

**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. 26/DB/2022

Rajiv Ranjan, s/o Late Shri V.S. Srivastava, aged about 49 years, presently posted as Executive Engineer, Minor Irrigation Department, Haridwar, Uttarakhand, r/o 35, Chitrakoot Enclave, Kanwali Road, Dehradun, 248001, Uttarakhand.

.....Petitioner

VS.

1. State of Uttarakhand through Secretary, Minor Irrigation Department, Government of Uttarakhand, District Dehradun, Uttarakhand.
2. Chief Engineer/ Head of Department, Minor Irrigation Department, Govt. of Uttarakhand, Lane No. 3, Indraprastha Enclave, Nathanpur, Jogiwala, District Dehradun, Uttarakhand.
3. Superintending Engineer, Minor Irrigation Department, Pithoragarh, Uttarakhand.
4. Superintending Engineer, Minor Irrigation Department, Pauri Garhwal, Uttarakhand

.....Respondents.

Present: Sri Abhijai Singh Panwar, Advocate, for the Petitioner.(online)
Sri V.P.Devrani, A.P.O., for the State Respondents

JUDGMENT

DATED: FEBRUARY 21, 2022.

Justice U.C.Dhyani (Oral)

Present claim petition has been filed by the petitioner challenging his 'downgraded' entries in the Annual Character Roll (ACR) for the financial years 2015-16, 2018-19 and 2019-20, which were

communicated to the petitioner *vide* Letter No. 918/2020-21 dated 20.10.2020, issued by Respondent No. 2 and Letter No. 546/II-01(12)/2020 dated 16.10.2020, issued by the Deputy Secretary, Minor Irrigation Department, Govt. of Uttarakhand.

2. The petitioner has stated, in his claim petition, that his representation dated 27.11.2020, followed by reminders dated 31.05.2021, 13.08.2021 and 18.09.2021 against those 'downgraded' entries remained un-disposed of for a period over and above the time frames stipulated under the Uttarakhand Government Servants (Disposal of Representation against Adverse, Fair/Satisfactory, Good, Very Good, Excellent Annual Confidential Reports and Allied Matters) Rules, 2015 (hereinafter referred to as the Rules).

3. According to the claim petition, the petitioner being one of the prospective eligible candidates for consideration for promotion to the two vacant posts of Superintending Engineer, Minor Irrigation Department has a locus standi to challenge the 'downgraded' entries in the ACR for the financial years 2015-16, 2018-19 and 2019-20.

4. According to the claim petition, petitioner's annual entries for the financial years 2016-17 and 2017-18 are of outstanding category. The 'downgraded' entries for the years 2015-16, 2018-19 and 2019-20 were communicated to the petitioner on 16.10.2020 and 20.10.2020. Petitioner moved representation followed by three reminders, but the same were not disposed of within stipulated 165 days, as provided in the Rules. According to Ld. Counsel for the petitioner, petitioner's representations have not been decided till date, therefore, in view of Rules 4 and 5 of the Rules 'downgraded' entries shall be treated as 'upgraded' entries for the purpose of promotion in view of the law laid down by Hon'ble Apex Court in matters of *Dev Dutt vs. Union of India & others, (2008) 8 SCC 775* and *Sukhdev Singh vs. Union of India & others, (2013) 9 SCC 566*.

5. As many as eight Executive Engineers, including the petitioner, were communicated ACRs for the last five years *vide* letter dated 20.10.2020 of the Chief Engineer/ HOD, Respondent No.2 (Annexure- 1).

6. Deputy Secretary, Minor Irrigation Department, *vide* letter dated 16.10.2020 communicated ACRs of the years 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 to the petitioner (Annexure- 1 *colly*). Such letter was accompanied by ACR of the petitioner for the relevant years.

