

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

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

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 28/DB/2019

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

.....Petitioner.

vs.

1. State of Uttarakhand through Additional Chief Secretary, Public Works Department, Govt. of Uttarakhand, Secretariat, Subhash Road, Dehradun.
2. Engineer-in-Chief and Head of Department office, Public Works Department, Yamuna Colony, Dehradun.
3. Sri Shiv Kumar Rai, Superintending Engineer, P.W.D., Yamuna Colony, Dehradun (through Engineer-in-Chief and Head of Department office, P.W.D., Yamuna Colony, Dehradun).
4. Sri Yogesh Lal Shail, Superintending Engineer, P.W.D., Yamuna Colony, Dehradun (through Engineer-in-Chief and Head of Department office, P.W.D., Yamuna Colony, Dehradun).
5. Sri Girish Chandra Vishwakarma, Superintending Engineer, P.W.D., Yamuna Colony, Dehradun (through Engineer-in-Chief and Head of Department office, P.W.D., Yamuna Colony, Dehradun).

.....Respondents.

Present: Sri L.K.Maithani, Counsel, for the petitioner.
Sri V.P.Devrani, A.P.O., for State of Uttarakhand.

JUDGMENT

DATED: JULY 05, 2019

Justice U.C.Dhyani (Oral)

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

“(a) To issue an order or direction to review the 30.01.2018 DPC and promote the petitioner to the post of Superintending Engineer from the date of promotion of junior persons with all consequential benefits.

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

(c) Award the cost of the petition to the petitioner.”

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

Petitioner was initially appointed as Assistant Engineer in Public Works Department on 06.03.1990. He was, thereafter, promoted to the post of Executive Engineer (for short, Ex.En.) on 06.09.1997. At present, the petitioner is working as officiating Superintending Engineer (for short, S.E.) in the office of Engineer in Chief/ HOD, P.W.D., Dehradun. The criteria for promotion to the post, having pay scale of Rs.37400-67000/- grade pay Rs.8700/- and above is, ‘merit’, as per the Uttarakhand Government Servants (Criteria for Recruitment by Promotion) (Revision) Rules, 2010 (for short, Rules of 2010) and on the posts, having pay scales below grade pay Rs.8700/-, criteria for promotion is, ‘seniority subject to rejection of unfit’.

Prior to 07.12.2017, pay scale of S.E. was Rs.15600-39100/- grade pay Rs.7600/- and, therefore, promotions to this post were being done by the criteria of ‘seniority subject to rejection of unfit’. *Vide* Govt. order dated 07.12.2017, pay scale of S.E. was upgraded to Rs.37400-67000/- grade pay Rs.8700/- with immediate effect. Due to this change, criteria for promotion to the post of S.E. was also changed to ‘merit’ as per the aforesaid Rules, for the vacancies arising on or after 07.12.2017.

After issuance of G.O. dated 07.12.2017, a DPC was held for promotion for four posts of S.E. on 30.01.2018. Out of these four posts, three posts were vacant prior to 07.12.2017, the date, on which pay scale of S.E. was upgraded. One post got vacant on retirement of Sri K.C.Upreti, S.E., on 31.03.2018.

In the DPC under question, all promotions were done on the basis of ‘merit’ without considering the fact that three vacancies were

available before 07.12.2017, the date of up-gradation of pay scale. Only one vacancy arose after 31.03.2018. According to petitioner, established law to fill up old vacancies by old Rules was not followed in this DPC of 30.01.2018. DPC in question, recommended the names of Respondents No. 3, 4 & 5, who were categorized as 'very good'. Respondents No. 3, 4 & 5 were junior to the petitioner, who was categorized as 'good' by DPC. The petitioner was at Sl. No. 47 in the seniority of feeding cadre.

Respondent No.2 sent proposal for promotion to various posts including the post of S.E., *vide* letter dated 11.08.2017 to Respondent No.1. This letter clearly stated that three posts of S.E. were vacant on 11.08.2017. These three posts were vacant before 07.12.2017, the date, on which pay scale of S.E. was upgraded.

