

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Civil Writ Petition No.6578 of 2012 (O & M)

Date of Decision: September 20, 2018

Surinder Kumar Mahajan

..... PETITIONER

VERSUS

State of Punjab & others

..... RESPONDENTS

. . .

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

. . .

PRESENT: - Mr. C.M. Chopra, Advocate, for the petitioner.

Mr. Jaswinder Singh, Senior Deputy Advocate General,
Punjab.

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Jaspal Singh, J

Through the instant writ petition preferred under Article 226/227 of the Constitution of India, petitioner has sought for issuance of a writ in the nature of mandamus, directing the respondents to upgrade his ACR for the period 1994-95 wherein adverse remarks recorded stands expunged by the Government vide letter dated September 16, 2009 conveyed on September 23, 2009 (Annexure P-1) and for declaration that non-communication of average reports is arbitrary and violative of Article 14 of the Constitution, as well as for release of ACP from the due date i.e. January 01, 1996.

Heard learned counsel for the parties and perused the record.

Petitioner was working as Executive Engineer in the office of Director, Plant Design & Central Purchase Organization, Ranjit Sagar Dam Project, Shahpurkandi Township. He retired from service on October 31, 2009 on attaining the age of superannuation. It is the case of petitioner that he was denied the benefit of ACP on competition of 4, 9, 14 years of service w.e.f. January 01, 1996 in view of Punjab Government circular dated April 17, 2000 of ACP Scheme as his ACRs for the period 1993-94, 1994-95 and 1995-96 were average which were never conveyed or communicated to him. Though, adverse remarks in ACR of 1994-95 were expunged by the Punjab Government, Irrigation Department vide letter dated September 23, 2009 (Annexure P-1) but ACP w.e.f. January 01, 1996 has been rejected on the ground that his ACRs were not upto the bench mark.

The only question which requires determination in this case is whether the ACRs pertaining to the years 1993-94, 1994-95 and 1995-96 which have been adjudged as Average” and have not been conveyed to the petitioner, can be taken into consideration while assessing the benchmark for the purposes of Promotion or Grant of ACPs.

This question/controversy is no more res-integra in view of the catena of judgments delivered by the Hon’ble Apex Court as well as by this Court. A similar question came up for hearing before this Court in ***Dr. Gurdev Singh Bhardwaj vs. State of Punjab & others, 2012(4) SCT 635***, wherein following the law laid down by the Hon’ble Apex Court, this Court observed as under:-

“10. The first question that arises for consideration is as to whether the ACR relating to the year 2005-06 wherein the petitioner had been graded as 'average' and the same having 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 Senior Medical Officer.

11. The Hon'ble Supreme Court in the case of **Dev Dutt v. Union of India and others** reported as **2008(3) S.C.T. 429 ; 2008(4) R.A.J. 432 ; (2008) 8 SCC 725** had held in the following terms:

“Learned counsel for the respondent relied on a decision of this Court in **Vijay Kumar vs. State of Maharashtra & Ors. 1988 (Supp) SCC 674** in which it was held that an uncommunicated adverse report should not form the foundation to deny the benefits to a government servant when similar benefits are extended to his juniors. He also relied upon a decision of this Court in **State of Gujarat & Anr. vs. Suryakant Chunilal Shah, 1999(1) S.C.T. 208 ; 1999 (1) SCC 529** in which it was held:

"Purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance".

On the strength of the above decisions learned counsel for the respondent submitted that only an adverse entry needs to be communicated to an employee. We do not agree. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved.

In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus, in this situation the 'good' entry in fact is 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 rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which

was not done in this case. Hence, we are of the opinion that the noncommunication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.”

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.”

A close reading of the above reproduced judgment makes it clear that an uncommunicated adverse report should not form the foundation to deny the benefits to a government servant. It is also not the case of respondents that adverse remarks were ever communicated to the petitioner. Moreover, denial of ACP to the petitioner is based upon a Government circular dated April 17, 2000 which could not be given effect retrospectively as petitioner was due for ACP w.e.f. January 01, 1996. Thus, this Court is of the considered view that on the basis of an ‘average’ report which was never communicated, petitioner could not be deprived the benefit of ACP, rather ‘average’ report could not be treated as adverse for the purposes of determination of the benchmark for promotion or grant of ACPs.

As far as ACR relating to the year 1994-95 is concerned, adverse remarks, if any made therein, has already been expunged by the competent authority. As such, it cannot have any adverse bearing.

In the light of what has been discussed above, instant petition is allowed. Consequently, petitioner is entitled to the ACPs and arrears thereof w.e.f. January 01, 1996 alongwith consequential benefits be paid within two months from the date of receipt of a certified copy of this judgment and on

failure, petitioner shall be entitled to interest @ 9% per annum from the date of institution of this writ petition till actual payment.

September 20, 2018
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(Jaspal Singh)
Judge

Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No