7. Petitioner moved a representation to the Secretary, Minor Irrigation, Govt. of Uttarakhand (Respondent No.1) on 27.11.2020 (Annexure: 2) for upgradation of his entries for the relevant years, along with supporting documents. When the representation of the petitioner was not disposed of, he sent a reminder to Respondent No.1 on 31.05.2021 (Copy: Annexure-4). Such reminder was received in the office of Respondent No.1 on the same date. Petitioner again sent a reminder to Respondent No.1 on 13.08.2021 (Copy: Annexure-5) through registered post. Detailed reminder was again sent by the petitioner to Respondent No.1 on 18.09.2021 (Annexure: 6). It is the submission of Ld. Counsel for the petitioner that 440 days have elapsed since the date of petitioner's representation dated 27.11.2020, but still the same has not been decided.

8. Ld. A.P.O., on seeking oral instructions from the Respondent Department, sought time to file detailed Counter Affidavit, which prayer of Ld. A.P.O. is not being accepted, primarily on account of the fact that all the documents, which appear to be necessary for adjudication of present claim petition at the admission stage, have been made available by the petitioner. At the most, by filing C.A., the Respondent Department might justify the delay in disposing of the representation on time, which, in any way, will not help the department because the Rules nowhere leave any scope for any department to justify the delay in disposing of the representations against the 'downgraded' or 'adverse' entries.

9. This Tribunal while deciding Claim Petition No. 104/DB/2019 *Mayan Pal Singh Verma vs. State and others*, on identical issue, on

20.07.2021 [which decision has been affirmed by Hon'ble High Court on 10.01.2022 while disposing of WPSB No. 09 of 2022, State of Uttarakhand and others vs. Mayan Pal Singh Verma], had observed as under:

"2.9 Rule 5 of Rules of 2015 provides that where any adverse entry has not been communicated to the government servant or where the representation has not been decided as per Rule 4 then such adverse entry should not be treated as adverse for the purpose of promotion or other service benefits of the employee.

2.10 In *Dev Dutt vs. Union of India & others, (2008) 8SCC 775*, the Hon'ble Supreme Court has held that every entry in the ACR of public servant must be communicated to him, within a reasonable period, whether it is poor, average, good or very good. This affects the employees in two ways: (1) had the entry been communicated to him, he would know about the assessment of his work & conduct by his superiors, which would enable him to improve his work in future, and (2) he would have an opportunity of making a representation against the entry if he feels unjustified and prays for its upgradation. Hence, non-communication of an entry is arbitrary and arbitrariness violates Article 14 of the Constitution. The Hon'ble Supreme Court also has held that non-communication of entries, certainly has civil consequences because it affects adversely employee's chances of promotion and other service benefits.

2.11 The judgment rendered in the case of *Dev Dutt (Supra)*, has been affirmed by the Constitution Bench of Hon'ble Supreme Court in the decision of *Sukhdev Singh vs. Union of India, (2013) 9 SCC 566*. It has been held that every downgraded entry, whether it is poor, fair, average, good or very good may be adverse at the time of promotion. In para 10 of the decision of *Dev Dutt (Supra)*, it was observed that the benchmark (i.e. essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' Annual Confidential Reports for the last 5 years. Thus, in the situation 'good' entry, is in fact an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having, which determines whether it is an adverse entry or not. It is thus the rigors of the entry which is important, not the phraseology. The grant of a 'good' entry is of no use to the incumbent, it makes him ineligible for promotion or has an adverse effect on his chances of promotions.

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5.2 Section 5 provides for limitation in respect of claim petitions filed before this Tribunal, which runs as below:

"5. Powers and procedure of the Tribunal- (1) (a) The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (Act 5 of 1908), or the rules of evidence contained in the Indian Evidence Act, 1872 (Act 1 of 1872), but shall be guided by the principles of natural justice, and subject to the provisions of this section and of any rules made under Section 7, the Tribunal shall have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private):

Provided that where, in respect of the subject-matter of a reference, a competent court has already passed a decree or order or issued a writ or direction, and such decree, order, writ or direction has become final, the principle of res judicata shall apply;

(b) The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to the reference under Section 4 as if a reference were a suit filed in civil court so, however, that-

(i) notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) in computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded.

