

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.23996 of 2011(O&M)

Date of decision: June 30,2015

Renu Gupta

----Petitioner

Versus

The State of Punjab and others

----Respondents

CORAM: HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

Present: Mr. C.M. Chopra, Advocate for the petitioner.

Mr. Manjit Singh Naryal, Addl. A.G., Punjab

Mr. G.S. Bal, Sr. Advocate with
Mr. Amrinder Singh, Advocate for respondent No.5.

HARINDER SINGH SIDHU, J.

This petition has been filed praying for directions to quash the order dated 1.2.2011 (Annexure P-24) whereby respondent No.5 has been promoted as Accountant and the petitioner has been left out on the ground that she does not have the required Bench Mark of 10 as per the last five years confidential reports.

The petitioner is an employee of the District Rural Development Agency, Gurdaspur. She was appointed as a Clerk on regular basis on 6.10.1987 and joined service on 20.10.1987. She successfully completed her probation on 28.4.1989. On the other hand, respondent No.5 was initially appointed on 1.4.1987 for 89 days against the post of one Shri Sanjeev Kumar, Sr. Clerk. She was granted 89 days extension with break from time to time. Vide order dated

28.04.1989 she was placed on probation for a period of one year which she completed on 26.3.1990.

Aggrieved of the grant of selection grade to respondent No.5, and claiming that the said selection grade should have been granted to her as she was senior, the petitioner filed CWP No.11680 of 1998. This petition was disposed of vide order dated 11.11.2002. The petitioner was declared to be senior to respondent No.5 and the respondent department was directed to consider her case for selection grade from the date when respondent No.5 was so granted. The relevant part of the said order is reproduced as under:-

“xxx xxx xxx xxx xxx

We have heard counsel for the parties and it is their common case that the service condition of the petitioner and respondent No.5 are governed by the “Punjab Civil Services (General and Common Conditions of Service) Rules, 1994 (hereinafter called ‘the Rules) Rule 8 of the Rules determines the inter-se seniority of the members of the service. According to his rule, the seniority inter-se of persons appointed to posts in each cadre of a service shall be determined by the length of continuous service on such post in that cadre of the service. In the case before us, the petitioner was appointed on regular basis on 16.10.1987, whereas respondent No.5 was made regular with effect from 27.3.1989. Since the petitioner has been working in the department on regular basis for a longer period, she will be deemed to be senior to respondent No.5. The respondents are therefore, in

error in ignoring her claim in the matter of grant of selection grade.

In view of the matter, we have no hesitation in allowing the writ petition and directing the respondents to consider the claim of petitioner for grant of selection grade with effect from the date when it was granted to respondent No.5. We order accordingly. The respondents are directed to undertake the exercise and complete the same within three months from the date of receipt of a copy of this order. There will be no order as to costs."

Accordingly, the petitioner was treated as senior and released selection grade w.e.f. 19.1.1994 vide order dated 10.03.2003.

Vide order dated 1.2.2011 (Annexure P-24), respondent No.5 was promoted as Accountant, whereas, the petitioner was ignored for such promotion on the ground that she did not have the requisite bench mark of 'Good' in the confidential reports for the last five years. Aggrieved of this, the petitioner has filed the present writ petition.

It is stated that the service conditions of the petitioner are governed by the Rural Development Agency Employees Regulations, 1991. Regulation 3.4 prescribes the method of employment, Regulation 3.6 deals with departmental examination and Regulation 3.13 deal with promotion. These Regulations are as under:-

"3.4 "Method of Appointment"

Recruitment to the service shall be made according to the norms as shown in Appendix 'A' of these rules.