As per promotion procedure on various posts, selection year has been defined as 12 months' duration starting from 1st July of each year. As per this procedure, number of vacancies in a selection year shall be calculated and conveyed to DPC in the beginning of selection year. Had the DPC been convened on time, i.e., on 01.12.2017, petitioner would have been promoted to the post of S.E., as the pay scale was upgraded afterwards. When the petitioner came to know that he was not promoted, on the ground that he was categorized as 'good', he made a representation to Respondent No.1 through proper channel. When the representation was not decided, the same was followed by a reminder.

On 26.11.2018, DPC for promotion from the post of S.E. to the post of Chief Engineer Level-II was convened. Had proper criteria been followed by DPC, which was convened on 30.01.2018, then the petitioner would have been promoted to the post of S.E. well before this DPC and name of the petitioner would also have been there in DPC under question, in which persons junior to him were promoted as Chief Engineer Level- II. Hence, according to petitioner, he is entitled to promotion and service benefits from the date his juniors were promoted.

It has been pleaded, with utmost vehemence, that petitioner has been categorized as 'good' on the basis of low graded A.C.Rs. in the meeting of DPC, which was convened on 30.01.2018. The legal plea which has been taken, in the petition, is that 'good' entries were never communicated to the petitioner by Respondents No. 1 & 2 and, therefore, the petitioner has been deprived of fair opportunity of hearing against these A.C.Rs. As per the Uttarakhand Government Servants (Disposal of Representation against Adverse Annual Confidential Report and Allied Matters) Rules, 2015 (for short, Rules of 2015), the A.C.Rs., which were not communicated or decided, cannot bar the promotion avenues and service benefits of the employee. Hence, according to petitioner, classification of petitioner in 'good' category, on the basis of un-communicated A.C.Rs., is illegal. The petitioner ought to have been categorized as 'very good' and had he been categorized as 'very good', he would have got promotion from the date on which his juniors were promoted.

The petitioner has taken yet another ground in the claim petition. According to him, he is entitled and deserves to be considered for promotion on the post of S.E., as per old Rules, on the basis of 'seniority - subject to -rejection of unfit'.

3. W.S./C.A. has been filed on behalf of Respondents No. 1 & 2. Largely, pleadings contained in claim petition have been contradicted. In the C.A., legal pleas have been taken, which shall be adverted to by us, if and when so required, during the course of dictation of judgment. In such C.A., the official respondents have made an attempt to justify the action of DPC dated 30.01.2018.
4. It has been pleaded in para 10 of the C.A. that there was a provision for communicating only 'bad entries' before 28.04.2015. The petitioner was awarded better entries than 'good' in the A.C.Rs. of the year 2015-16 and 2016-17 and, therefore, such entries were not communicated to him. Had the petitioner been awarded best entries in the years 2015-16 and 2016-17, even then he was not entitled to promotion.

5. R.A. has also been filed by the petitioner reiterating the facts and contentions raised in the claim petition.
6. Two fold legal pleas have been taken in the claim petition. Firstly, the petitioner is entitled and deserves to be considered for promotion on the post of S.E. under the Rules applicable to the old pay scale, on the basis of 'seniority- subject to-rejection of unfit.' Secondly, the petitioner could not have been categorized on the basis of un-communicated A.C.Rs.
7. Prior to 07.12.2017, pay scale of SE was Rs. 15600-39100/- grade pay Rs.7600/-. As per Rules of 2010, promotion to the post of SE was being done by the criteria 'seniority- subject to-rejection of unfit'. Criteria for promotion to the post having pay scale of Rs.37400-67000/- , grade pay Rs.8700/- and above was by 'merit'. On posts having pay scales below it, criteria for promotion was by 'seniority- subject to-rejection of unfit'. (Copy of G.O.: Annexure- A 1). *Vide* G.O. dated 07.12.2017 (Copy: Annexure -A 2), pay scale of SE was upgraded to Rs.37400-67000/- grade pay Rs.8700/- with immediate effect. Due to this change, criteria for promotion to the post of SE was also changed to 'merit' after 07.12.2017, as per the Rules of 2010.
8. After issuance of G.O. dated 07.12.2017, DPC was held for promotion to four posts of SE on 30.01.2018. This fact is under no dispute that out of these four posts, three posts were vacant prior to 07.12.2017, the date on which pay scale of SE was upgraded. Proceedings of DPC have been brought on record as Annexure- A 3 to the claim petition.
9. It may further be noted here that in the DPC, which was convened on 30.01.2018, all the promotions were considered on the basis of 'merit'. It is the submission of Ld. Counsel for the petitioner that the DPC did not consider the fact that three vacancies occurred before 07.12.2017, the date of up-gradation of pay scale of SE. One vacancy occurred afterwards on 31.03.2018 on the superannuation of one Sri K.C. Upreti, SE. It is also submitted that the established law of filling up old vacancies by old Rules was not followed in the DPC of 30.01.2018. In this DPC, private