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 may be made within the period prescribed by that Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985 whichever period expires earlier: Provided further that nothing in this clause as substituted by the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985, shall affect any reference made before and pending at the commencement of the said Act.

(2)

(3).....”

[Emphasis supplied]

.....

13. Rule 5 of the Rules of 2015 reads as under:

“5. Report not to be treated adverse- Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Hand Book, Volume-II, Parts-II to IV. Where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned.”

14. The first relief sought by the petitioner is to treat his uncommunicated ‘Uttam’ entries as adverse. While ‘Uttam’ category is not an ‘adverse’ entry *per se* but, if it is causing an adverse effect on the promotion of the petitioner then, it can be covered under the ambit of Rule 5 of the Rules of 2015 inasmuch as the petitioner has not got an opportunity to represent against the same which could have led to the upgradation of the respective ACR after due consideration of the competent authority. The case laws cited in Dev Dutt (*Supra*), Sukhdev Singh(*supra*) and Prabhu Dayal Khandelwal (*supra*), lay down the requirement of communication of entries to the employees so that they can make timely requests for upgradation of the same and if the employee is deprived of such opportunity, such entries though, they may not be adverse as such, but being of lower grade can affect the service prospects of the employee. Learned Counsel for the petitioner has also filed two judgments of Hon’ble High Court of Uttarakhand passed in *Writ Petition (S/S) No. 1370 of 2019, Bhola Dutt Sharma vs. State of Uttarakhand and others*, decided on 23.07.2020 and in *Writ Petition (S/B) No. 237 of 2016, Kailash Prakash Joshi vs. State of Uttarakhand & others*, decided on 29.08.2016, laying down the same principle. He has also filed copy of the minutes of the DPC dated 29.12.2015 in which Sri K.P.Joshi was not promoted having been put in ‘Uttam’ category while his juniors having ‘Atti Uttam’ category

were promoted. Subsequently in compliance of the Hon'ble High Court's order dated 29.08.2016, on Sri K.P. Joshi's writ petition, quoted above, a review DPC was held on 05.10.2016, copy of whose minutes has also been filed, which shows that this review DPC ignored '*Uttam*' entries of 2010-11 and 2011-12 and, on the basis of remaining entries, he was classified in '*Atti Uttam*' category and recommended for promotion on the basis of this classification. The same should also be done in the case of present claim petitioner by ignoring his uncommunicated entries and classifying him on the basis of the entries of other years.

15. We, however, cannot agree to the prayer of the claim petitioner to upgrade the uncommunicated '*Uttam*' ACRs as the consideration for the same could have been done only by competent authority after representation for the same was submitted by the petitioner. It would however be in the interest of justice, to afford an opportunity to the petitioner now to give representations for the upgradation of these entries to the competent authority within a period of 45 days who shall take suitable decision on the same within the further period as prescribed in the Rules of 2015.

.....

17. We have been given to understand that the petitioner has been considered for promotion to the post of Chief Engineer Level-II in earlier DPCs, in which he has not been found to fulfill the requisite criteria of merit. In the light of the above, a review DPC needs to be held in his case but, before the same, the petitioner has to indicate whether he wants to give representations against the uncommunicated 'good' entries or not. If he submits representations for upgradation of such entries, then after the competent authority's decision on the same, the review DPC may be held and the entries may be read in the modified form after such decision. If the petitioner prefers not to furnish any representations for upgradation of such entries, then these uncommunicated entries are required to be ignored by the review DPC for consideration of his notional promotion to the post of Chief Engineer Level-II from the date of promotion of his juniors. The claim petition is accordingly disposed of with the following directions:

(i) The uncommunicated '*Uttam*' Annual Confidential Reports (ACRs) cannot be upgraded unless the petitioner submits representations for upgradation of the same and the representations are duly decided by the competent authority.

