paragraphs 14 to 18 of this order, the "Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 which provides communication of ACR only when it is adverse, becomes arbitrary and hence illegal being violative of Article 14 of the Constitution and, therefore, liable to be ignored.

19.6. As there is no dispute and it is admitted by the respondents that annual entries in respect of the years 2008-09 and 2009-10 were not communicated to the petitioner but these annual entries were considered by the DPC which adversely affected his chances for promotion, we are of the opinion that the promotion of the petitioner should be reconsidered and a review DPC must be held.

19.7. For the reasons stated above, we pass the following order.

ORDER

State respondents are directed to hold a review DPC to consider the case of the petitioner for promotion from the date of his entitlement. As far as un-communicated annual entries are concerned, a decision will be taken in the light of the judgments of the Hon'ble Supreme 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 (14) SCC 427. The holding of review DPC and thereafter decision by the respondents on it will be taken within a period of three months from today. No order as to costs.

(RAM SINGH)
VICE CHAIRMAN (J)

(D.K.KOTIA)
VICE CHAIRMAN (A)

DATE: MARCH 08, 2018
DEHRADUN

KNP