

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

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

----- Chairman

Hon'ble Mr. D.K.Kotia

-----Vice Chairman (A)

CLAIM PETITION NO. 16/DB/2017

Rakesh Kumar Jain s/o late Sri Sumat Prasad Jain aged about 55 years at present working and posted as Officiating Superintending Engineer ADB, Public Works Department, New Tehri.

.....Petitioner

VS.

1. State of Uttarakhand through Secretary, P.W.D., Government of Uttarakhand, Secretariat, Subhash Road, Dehradun.
2. Chief Engineer and Head of the Department, P.W.D., Uttarakhand, Yamuna Colony, Dehradun.

.....Respondents.

Present: Sri L.K.Maithani, Counsel
for the petitioner.

Sri U.C.Dhaundiyal, A.P.O.
for the Respondents

JUDGMENT

DATED: MAY 04, 2018

Justice U.C.Dhyani (Oral)

By means of present claim petition, the petitioner seeks following relief among others:

“ To issue an order or direction to the concerned respondents to promote the petitioner on the post of Superintending Engineer since 23.01.2017, when the promotion was granted to the other persons, as the petitioner was fully eligible and entitled for consideration for

promotion to the post of Superintending Engineer on 11.01.2017 when the DPC hold its meeting for promotion to the post of S.E.”.

2. Necessary facts giving rise to present claim petition, are as follows:

On 11.01.2017 a Departmental Promotion Committee (DPC) was held for promotion to the post of Superintending Engineer (S.E.) in which name of the petitioner was included in the eligibility list of Executive Engineers. DPC did not consider the name of the petitioner for promotion to the post of S.E.. On the recommendation of DPC, respondent No.1, *vide* office order dated 23.01.2017 granted promotion to other Executive Engineers. Since the name of the petitioner was not considered by DPC, therefore, petitioner was compelled to file present claim petition.

3. In C.A./W.S., it is admitted that a DPC was convened on 11.01.2017, which DPC was to consider recommending names of Executive Engineers for 5 vacant posts of S.E. Name of petitioner was placed at Sl. No. 8 in such list, whose name was to be considered for promotion on the post of S.E. The names of Sri A.K.Goel and Sri Girish Chandra Arya were inadvertently left, but when DPC was next convened on 11.01.2017, their names were also considered. Out of 8 Executive Engineers, 4 Executive Engineers were found unsuitable. Since departmental proceeding was initiated against one, therefore, the recommendation of DPC in respect of that Executive Engineer was kept in sealed cover. Names of three Executive Engineers placed at Sl. Nos. 5,7 & 8 were recommended by DPC for promotion. Promotion orders were, accordingly, issued in respect of those three Executive Engineers.

4. It has also been averred in C.A./W.S. that since one Sri Vijay Narayan Pandey, Executive Engineer had moved a representation for his notional promotion to the Government, and his representation had not been decided as yet, therefore, one post of S.E. was kept vacant till the decision on the representation of Sri Vijay Narayan Pandey was

taken by the Government. Sri Vijay Narayan Pandey is senior to Sri Chandra Mohan Pandey, who was placed at Sl. No.8 in the seniority list.

5. It is the submission of Ld. Counsel for the petitioner that the DPC acted in an arbitrary manner and did not consider the name of the petitioner for promotion to the post of S.E.. It is also submitted that one post of S.E. was left vacant without any reason. It is not within the competence of DPC to leave any post vacant. The recommendation of the DPC was acted upon by respondent No.1. While other Executive Engineers (from the eligibility list) were granted promotion to the post of S.E., petitioner was not. Petitioner's name was not even considered by the DPC, simply upon a representation moved by Sri Vijay Narayan Pandey. Copy of promotion order dated 23.01.2017, in respect of three other Executive Engineers, has been brought on record as Annexure: A 1 to the petition. It is also the submission of Ld. Counsel for the petitioner that the work and conduct of the petitioner has always been satisfactory- good. There was no adverse remark or punishment order against the petitioner when the DPC was convened. Criteria for promotion to the post of S.E., on the day DPC was convened, was seniority subject to rejection of unfit. Against five vacant posts of S.E., one post was kept reserved for one Sri Arun Kumar Goel, under sealed cover procedure. As against remaining four posts, DPC recommended the names of only three persons, viz- Sarvsri Shoorveer Singh Tomar, Ramesh Chandra Agarwal and Chandra Mohan Pandey. Keeping one post of S.E. vacant for Sri Vijay Narayan Pandey, only on his representation is totally untenable and is beyond the jurisdiction of DPC. The DPC kept one post vacant for Sri Pandey only on the ground that his representation for notional promotion was pending before the respondents. DPC was bound to consider the name of the petitioner for the post of S.E. against the 4th vacant post, as he alone was eligible person to be promoted against the said post, but the DPC did not consider his name. Sri Pandey had not even completed six years of qualifying service on the post of Executive Engineer. The petitioner moved various representations, details of which have been given in