Provided that in case suitable candidate is not available for recruitment by the method mentioned in Appendix 'A' appointment to the service shall be made by following procedure:-

- (a) *By transfer from other DRDAs, Autonomous Bodies, Corporations, Boards, Institutions in Punjab State or*
(b) *On deputation from the Government Departments.*

<i>Sr.No.</i>	<i>Name of Post</i>	<i>Mode of recruitment</i>	<i>Education Qualification or experience required</i>
5.	Accountant	2/3 rd by promotion	From amongst the Clerks with minimum 5 years experience in the Agency.
		1/3 rd by direct recruitment	Having degree in B.Com.
		NOTE: Both the categories of Accountants shall be required to clear the prescribed test conducted by the Rural Development and Panchayats Departments within a period of 1 year from the date of joining as Accountant.	

3.6 Departmental Examination:-

Every member of the service unless he has already done so shall pass such departmental examination as may be prescribed by the Govt. for such posts from time to time.

3.13 Promotion:-

All promotions to the posts in service shall be made on the basis of merit-cum-seniority and no persons shall have a right to promotion to any post on the basis of seniority alone.”

Thus, as per the Regulations all promotions are to be made on the basis of merit-cum-seniority and no person shall have a right to promotion on the basis of seniority alone. It is further stated that apart from the above Regulations, Punjab Civil Services (General and

Common Conditions of Service) Rules 1994 are also applicable for promotion to Group A and Group B posts. As per these Rules, the minimum bench mark for promotion to the post falling in Group B is 'Good'. The relevant Rule 18 is reproduced hereunder:-

"18. Promotion to Group A' and Group 'B' Services.

1 (a) xxx

(b) xxx

(c) *For promotion to post falling in Group 'B' the minimum benchmark will be 'Good' and there shall be no supersession on the basis of merit."*

The post of Accountant is a 'Group B' post and hence, for promotion to the said post the minimum bench mark of 'Good' is required. It is averred that the petitioner has earned 'Good' and 'Very Good' reports throughout her career and no adverse reports have ever been communicated to her. After she had been denied promotion, she sought information through the RTI regarding her ACRs for the period 1999 onwards. As per information received, the Confidential Report for the period 1.4.2007 to 31.3.2008 was categorized as 'Average' . Similarly, the ACR for the period 2009-10 was also 'Average' and so was the case with respect to ACR for the period 1.4.2010 to 31.12.2010.

The petitioner has alleged that these ACRs have been wrongly recorded by Shri J.S. Ramdas, then ADC (Development), Gurdaspur (respondent No.6) who was inimically disposed towards her.

It is averred that the department considered the case for promotion of the petitioner, respondent No.5 and Shri Varinder Singh in the month of January 2009 and if the previous five years reports namely

for the years 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08 were to be considered, she would meet the bench mark of 'Good'. It is further stated that the evaluation of the ACRs is governed by the Government instructions dated 29.12.2000 (Annexure P-25) which is as under:-

"i) All Cases pertaining to promotion as Head of the Department would be decided on the basis of merit-cum-seniority. The benchmark for promotion to such posts will be 'Very Good' and the officer graded as 'Outstanding' would rank senior to those graded as 'Very Good'.

ii) For promotion to posts falling in Group 'A' with existing pay scales of Rs.12000-16350 and above the benchmark will be 'Very Good' and officers graded as 'Outstanding' would rank senior to those graded as 'Very Good'.

iii) In the case of promotion to posts with pay scales less than Rs.12000-16350, the bench mark will be 'Good'. This benchmark will determine fitness of the officer and person graded 'Very Good' or 'Outstanding' will not supersede persons graded 'Good'.

iv) Henceforth each Annual Confidential Report will be evaluated as under:-

<i>'Outstanding</i>	<i>4 marks</i>
<i>'Very Good</i>	<i>3 marks</i>
<i>'Good'</i>	<i>2 marks</i>
<i>'Average</i>	<i>1 marks.</i>

ACRs for 5 years are taken into consideration for promotion. Out of a total of 20 marks, officers earning 10 to 14 marks will be graded overall 'Good' and those earning 15 to 17 marks will be graded overall 'Very Good'. Those earning 18 to 20 marks will be graded as 'Outstanding Departmental Promotion Committee while considering reports which are 'Outstanding' must have been out of the ordinary and reasons for giving grading must be cogent and well spelt out, to be accepted as 'Outstanding'. If the ACR does not fulfill the

above criteria, the entry of 'Outstanding', should be read as 'Very Good' only an officer will not be fit for promotion if he is rated 'below average' in any one of the 5 years.

