

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CWP No.12110 of 2011
Decided on :12.01.2016**

Daljeet Kaur

... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present : Mr. S.K. Rattan, Advocate
for the petitioner.

Mr. L.S. Virk, Addl. AG, Punjab.

Mr. Rakesh Gupta, Advocate
for respondent No.2.

None for respondents No.3 and 4.

G.S. Sandhawalia , J. (Oral)

The petitioner seeks the quashing of the order dated 04.02.2011 (Annexure P-6) by which she is not promoted to the post of Senior Assistant (Accounts) in the pay scale of 10300-34800 + 3800 Grade Pay.

The reasoning given in the impugned order is that she does not fulfill the benchmark criteria and respondents No.3 and 4 have been promoted to the said post.

The pleaded case of the petitioner is that she was appointed as an Accounts Clerk on 13.06.2001 (Annexure P-4) and stood at Sr. No.129, whereas, respondents No.3 and 4 who have chosen not to contest stood at Sr.No.133 and 134. The seniority list has been attached as Annexure P-5.

It is the case of the petitioner that there were 5 vacancies of Senior Assistant and 4 were promoted from Junior Assistants as Senior Assistants vide impugned order and respondents No.3 and 4 were junior to her, whereas, she was ignored on the criteria that she does not have the requisite benchmarks. It is pleaded that her ACRs were Good/Very Good and she was never communicated regarding any adverse remarks regarding the down grading of her ACR and, therefore, only on the supply of ACRs she has come to know that for the year 2006-07 and 2008-09 they had been recorded as average. Resultantly, the benchmarks she obtained were only 9 marks, whereas, the requisite standard was 10. It is, thus, submitted that on account of the non-communication of the average remarks for two years, she has been prejudiced and never got a chance to represent against the same and, therefore, has been wrongly denied the promotion. The same was on the strength of seniority-cum-merit as per Regulation 9 of Punjab State Warehousing Corporation Staff (Conditions of Service) Group C and Group D (Services Regulation 2002). Reliance has been placed upon a judgment of this Court '**Dr.Gurdev Singh Bhardwaj Vs. State of Punjab and others'** 2013 (1) RSJ 474 to contend that the position stands settled that where adverse remarks are not communicated to the employee they cannot be used adversely to deny promotion.

The respondents in their written statement have admitted the fact that there were 5 sanctioned posts of Senior Assistant (Accounts), which were to be filled up on account of promotion, but out of them one was a reserved post and there was no SC candidate and, therefore 4 persons were promoted. It has been averred that the petitioner has failed to secure the minimum benchmark. As per Rule 18 (c) of the Punjab Civil Services (General and Common Conditions of Service) Rules, 1994, the minimum benchmark was to be 'Good' and there should be no supersession on the basis of merit.

Resultantly, on account of the two average remarks, the petitioner has been denied the promotion and was not considered for promotion as she has failed to secure the minimum benchmark. The fact of non-communication has been justified on the ground that as per instructions issued by Government of State of Punjab average remarks were not required to be communicated to the official. However, it is matter of record that nothing has been placed on record as to which instructions have taken this stand.

A perusal of Annexure P-7 would go on to show that as per service record of the petitioner following entries have been made for the 5 years proceeding her case for consideration for promotion which is as under:-

	Xc	X
Daljit Kaur	DO Patiala	2005-06 Good 2006-07 Average 2007-08 V. Good 2008-09 Average 2009-10 Good

As per instructions dated 06.09.2001 (Annexure P-9)

and as per Clause (c), the marks to be granted on the basis of the ACRs, reads as under:-

“(c) It has been decided to retain the numbering system of evaluation of ACRs as contained in the instructions dated 29.12.2000 is as under:

<i>'Outstanding'</i>	<i>:</i>	<i>4 Marks</i>
<i>'Very Good'</i>	<i>:</i>	<i>3 Marks</i>
<i>'Good'</i>	<i>:</i>	<i>2 Marks</i>
<i>'Average'</i>	<i>:</i>	<i>1 Marks</i>

ACRs for the last 5 years are to be taken into consideration for promotion.”

Counsel for the petitioner has relied upon the said circular dated 06.09.2001 to contend that the minimum benchmark was to be 'Good' and there could be no supersession and promotion was to be made strictly on seniority-cum-merit basis.

The relevant Clause reads as under:-

“(3) For promotion to posts falling in Group 'B' the minimum bench mark will be 'Good' and there would be no supersession i.e. promotions would be made strictly on seniority-cum-merit.”