(ii) The petitioner is hereby given an opportunity to represent for upgradation of the uncommunicated '*Uttam*' entries within 45 days from today to the competent authority, who shall consider the same and take suitable decisions on the representations within the period as specified in the Rules of 2015. After such decisions have been taken, the review DPC for consideration of promotion of the petitioner to the post of Chief Engineer Level-II shall be held in which such entries shall be read and acted upon along with modifications, if any, done by the competent authority after decisions on his representations.

(iii) If the petitioner opts not to give any representation for upgradation of above uncommunicated '*Uttam*' entries, the same shall be ignored while considering his promotion to the post of Chief Engineer Level-II by the review DPC, which may be convened shortly after such option of the petitioner.

(iv) In the review DPC, if the petitioner is found fit for promotion on the criteria of 'merit-cum-seniority', he shall be given notional promotion to the post of Chief Engineer Level-II from the date his juniors were promoted on such post."

10. Likewise, in another Claim Petition No. 02/DB/2021, Kapil Kumar vs. State & others, decided on 27.12.2021, on identical issue, this Tribunal observed as under:

“3. A time frame has been given for making representation(s) against the adverse entries and disposal of representation(s) in the Uttaranchal Government Servants (Disposal of Representation against adverse, fair/satisfactory, good, very good, excellent Annual Confidential Reports and Allied Matters) Rules, 2015.

4. Rule 4 of the aforesaid Rules provides for the competent authority to take decision on the representation. Rule 5 provides that if representation is not decided in accordance with Rule 4 or the adverse entry is not communicated, then the adverse entry cannot be treated adverse for the purposes of promotion and other service benefits.

.....

9. Rules 4 of the Uttaranchal Government Servants (Disposal of Representation against adverse, fair/satisfactory, good, very good, excellent Annual Confidential Reports and Allied Matters) Rules, 2015 (hereinafter referred to as ‘ the Rules’), provide for the following:

“4. Communication of adverse, fair/ satisfactory, good, very good, excellent report and procedure for disposal of representation--

(1)

(2)

(3)

(4) The competent authority or accepting authority, as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2) and (3), transmit the representation to the appropriate authority, who has recorded the adverse, fair/satisfactory, good, very good report, for his comments, who shall, within a period not exceeding 45 days from the date of receipt of the representation furnish his comments to the competent authority or the accepting authority, as the case may be :

Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the Service or is under suspension before sending his comments.

(5) The competent authority or the accepting authority, as the case may be, shall, within a period of 120 days from the date of expiry of 45 days specified in sub-rule (4) consider the representation along with the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders--

(a) rejecting the representation; or

(b) expunging the adverse report wholly or partly as he considers proper.

(c)

9.9 The consequence of non-compliance has been given in Rule 5 of the Rules, as below:

“5. Report not to be treated adverse--Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Hand-book, Volume-II, Parts-II to IV, where an adverse report is not

communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purposes of promotion and other service matters of the Government Servant concerned.”

[Emphasis supplied]”

11. Admittedly, this fact is under no dispute that the representations of the petitioner against the ‘downgraded’ entries have not been disposed of so far. The law requires that the representations against the ‘downgraded’ entries should be disposed of within 165 days, which has not been done in the instant case.

12. The consequence would, therefore, be that the adverse report which has been communicated to the petitioner on 16.10.2020 and 20.10.2020 (Annexure: A 1) shall not be treated adverse for the purposes of promotion and other service matters of the petitioner.

12.1. The claim petition, therefore, can be safely decided in terms of Rule 5 of the Rules.

13. The claim petition is disposed of at the admission stage, by directing that since the representations against the ‘downgraded’ entries, which was communicated to the petitioner *vide* letters dated 16.10.2020 and 20.10.2020 (Annexure: A 1) were not disposed of within stipulated time, as given in the Rules, therefore, such entries shall be ignored if they are coming in the way of promotion and other service matters of the petitioner.

14. In the circumstances, there shall be no order as to costs.

RAJEEV GUPTA
VICE CHAIRMAN (A)

JUSTICE U.C.DHYANI
CHAIRMAN

DATED: FEBRUARY 21, 2022
DEHRADUN.

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