respondents no. 3, 4 & 5, who were admittedly junior to the petitioner, were promoted to the post of SE. Since criteria of merit was observed by the DPC, that too on the basis of un-communicated entries of the petitioner, therefore, he was not found fit for promotion on the post of SE. In fact, the criteria 'seniority- subject to-rejection of unfit' ought to have been followed by the DPC in its meeting dated 30.01.2018. In Annexure- A 3, which contains proceedings of DPC dated 30.01.2018, petitioner has been placed at Sl. No. 47 of the seniority list. Private respondents no. 3, 4 & 5 have been placed at Sl. No. 114, 115 and 116 of the seniority list, respectively. The petitioner is, undisputedly senior to private respondents.

10. In the C.A./W.S. respondents have stated that three vacancies were of the selection year 2017-18. One consequential vacancy arose on 31.03.2018 on retirement of Sri K.C.Upreti, SE. Ld. Counsel for the petitioner drew attention of this Tribunal towards Annexure- A 5, which is a letter written by Engineer-in-Chief to Additional Chief Secretary to the Government in PWD, showing that three vacancies of SE were vacant on 11.08.2017, which means that the vacancy on which the petitioner was to be considered, arose before that. Relevant Government order came into effect on 07.12.2017 and, therefore, the petitioner ought to have been considered for promotion to the post of SE under the old criteria of 'seniority- subject to-rejection of unfit'.
11. Respondents should, therefore, be 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'. This inference of ours is fortified by the decision of Hon'ble Apex Court in *Y.V. Rangaiah and others vs. J. Sreenivasa Rao and others*, (1983) 3 SCC 284, in which it was held by Hon'ble Apex Court that, **the posts which fell vacant prior to the amended Rules, would be governed by the old Rules and not by the new Rules.**
12. Relevant paragraph of the aforesaid decision reads as under:

“8. The contention on behalf of the appellants herein is that by the time the list was prepared in May, 1977, Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules was amended and the list prepared was in accordance with the rules then prevailing at the time of preparation, and therefore there was nothing wrong with the preparation of the panel. It was further contended that the petitioners in the two representation petitions having not challenged the validity of the amendment to Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules, it was not open to them to challenge the list prepared in May, 1977 which is in accordance with rules prevailing at that time.”

13. The challenge to the contention of those who were in favour of filling up old vacancies as per amended Rules, was quoted by the Hon’ble Court thus:

“.....The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.”

14. In paras 12 and 14 of decision rendered by Hon’ble Apex Court in *Union of India and others vs. Tushar Ranjan Mohanty and others, 1994 SCC (5) 450*, the following was observed:

“In *T.R. Kapur v. State of Haryana, 1986 Supp SCC 584*..... This Court came to the conclusion that the retrospective effect given to the amendment was violative of Articles 14 and 16 of the Constitution of India on the following reasoning: (SCC p. 595, para 16)

"It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: *B.S. Vadera v. Union of India, AIR 1969SC 118*, *Raj Kumar v. Union of India, (1975)4SCC 13*, *K.Nagaraj v. State of A. P., (1985)1SCC 523* and *State of J & K v. Triloki Nath Khosa, (1974) 1SCC 19*. It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be.

It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights."

14. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation."

15. The second ground, which has been taken by the petitioner is that the petitioner could not have been categorized on the basis of uncommunicated A.C.Rs. Ld. Counsel for the petitioner seeks to withdraw this plea, as a ground in present claim petition, with liberty to raise this legal plea, if and when so required, as per law. The second ground is, therefore, not being discussed and no finding is given on the request of Ld. Counsel for the petitioner..

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.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: JULY 05, 2019
DEHRADUN

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