

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

CWP No. 18404 of 2011
Date of decision: 25.04.2016

Umrao Singh

....Petitioner(s)

Versus

State of Punjab and others

...Respondent(s)

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

Present: Mr. Neeraj Sharma, Advocate,
for the petitioner.

Mr. I.P. Goyat, Addl. A.G., Punjab.

Mr. Anupam Singla, Advocate,
for the respondents.

G.S.SANDHAWALIA, J.

The petitioner seeks quashing of the order dated 26.08.2010 (Annexure P-11) whereby, he has been held dis-entitled for the grant of proficiency step up on completion of his 24 years of service on 16.02.1997 upto his retirement on account of the fact that his Annual Confidential Report (ACR) is not upto the mark.

The pleaded case of the petitioner is that he was appointed as a Driver in the respondent-Corporation and joined on 25.11.1971 and he had been performing his duties honestly and efficiently without any complaint from any quarter. He was never communicated or served any ACRs and was granted annual grade increments and proficiency step ups from time to time during his service tenure. However, proficiency step up increment after a period of 24 years was not granted and he thereafter had taken voluntary retirement after attaining the age of 55 years w.e.f. 31.10.1998.

He had been representing for consideration for grant of the same and he was served a show cause notice on 25.10.2005 (Annexure P-1) that his proficiency step up was required to be withheld and he was being given opportunity to show cause why it should not be. He had submitted his reply to the same that he had not been communicated any adverse report during his service career and thereafter, was called for personal hearing on 09.12.2005. He had appeared before the competent authority for personal hearing and given details of his version regarding his clean service record but no order was passed. A written request was thereafter sent on 10.09.2007 but of no avail. He applied for information under the Right to Information Act, 2005 for supply of ACRs for the period 1991-92 to 1996-97, which were supplied on 08.02.2010. From the said information supplied, he came to know that for the period 1992-93, 1993-94, 1994-95, 1996-97, the ACRs had not been written and the grading of 1995-96 had been shown as "average". Thereafter, he had served a legal notice dated 04.03.2010 and filed CWP No. 7848 of 2010 for grant of the said benefit, which was disposed of with the directions on 03.05.2010 to decide the issue in question. Resultantly, the impugned order has been passed.

As per the Punjab Government instructions dated 23.09.1998, the benefit of placement in higher scale and proficiency step up was only to be granted to employees whose over all service record was adjudged good. As per the clarification dated 10.01.2000 (Annexure P-12), 50% of the reports should be good and above including at least 2 of the last 3 reports. The rest of the reports may be satisfactory or average. Clarification had been issued on 16.01.2001 (Annexure P-13) that where 3 or more reports had not been written and no report certificate had been issued, then the same

number of years previous reports, if available, should be considered. Resultantly, a specific averment was made in para no. 19 that the writ petitioner had never been communicated the ACRs and, therefore, if the average entries of the ACRs were not communicated to the petitioner, the entries could not be used against him. On account of the entries not having been recorded, the petitioner could not be denied the claim of the 24 years' proficiency step up. Reliance was placed upon the judgment of the Apex Court in ***Dev Dutt vs. Union of India and others, 2008 (8) SCC 725.***

The respondents, in their written statement, have denied that the work and conduct of the petitioner was good in his entire career. It was averred that he was suspended 3 times and warnings were issued 9 times. Token recovery was effected 8 times and 4 annual grade increments were stopped for violation of the official duty 6 times. A letter of censure was issued 8 times and, therefore, he was not entitled to get the benefit as per the instructions dated 10.01.2000 as out of the last 8 years, 50% of the reports should be good and out of the last 3 ACRs, 2 should be good. In the petitioner's case at the time of consideration from 1988-89 to 1995-96, it had been found that 4 of the ACRs were "average" and one was "good" and there were no report certificates for 1992-93, 1994-95. Therefore, 3 ACRs for the years 1984-85 to 1986-87 were taken into consideration and resultantly, only 1 was good out of 8 ACRs and the rest were average. The petitioner had been provided an opportunity of hearing and, therefore, he was not entitled for placement in the higher scale. The contents of para no. 19, in which specific averment had been made that the adverse ACRs had not been communicated, were not denied.

From the above pleadings and the impugned order, it would be

clear that the petitioner's average ACRs for the year 1995-96, 1997-98 was never communicated to him and prior to that, no report service had been there for the years 1992-93, 1993-94, 1994-95, 1996-97, 1998-99. He had earned average reports for the years 1995-96, 1997-98 and a good report for 1991-92. Resultantly, it is apparent that the petitioner has been prejudiced on account of the fact that for 5 years, no report had been recorded against him and the average report of 1995-96 and 1997-98 had never been communicated to him. In the absence of the communication of the reports, he was in no position to improve his work and conduct. As per the instructions dated 16.01.2001, the benefit was only to be granted where 50% of the reports were to be good out of the last 8 reports and out of the last 3 reports, at least 2 reports should be good and the rest of the reports could be average. The Apex Court in *Dev Dutt's case (supra)*, held that every ACR should be communicated to the employee within a reasonable period as non-communication may adversely affect the employee and he would not be able to improve his work in future and, therefore, it would be violation of the principles of fairness. Similarly, even an outstanding entry was to be communicated to help to boost the morale of the employee.

Relevant portions read thus:-

“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 bench mark or not. Even if there is no bench mark, 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.

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17. In our opinion, every entry in the A.C.R. 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 vs. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark 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.

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22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a

pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

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37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.”

The said view has further been approved by a three-Judge Bench of the Apex Court in ***Sukhdev Singh vs. Union of India and others, 2013 (5) SCR 1004***. The relevant portion reads as under:-

“8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in

the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.

9. The decisions of this Court in [Satya Narain Shukla vs. Union of India and others](#)¹⁰ and [K.M. Mishra vs. Central Bank of India and others](#)¹¹ and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.”

In 'Raghubir Singh, Sub-Inspector Vs. State of Haryana and others' 2012 (1) RSJ 355, it was 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 vs. State of Punjab and others, 2013 (1) RSJ 474**, it was held that adverse entry needs to be communicated to the employee and is liable to be ignored while determining the bench marks. The relevant portions read thus:-

“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 reconsider 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.”

Keeping in view the above discussion and the fact that the petitioner had not been communicated the adverse ACRs and there had been non-recording of his ACRs for 5 years prior to his retirement, the same cannot be held to be adverse factor against him for the declining of the benefit of the ACP scheme. Accordingly, the impugned order dated

26.08.2010 (Annexure P-11) is quashed. A writ of mandamus is issued to the respondents to grant the petitioner the benefit of 24 years' proficiency step up increment from the due date with all consequential benefits including the revision of his pension. The arrears with interest be paid to him @ 8% per annum, from the due date.

25.04.2016
shivani

(G.S. SANDHAWALIA)
JUDGE