

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

Date of decision: 05.07.2016

CWP No.17360 of 2013

Balwinder Kaur

...Petitioner

Vs.

State of Punjab & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. A.D.S.Jattana, Advocate, for the petitioner.

Mr. Harkesh Manuja, Addl. AG, Punjab.

1. *To be referred to the Reporters or not? Yes*
2. *Whether the judgment should be reported in the Digest? Yes*

RAJIV NARAIN RAINA, J.

1. Annual Confidential Reports bear special character when promotion is based on grading of service record in confidential rolls by the numbering system i.e. where the grading system carry marks to achieve the minimum benchmark of 12 required for promotion. The numbering policy has been laid down vide Punjab Government instructions dated 06.09.2001. The 'Outstanding' entry carries 4 marks; 'Very Good' 3 marks; 'Good' 2 marks and an 'Average', weighs 1 mark.

2. The petitioner retired from service in October, 2012 on attaining the age of superannuation. She had put 37 years in Government service of which she had spent 29 years working as an Assistant. Her claim for promotion as Superintendent Grade-I has been rejected for the reason that she was graded in the relevant previous five years prior to the date of

consideration by the Department Promotion Committee as ‘Below Average’ for the short period 01.04.2007 to 20.08.2007 and as per instructions dated 29.12.2000 and 06.09.2001, the petitioner was found ineligible for promotion due to ‘Below Average’ remarks recorded in her ACR. But at the same time, for the balance period of the Assessment Year 2007-08 i.e. from 21.08.2007 to 31.03.2008, the period is recorded as ‘No Report Certificate’. The same is true for the period 01.04.2008 to 10.12.2008 for which period ‘No Report Certificate’ has also been issued. Similarly, there is no ‘No Report Certificate’ for the period from 08.12.2011 to 31.03.2012. In order to take a bird’s eye of the ACRs for calculation of numbers required for achieving the requisite benchmark, the same are reproduced below taken from Para.3 of the written statement filed by the State:

Year	Marks	Grading
2012-13	ACR not received uptil now	
01.04.2011 to 07.12.2011	4	Outstanding
08.12.2011 to 31.03.2012	-	No report certificate
01.04.2010 to 31.03.2011	2	Good
08.05.2009 to 2/2010	3	Very Good
01.04.2008 to 10.12.2008	-	No report certificate
11.12.2008 to 31.03.2009 (3 months 20 days)	1.5	Outstanding
01.04.2007 to 20.08.2007	-	Below Average (There are adverse remarks)
01.09.2007 to 31.03.2008	-	No report certificate
Total	10.5	

3. There is no manner of doubt that the last 5 years’ ACRs have to be taken into account while considering cases for promotion. It is the

petitioner's case that she satisfies the benchmark of 12, as required by the instructions dated 06.09.2001 but there has been an error in calculation pertaining to the period 2008-09 which deserves to be corrected by issuing directions. However, not having met with any success on a representation submitted by her against non-promotion, she approached this Court by way of CWP No.21665 of 2012, which was disposed of on 10.01.2013 with a direction to the first respondent to take a final decision on the claim made by the petitioner in her legal notice dated 03.09.2012. The representation/legal notice has been rejected by the order dated 03.04.2013 (Annex P-4). The order records that the petitioner has secured only 10.5 marks and therefore is shy of the minimum benchmark entitling promotion.

4. In her challenge to the ACRs for the period 2008-09, she submits that the grading is 'Outstanding' for the period from 11.12.2008 to 31.03.2009, but only 1.5 marks have been given, whereas she was entitled to 4 marks for the balance period i.e. 01.04.2008 to 10.12.2008 as 'No Report Certificate' has been issued, which is not her fault since she performed her duties diligently and therefore, the entire period deserves to be treated as 'Outstanding' since 'No Report Certificate' is of no value in the numbering system and especially looking to the average ratings of the ACRs from 2009 to 2012, which are either 'Very Good', 'Good' or 'Outstanding' the period deserves to be moderated beneficially. Similarly, the period from 01.04.2011 to 07.12.2011 suffers from the same lacuna as the grading for the year 2008-09 since the period from 08.12.2011 to 31.03.2012 also records 'No Report Certificate'. The strange thing is that she has been given 4 marks for 2011-12 and by the same reasoning has been given only 1.5 marks for the period 2008-09 by apparently treating the longer period of 'No Report Certificate' from 01.04.2008 to 10.12.2008 as adverse in nature. If

the position is corrected from 2008 to 2012 by treating the first limb of the period 2008-09 i.e. 01.04.2008-10.12.2008 as 'Outstanding', then the petitioner meets the benchmark of 13 and falls within the zone of consideration for promotion.