Reliance has also been placed upon Regulation 9 (3) of the 2002 Service Regulations which provide that promotion is to be made on seniority-cum-merit and not on the basis of seniority

alone. The relevant Clause reads as under:-

“(3) Appointment to the service by promotion shall be made on the basis of seniority-cum-merit but no person shall have any right to claim promotion on the basis of seniority alone.”

A perusal of the above would thus go on to show that since there were two marks to be given for 'Good' and the ACRs for the last 5 years have to be considered, the petitioner would have required 10 marks. However, the petitioner is fall short of one mark on account of being granted average in the year 2006-07 and 2008-09 and it is not being disputed that the petitioner has not been communicated the average ACRs, due to which she has been adversely affected.

This Court in ***'Raghubir Singh, Sub-Inspector Vs. State of Haryana and others' 2012 (1) RSJ 355*** held that where a mere average entry was to be taken adverse and not fulfilling a benchmark of promotion, then it was to be communicated to the employee. The relevant observations read as under:-

“3. This fits with a logic that if a particular appraisal and a grading have a bearing on promotion prospects, then any relative grading which denies eligibility for consideration must be taken as adverse and hence, ought to be communicated. An 'Average' entry normally may not be taken as adverse, but in a situation where a mere 'Average' entry would be taken as not fulfilling a benchmark for promotion, it has an immediate ramification for promotion and hence, no such appraisal could be taken into reckoning if it is not communicated.

Consequently, the decision not to promote the petitioners on the basis of 'Average' reports is vitiated by the fact that they were not communicated and hence, the petitioners were bound to be favourably considered for promotion from the date when the respective juniors were promoted."

Similarly in '**Dr.Gurdev Singh Bhardwaj (supra)** while keeping in mind the observations in '**Dev Dutt Vs. Union of India and others' (2008) 8 SCC 725** it was held that adverse entry needs to be communicated to the employee and is liable to be ignored while determining the benchmarks. Relevant portion reads as under:-

"12. Following the dictum laid down by the Apex Court, it is clear that the average report relating to the year 2005-06 which clearly had an adverse effect insofar as consideration of the petitioner for purposes of promotion to the higher post of Senior Medical Officer, was required to be conveyed to him. Accordingly, it is held that the ACR for the year 2005-06 having not been communicated to the petitioner was liable to be ignored while determining the bench mark.

13. That apart, I find that the respondent-authorities have acted arbitrarily in not considering the ACR of the petitioner for the year 2007-08. The right of an employee to be considered for promotion is a fundamental right under Article 16 of the Constitution of India. It is not just a right of consideration but, in fact, an obligation cast upon the employer to afford a fair consideration to an employee in terms of the principles of service jurisprudence. It has been admitted that the petitioner had been graded 'very good' for the year 2007-08 and such report had been duly received but

was not available at the time of preparation of agenda submitted before the Departmental Promotion Committee. This cannot be a basis for denying to the petitioner the grading in terms of assigning three numbers for such 'very good' report for the year 2007-08.

14. Learned counsel appearing for the petitioner would bring to my notice that the petitioner has since retired on 29.2.2012, having attained the age of superannuation.

15. Accordingly, I allow the present petition in terms of directing the respondent-authorities to re-consider the claim of the petitioner for promotion to the post of Senior Medical Officer in terms of determining the bench mark afresh by ignoring the ACR for the year 2005-06 and in terms of taking into account the five previous ACRs i.e. for the years 2008-09, 2007-08, 2006-07, 2004-05 and 2003-04. It is further directed that if in pursuance to such exercise, which shall be concluded positively within a period of three months from the date of receipt of a certified copy of this order, the petitioner fulfils the requisite bench mark, then orders shall be issued promoting the petitioner to the post of Senior Medical Officer on a notional basis. The petitioner in such eventuality would also be held entitled to notional pay fixation on the post of Senior Medical Officer as on the date of his superannuation and would be released the revised pensionary/retiral benefits accordingly.”

Accordingly, keeping in view the settled position of law, the present writ petition is allowed. A direction is issued to the respondents to reconsider the case of the petitioner after ignoring the average report for the years 2006-07 and 2008-09 and give her the said benefit, on account of the fact that the same was not

communicated to the petitioner, from the date her juniors were given. The said exercise be done within a period of 2 months from the receipt of the certified copy of this order.

With the abovesaid observations, the present writ petition is allowed.

JANUARY 12, 2016
Naveen

(G.S. SANDHAWALIA)
JUDGE