Para 4(X) of the claim petition, but none of the representations has been decided by respondent No.1 so far.

6. After hearing Ld. Counsel for the parties at great length and having gone through the record of the case, the controversy boils down to the following legal proposition:

“Could one post of Superintending Engineer be left vacant by DPC only on the premise that an Executive Engineer has filed a representation to the Government for his notional promotion and his representation is pending decision of the Government?”

7. Shri Vijay Narayan Pandey did not have even six years of qualifying service on the post of Executive Engineer when DPC was held. He moved a representation before DPC that his matter is pending decision of the Government and, therefore, one post of S.E. should be left vacant. D.P.C., although it was not within its domain to do so, readily agreed to the request of Sh. Vijay Narayan Pandey and left one post of S.E. vacant. When DPC held its meeting, criteria of seniority was subject to rejection of unfit. Had DPC considered the name of the present petitioner, at that point of time, it is possible that he would have made it to S.E. After certain grade pay, criteria of promotion changed. It became merit. It is possible that the petitioner might not fit into the scheme in which he was to be adjudged suitably on merits, but if his case was to be considered on seniority, then it was possible that he might have called the shot and made it to S.E.. Another point is- whether it is within the jurisdiction of DPC to have left one post vacant? The same lies within the jurisdiction of the State Government to have directed DPC to leave one post vacant. Had the State Government directed the DPC to leave one vacancy of S.E., DPC was well within its right to have done the same. But, in the absence of such direction from the State Government, a Departmental Promotion Committee has no authority to usurp

the jurisdiction of the Government that they are leaving one post of S.E. vacant on the ground that a person , who is senior to the petitioner, has moved a representation to the Government, although that man was not having six years of qualifying service on the post of Ex. En., when he moved such representation.

8. Sealed cover procedure, in the instant case, has been adopted with respect to Shri A.K.Goel. Adhering to such procedure in respect of Shri A.K.Goel, cannot be questioned, but leaving one post of S.E. vacant only on the representation of Sri Vijay Narayan Pandey, that too to government, and DPC acceding to Shri Pandey's request, in the humble opinion of this Court, was not proper. Only Government could have directed the Committee to leave one post of S.E. vacant. DPC could not have done it on its own. Had DPC considered petitioner for promotion, things would have been different. He could have been promoted to the post of S.E., because the criteria, at that point of time, was seniority subject to rejection of unfit. But, that was not to be.
9. The Government of India (Department of Personnel and Training), issued an Office Memorandum on 30.01.1982 on the subject of promotion of officers in whose case "sealed cover procedure" was followed and against whom disciplinary proceedings were pending for a long time. The Memorandum stated that according to the existing instructions, cases of officers (a) who are under suspension or (b) against whom disciplinary proceedings are pending or a decision has been taken by the competent disciplinary authority to initiate disciplinary proceedings or, (c) against whom prosecution has been launched in a court of law or sanction for prosecution has been issued, are considered for promotion by the Departmental Promotion Committee (hereinafter referred to as the 'DPC') at the appropriate time but the findings of the Committee are kept in a sealed cover to be opened after the conclusion of the disciplinary/court proceedings. While the findings are kept in the sealed cover, the vacancy which might have gone to the officer concerned is filled only on an officiating

