

(2020) 10 SHI CK 0381
In the High Court Of Himachal Pradesh
Case No : CWPOA No. 3672 Of 2020

Parkash Chand

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 08-10-2020

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2020) 10 SHI CK 0381

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : Bhuvnesh Sharma, Sudhir Bhatnagar, Arvind Sharma, Kunal Thakur

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Precisely, the facts of the case as emerge from the record are that the petitioner was appointed as clerk in the respondent-Department on 2.1.1984 and subsequently, in November 2005 he was promoted to the post of Senior Assistant. In the seniority list of Senior Assistant, petitioner was placed at Sr. No.1 and as such, he was entitled to be considered for promotion to the post of Superintendent Grade-II. On 21.11.2013, respondent No.2 promoted the persons junior to the petitioner from the post of Senior Assistant to the post of Superintendent Grade-II and as such, petitioner made representation to respondent No.2. On 6.6.2014, respondent informed the petitioner that he has been not considered for promotion on account of adverse entries in his ACR's pertaining to the year, 2009-2010 and 2011-2012. Now, petitioner stands retired from service on his having attained the age of superannuation on 30.4.2014. It also emerge from the pleadings adduced on record by the respective parties that penalty of stoppage of two increments with cumulative effect was also imposed upon the petitioner during his aforesaid service carrier, but same was also set-aside much prior to the convening of the DPC.

2. Precise grouse of the petitioner is that since adverse ACR's pertaining to the year, 2009-10 and 2011-12 were never communicated to him, same could not be taken into consideration by the DPC while considering his case for promotion alongwith other eligible candidates.

3. Having heard learned counsel representing the parties and perused the material available on record, especially reply filed by the respondents, this Court finds that petitioner was ignored for promotion on the basis of adverse ACR's pertaining to the year 2009-10 and 2011-12, which were admittedly communicated to the petitioner vide letter dated 6.1.2014 (Annexure R-1) i.e. after convening of the DPC, which admittedly held on 20.11.2013. Careful perusal of communication dated 6.1.2014 (Annexure R-1) clearly suggests that adverse remarks in the ACRs of the petitioner for the year, 2009-10 & 2011-12 by the then Tehsildar Ghumarwin and Assistant Commissioner to Deputy Commissioner Bilaspur, respectively were conveyed to the petitioner after 20.11.2013 by which time petitioner stood considered for promotion alongwith others that too on the basis of ACRs, which were not communicated to him.

4. By now it is well settled that that all grading whether "very good", "good", "average" or "poor", are required to be communicated to the employees working in the government offices, statutory bodies, public sector undertakings or other state instrumentalities, so that employees concerned gets an opportunity of representation for improvement of his grading. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in case titled *Dev Dutt v. Union of India and Ors.*, (2008) 8 SCC 725, wherein it has been held as under:-

"16. In our opinion if the Office Memorandum dated 10/11.09.1987, 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 get some other benefit. For example, if the bench mark 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 for some other extraneous consideration.

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.

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.

23. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above).

34. Originally there were said to be only two principles of natural justice : (1) the rule against bias and (2) the right to be heard (*audi alteram partem*). However, subsequently, as noted in *A.K. Kraipak's case* (supra) and *K.L. Shephard's case* (supra), some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide *S.N. Mukherji vs. Union of India* AIR 1990 SC 1984. In *Maneka Gandhi vs. Union of India* (supra) (vide paragraphs 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

35. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

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.

38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in *Union of India vs. Major Bahadur Singh* 2006 (1) SCC 368. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants)."

5. Reliance is also placed on judgment passed by the Hon'ble Apex Court in *Sukhdev Singh v. Union of India and Ors.*, (2013) 9 SCC 566, wherein it has been held as under:

"7. A three Judge Bench of this Court in *Abhijit Ghosh Dastidar vs. Union of India and others*⁹ followed *Dev Dutt*³. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

"Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

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."

6. It is quite apparent from the aforesaid exposition of law laid down by the Hon'ble Apex Court that every entry in the ACR is required to be communicated to the public servant as it helps an employee to work harder and achieve more that helps in improving his work and better results, but at the same time, non-communication of adverse entries recorded in the ACRs would be violative of Article of 14 of the Constitution of India.

7. In the case at hand, it stands duly admitted on behalf of the respondents that adverse entries in the ACR's were communicated to the petitioner after convening of DPC in the year, 2013 and as such, prayer made in the instant petition deserves to be allowed.

8. Consequently, in view of the above, present petition is allowed and Annexure P- 4, dated 6.4.2014, whereby representation of the petitioner came to be rejected, is quashed and set-aside. The petitioner is held entitled to the promotion of Superintendent Grade-II from the date when persons junior to him in the list of Senior Assistant were promoted to the post of Superintendent Grade-II vide office order dated 21.11.2013 (Annexure P-2) with all consequential benefits.

9. In the aforesaid terms, petition stands disposed of, so also pending application(s), if any.