2 All cases of promotion to posts

In Group 'A and B' will fall within the purview of Departmental Promotion Committee. As required under circular letter No. 4044-5 GS-61/23179, dated 28th June, 1961, a panel of 3 suitable officers will be prepared if there is one post, 4 if there are two posts and 5 if there are 3 posts and so on when one officer out of the three in the panel is considered suitable for a vacancy, the remaining two officers will be considered for the next vacancy alongwith the 4th officer in the seniority list.

3. It is, therefore requested that where the promotion is to be made to the posts covered by the Punjab Services (Appointment by Promotion) Rules, 1962 or where there is specific provision in the service rules regarding promotion on the basis of merit-cum-seniority, the above procedure shall be meticulously adhered to by the Departmental Promotion Committees. In cases where promotion is to be made on the basis of seniority-cum-merit procedure given in (III) above will apply...."

As per these instructions, the Annual Confidential Report is evaluated in the following manner:-

Outstanding	4 marks
Very Good	3 marks
Good	2 marks
Average	1 mark

Accordingly, if the reports for the period from 2003 to 2008 which are as under are considered she would have the requisite bench mark of 10 (Good).

Year	Grade
2003-04	V.Good
2004-05	Good
2005-06	Good
2006-07	Good
2007-08	Average”

It is also averred that the petitioner has consistently good

ACRs and the same for the period from 1987 to 2003 are as under:

Year	Grade
1987-88	Good
1988-89	V. Good
1989-90	V. Good
1990-91	V. Good
1991-92	V. Good
1992-93	V. Good
1993-94	V. Good
1994-95	V. Good
1995-96	V. Good
1996-97	V. Good
1997-98	V. Good
1998-99	Good
1999-2000	Good
2000-01	Average
2001-02	V.Good
2002-03	Good

It is, thus, contended that the petitioner has wrongly been denied promotion and respondent No.5 wrongly promoted.

In the written statement filed on behalf of the respondents No.1 and 2, it has been stated that the petitioner does not meet the criteria laid down for promotion as her bench mark fell short of the

required ten by two marks. The record of her previous five years was considered and her total benchmark is eight, which is as under:-

<i>"Sr. No.</i>	<i>Time</i>	<i>Status</i>	<i>Bench Mark</i>
1.	1.4.2005 To 31.3.2006	Good	2
2.	1.4.2006 To 31.3.2007	Good	2
3.	1.4.2007 To 31.3.2008	Average	1
4.	1.4.2008 To 31.3.2009	Good	2
5.	1.4.2009 To 31.3.2010	Average	1
<i>Total Bench Marks</i>			<i>8"</i>

The claim of the petitioner that the relevant ACRs to be considered were to be for the five year period 2003-04 to 2007-08 has been disputed and it has been stated relying on the instructions Annexure P-25, the previous five year ACRs were required to be considered and the relevant years were 1.4.2005 to 1.4.2009 and as per this the petitioner does not meet the benchmark of ten.

Respondent No.6 Shri Jaswinder Singh has filed his separate affidavit denying allegations of malafide leveled against him in recording the ACRs.

I have heard Ld. Counsel for the parties and perused the record.

Ld. Counsel for the petitioner has contended firstly that the ACRs for the years 2003-04 to 2007-08 ought to have been taken into consideration on the premise that the ACRs of the five years immediately preceding the occurrence of the vacancy are relevant and not that of the five years preceding the decision to fill up the post. Secondly, it is argued even if the ACRs of the five year period as per the respondents is to be considered then the failure to communicate the 'Average' report is arbitrary and hence the 'Average' reports of this five year period cannot be taken into consideration and instead of the ACRs where the petitioner has been graded as 'Average', the ACRs of the immediately preceding years ought to have been taken into consideration. It is argued that if the two 'Average' reports are omitted from consideration, and the ACRs of the immediately preceding two years are taken into consideration by ignoring the 'Average' reports then even if the ACRs for the five years from 2005-06 to 2009-10 are taken into consideration, she fulfils the bench mark of ten and is liable to have been promoted.