basis. If on the conclusion of the departmental/court proceedings, the officer concerned is completely exonerated, and where he is under suspension it is also held that the suspension was wholly unjustified, the sealed cover is opened and the recommendations of the DPC are acted upon. If the officer could have been promoted earlier, he is promoted to the post which is filled on an officiating basis, the officiating arrangement being terminated. On his promotion, the officer gets the benefit of seniority and fixation of pay on a notional basis with reference to the date on which he would have been promoted in the normal course, but for the pending disciplinary/ court proceedings. However, no arrears of salary are paid in respect of the period, prior to the date of actual promotion. The Memorandum goes on to state further that it was noticed that some- times the cases in the courts or the departmental proceedings take unduly long time to come to a conclusion and the officers undergo considerable hardship, even where it is not intended to deprive them of promotion for Such a long time. The Government, therefore, in consultation with the Union Public Service Commission examined how the hardship caused to the Government servant in such circumstances can be mitigated and has laid down the procedure in paragraphs 3 to 7 of the Memorandum. The Government of India in the Deptt. Of Personnel & Training issued another Office Memorandum No. 22011/2/86 Estt. (A) dated January 12, 1988 in supersession of all the earlier instructions on the subject including the Office Memorandum dated January 30, 1982. The common question involved were: (1) What is the date from which it can be said that disciplinary/ criminal proceedings are pending against an employee? (2) To what benefits an employee who is completely or partially exonerated is entitled to and from which date? (3) What is the course to be adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? Hon'ble Supreme Court dealt with and replied those issues in the landmark decision of *Union of India and others vs. K.V.Jankiraman and others*, (1991)4 SCC 109. There is, therefore, no complaint for

following 'sealed cover procedure' in the case of Sri A.K. Goel, Executive Engineer.

10. Although, an employee has no right to promotion, but he has a right to be considered for promotion. The promotion to a post depends upon several circumstances. For promotion, the least that is expected of an employee is to have an unblemished record. An employee found guilty of misconduct, cannot be placed at par with other employees and his case has to be treated differently. While considering an employee for promotion, his whole record has to be taken into consideration. In the instant case, the petitioner, as we are told, was never found guilty of misconduct. Sh. Vijay Narayan Pandey was certainly senior to him, but his case could not have been considered because he did not have even six years of qualifying service on the post of Ex.En. Leaving one post of S.E. vacant, only on the premise that Sri Pandey had moved a representation to the Government for his notional promotion and his representation was pending decision of the Government, in the estimation of this Court, was not proper. What DPC was required to do, was to consider the case of the petitioner, irrespective of representation made by Sri Pandey, inasmuch as there was no direction by the Government to DPC to consider such representation of Sri Pandey. In the absence of such direction, it was not proper on the part of DPC to have kept one post of S.E. vacant. The DPC ought to have considered the case of present petitioner on the then criteria of seniority subject to rejection of unfit. If he was found fit for promotion, his case ought to have been recommended by DPC to Government. If he was not found suitable, the Government should have been forwarded his case, not recommending his promotion, but nothing has been done. His case has not, at all, been considered. The petitioner has Fundamental right of being considered against the vacancy and of being promoted in case found suitable. Non consideration of claim petitioner for promotion, would be discriminatory, violative of Articles 14 and 16 of the Constitution of India. [*Major General H.M. Singh, VSM vs. Union of India and others,*

(2014)3 SCC 670]. Therefore, this Court finds that it is a case for interference.

11. Respondents are directed to convene a meeting to review D.P.C., which was held on 11.01.2017, within a period of twelve weeks of presentation of certified copy of this order for considering the promotion of the petitioner on the post of Superintending Engineer, as the petitioner was eligible and entitled to be considered for promotion to the post of S.E. on such date. If he is found suitable, it is directed that the petitioner shall be promoted to the post of Superintending Engineer.
12. Claim petition thus stands disposed of. No order as to costs.

D.K.KOTIA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: MAY 04, 2018
DEHRADUN

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