5. However, the moot issue which remains is as to how the period 01.04.2007 to 20.08.2007 is to be treated, where she has been assessed 'Below Average' which is adverse in nature. However, the period is of short duration of 4 months and 19 days while the substantial period suffers 'No Report Certificate'. Then how is the entire period 2007-08 to be treated. During this period, the Department in its reply admits that the petitioner had submitted a complaint dated 02.06.2007 against one Surmukh Singh, the then Superintendent Grade-I, Punjab Civil Secretariat alleging sexual harassment against him. The complaint was referred to the Committee against sexual harassment of women employees at work place. It was investigated and the conclusion reached was that the charges leveled against Surmukh Singh were not proven and the complaint was filed vide Annex R-III. It is admitted that as per instructions dated 03.05.1960 (Annex R-VI), the Reporting Authority, who has seen the work of the employee for 3 months can initiate Annual Confidential Report.

6. Mr. A.D.S.Jattana, learned counsel appearing for the petitioner, draws attention of this Court towards the instructions of the Punjab Government dated 07.06.1982 on the subject of 'Writing of Annual Confidential Reports – Recording of remarks by the Reporting/Reviewing Authority – Prescribing of time limit to avoid delay'. Sub para (vii) prescribes that in case the ACR in respect of any employee is not recorded by the 30th September, by the authorities concerned, the report written

thereafter shall not be placed on his personal file and only a certificate, duly signed by the competent authority, should be added in personal file of the Government employee that the work and conduct of the officer/official concerned during the period in question, was satisfactory. These instructions take care of 'No Report Certificates' and the periods have to be treated as satisfactory. Further clarificatory instructions were issued by the Punjab Government on the question of 'No Remarks' and was decided by Government in sub para.(v) of the instructions dated 15.07.1983, produced by Mr. Jattana at the hearing, as follows:

“(v) In the instructions referred to above, it is provided that a certificate duly signed by the competent authority to the effect that the work and conduct of the Government employee was satisfactory, be added to the Government employee was satisfactory, be added in personal file in case his ACR is not recorded by the 30th September, by the authorities concerned. On reconsidering the matter, it is clarified, that reports received after 30th September should not be treated as invalid. They should be placed on the ACR files along with a note to the effect that the report was received after 30th September.”

7. In the above background, the impugned order dated 03/04.04.2013 deserves to be examined. The case of the petitioner was rejected on two grounds by the Departmental Promotion Committee (DPC) in its meeting held on 23.05.2012 that she did not secure the benchmark of 12 marks and had adverse remarks in her confidential rolls. It was decided that the minimum benchmark is 'Very Good' with at least 12 marks in total to secure promotion, but among those meeting the criteria, there would be no supersession. The post of Superintendent Grade-I falls in Group-A service

and therefore the instructions dated 06.09.2001 apply. The Promoting Authority in the impugned order records that for the 5 years' ACRs relevant to the consideration, the petitioner has approximately 34 months of service to her credit while the period covered by 'No Report Certificates' extend to nearly 2 years of service and therefore she cannot be promoted. The Promoting Authority being the Principal Secretary to Government of Punjab, Department of Personnel has made no reference as to why the petitioner was awarded only 1.5 marks for the period from 01.04.2008 to 31.03.2009, when in similar situation (though the partial period of No Report Certificate is adverse) have 4 marks been awarded for the period 01.04.2011 to 31.03.2012 and why the two periods of assessment should not be put at par which should take the petitioner beyond benchmark of 12 marks.

8. The only issue which demands determination by this Court is addressed to the period 01.04.2007 to 31.03.2008, where for 4 months and odd, the petitioner's work has been assessed as 'Below Average' and hence what is to be done with the 'No Report Certificate' from 01.09.2007 to 31.03.2008, which period is about 7 months. No doubt, the 'No Report Certificate' has to be put on serviced file by virtue of the clarificatory instructions, but at the same time they have to be treated as satisfactory. In this view of the matter, for 4 months and odd, the petitioner is assessed as 'Below Average' while by fiction of the law her work and conduct has to be treated as satisfactory for the balance 7 months. According to the grading system 'Average' has to be assigned one mark, but all the same, the instructions dated 29.12.2000 non-suit employee and render him/her unfit for promotion if he/she is rated 'Below Average' in any of the one 5 years by virtue of Para.1 of the instructions found at Pg.56 of the paper-book. When these instructions speak of 'Below Average', the entire year has to be

taken into consideration and not just a part thereof. This to my mind appears to be the Achilles heel in the impugned order calling for striking it down when it treats the period of 4 months and odd as covering the entire period when the greater part of the assessment year was recorded as 'No Report Certificate' which has to be treated as satisfactory by reason of policy instructions creating a fiction which has to be taken to its logical end. This appears to be the rational meaning to be attached to the expression 'in any one of the 5 years' employed in the Government instructions. It is well settled that rating has to reflect work and conduct for the entire period of one year and therefore the entire period cannot be treated in isolation as 'Below Average' by any stretch of imagination, otherwise it may result in grave injustice occasioned by failure of the reporting officer to record ACR for the remaining period which default in performance of duty is not the fault of the petitioner whose work and conduct for the rest of the period draws a blank. There is no explanation on file as to why the period is not covered by recorded assessment. The balance period was I am inclined to think crucial to assessment and if it is sadly reflected by 'No Report Certificate' the entire period of one year has to be moderated in such a manner that future record earned by the petitioner in her ASRs is duly balanced by giving due credit for the whole requisite period relevant to consideration. The efficacy of the 'below average' remarks for 4 months and odd deserves to be read down as entirely satisfactory, especially when followed by Good, Very Good and two Outstanding ACRs. To show to the contrary, the burden is not on the petitioner to discharge but on the State and its functionaries who failed to perform duty. Let us hypothesize, supposing the work and conduct was assessed for the balance of the assessment period from 01.09.2007 to