In the light of the arguments the first point that needs to be considered is whether the ACRs for the years 2007-08 and 2009-10 wherein the petitioner had been graded as 'Average' but as the same had not been communicated to the petitioner could have been taken into account while determining the bench mark for purposes of promotion to the post of Accountant.

The Hon'ble Supreme Court in **Dev Dutt v. Union of India, (2008) 8 SCC 725**, has laid down that every entry and not merely a poor or adverse entry is required to be communicated. It has been held

that non-communication of such entry would be arbitrary and a denial of natural justice.

“13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee’s chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a “good” or “average” or “fair” entry certainly has less chances of being selected than a person having a “very good” or “outstanding” entry.

14. In most services there is a gradation of entries, which is usually as follows:

- “(i) Outstanding*
- (ii) Very Good*
- (iii) Good*
- (iv) Average*
- (v) Fair*
- (vi) Poor*

A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.

15. If we hold that only “poor” entry is to be communicated, the consequences may be that persons getting “fair”, “average”, “good” or “very good” entries will

not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. *In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. “poor” entry) need to be communicated and not “fair”, “average” or “good” entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent’s chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have “very good” entries in the last five years, then if he has “very good” (or even “outstanding”) entries for four years, a “good” entry for only one year may yet make him ineligible for promotion. This “good” entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.*

17. *In our opinion, every entry in the ACR 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 upgradation. 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 that arbitrariness violates Article 14 of the Constitution.

18. 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.....

41. 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.”

Thus, as per the decision of the Hon'ble Supreme Court the ACRs for the years 2007-08 and 2009-10 wherein the petitioner had been graded as 'average' and the same had not been communicated to the petitioner could not have been taken into account while determining the bench mark for purposes of promotion to the post of Accountant.

Consequently, in their place the ACRs for the next immediately preceding two years namely years 2003-04 and 2004-05 are liable to have been considered. As averred in paragraph 19 of the petition, and which fact has not been denied in the written statement, the grading of the petitioner for the year 2003-04 and 2004-05 is 'V.Good' and 'Good' respectively. If the ACRs of these two years are considered in place of the ACRs for the years 2007-08 and 2009-10, then the

petitioner has a bench mark of 11. Thereby, even going by the stand of the respondents to consider the ACRs for the period 2005-06 to 2009-10, of course in the manner as indicated by the Hon'ble Supreme Court, by disregarding the 'average' entries not communicated to the petitioner, the petitioner makes the grade by achieving the bench mark of 11.

Hence, without going into the other contention of the Ld. Counsel for the petitioner, that the ACRs for 2003-04 to 2007-08 ought to have been considered instead of the ACRs for the years 2005-06 to 2009-10, it has to be held that even taking into consideration the ACRs of the five years as per the stand of the respondents, of course by leaving out of consideration the ACRs where petitioner was graded 'average' in the light of the decision of the Hon'ble Supreme Court, the action of the respondents in ignoring the petitioner from consideration for promotion to the post of Accountant was illegal and arbitrary.

Accordingly, the writ petition is allowed. The respondent authorities are directed to reconsider the claim of the petitioner for promotion to the post of Accountant by leaving out of consideration the ACRs for the years 2007-08 and 2009-10 and instead relying on the ACRs for the years 2003-04, 2004-05, 2005-06, 2006-07 and 2008-09. It is further directed that if in pursuance to such exercise, which shall be concluded positively within three months from the date of receipt of certified copy of this order, the petitioner is entitled for promotion, then the necessary orders be issued for her promotion. The promotion will be with retrospective effect from the date of issue of promotion order

Annexure P-24. The petitioner will be entitled to all consequential benefits.

June 30 , 2015
dinesh

(HARINDER SINGH SIDHU)
JUDGE