31.03.2008 as Outstanding or Very Good or Good, as in the subsequent years then what would happen? The result is not far to see.

9. There is yet another precious way of looking at the case of the petitioner which is to view the reports immediately prior to 2007 and thereafter, backward and forward. The reports of the 4 years after rating the petitioner as 'Below Average' for 4 months and odd, to repeat, are either 'Good', 'Very Good' with two 'Outstanding' reports, but with two periods of the 'Outstanding' ACRs hanging fire with No Report Certificates. I would not therefore dunk the petitioner in the pool of 'Below Average' to force her into the canines of instructions without applying the beneficial molars only to throw her out of consideration for promotion mostly for the reason that about 7 months of the relevant year are to be treated as satisfactory, and I would not do so unless there was some tangible and dependable material justifying recording the 'Below Average' remarks, while grading is for the whole year. No material has been shown to the satisfaction of the Court or placed on record to cover the period of reasonable suspicion arising out of the complaint of sexual harassment although not proven, which charge is often not easy to bring home as there may be no direct evidence of covert acts done closeted in office. The previous year i.e. 01.04.2006 to 31.03.2007 is also reported as 'No Report Certificate' and it is so recorded in the impugned order. If the meeting of the DPC was held on 23.05.2012, then technically speaking the five previous years would start from 23.05.2007, which reduces 'Below Average' period to less than 3 months since that period of assessment was till 20.08.2007 which substantially dents the work of the DPC since ACRs form less than watching period of less than 3 months are not recordable by virtue of separate instructions. Even though the charges may not have been proven,

but the complaint casts clouds on the ACR for the brief period by guiding hand and when read holistically and in the total impact of the 5 years presented to the naked eye a different picture can emerge. It also appears worthy of consideration that the report for a smaller part of the ACR year eventually merges into the final ACRs. Nothing can be said with any certainty as to the work and conduct of the petitioner for the 7 remaining months of the assessment year 2007-08 and the petitioner deserves benefit of instruction treating the period by fiction of the law as satisfactory to claim her last promotion as Superintendent Grade-I after spending 29 years as Assistant.

10. I would, therefore, not read 'Below Average' remarks recorded for the short period to the disadvantage of the petitioner. Annual Confidential Reports are never earned by employees since they are recorded by superior officers on their own. If for any reason the superior officers were unable or failed to record the same, it was no fault of the candidate and he/she cannot be put to disadvantage on this count. The good work done by the petitioner for the entire period 2007-2012 has to be spread pro-rata on the basis of available reports to be worked out on average basis. *See Full Bench judgment of this Court in Kamal Kumar Gupta Vs. State of Haryana & others, AIR 1991 Punjab & Haryana 118: 1991 (1) SLR 91.* Though the decision is not pat on the point, but drives home the argument of Mr. Jattana to which I would add that the 'Below Average' period is short and not supported by at least some tangible material to justify the recording of ACR to assuage the conscience of the Court. It matters little what fate that period met in appeal. There is no explanation on this point in the impugned order, which is in fact silent on the most crucial aspect which has jettisoned her claim for promotion. It is hard for this Court to appreciate how does 'Below

Average' for a few months stand alone beside one 'Good', one 'Very Good' and two 'Outstanding' reports for the period under consideration. Moreover, the instructions mandate

11. In the facts and circumstances noticed above, this Court is satisfied that consideration at the hands of the respondents as reflected in the impugned order deserves to be set aside as it is neither just nor fair dispensation of justice. The impugned order is accordingly set aside. The competent authority shall re-examine the claim of the petitioner for promotion to the post of Superintendent Grade-I with effect from the same date when it was considered and rejected in the DPC meeting held in 2012. The period from 01.04.2008 to 31.03.2009 has to be treated as 'Outstanding' on the principle of *pari passu* to carry 4 marks to the credit of the petitioner which makes her cross the 12 mark boundary. The entire exercise be completed within a period of two months from the date of receipt of certified copy of this order. In case the claim of the petitioner is eventually granted on reconsideration, she is also held entitled to all consequential benefits flowing there from.

12. Accordingly, the writ petition stands allowed in the above terms.

05.07.2016
Vimal

[RAJIV NARAIN RAINA]
JUDGE