

**IN THE GAUHATI HIGH COURT**

**THE HIGH COURT OF ASSAM:NAGALAND:MEGHALAYA  
MANIPUR:TRIPURA:MIZORAM:TRIPURA & ARUNACHAL PRADESH**

**W.P (C) No. 417 AP of 2010**

Smt. Bhogeshwari Kalita  
W/o Sri B.C. Kalita  
ESS Sector, Itanagar  
Dist. Papum Para  
Arunachal Pradesh

**Petitioner**

-Vrs.-

The State of Arunachal Pradesh  
Represented by the Chief Secretary  
Of Arunachal Pradesh

2. The Arunachal Pradesh Public  
Service Commission, represented  
By its Chairman

3. The Secretary, the Arunachal Pradesh  
Public Service Commission, Itanagar

4. Smt. Padma Rajeev  
C/o Secretary  
Arunachal Pradesh Public  
Service Commission, Itanagar

**Respondents**

**BEFORE  
THE HON'BLE MR JUSTICE U.B. SAHA**

Advocate for the petitioner: Mr. D. Lazi

Advocate for the  
Respondent No. 1: Mr. R.H. Nobam, Sr. G.A.

Advocate for the  
Respondent No. 2 and 3 : Mr. N. Tagia

Advocate for the

Respondent No. 4 : Mr. P.K. Tiwari

Date of hearing  
and delivery  
of the judgment: 26.7.2011

### **JUDGEMENT AND ORDER (oral)**

The challenge in this writ petition is the minutes of the Departmental Promotion Committee (DPC) dated 18.8.2010 and also the minutes dated 10.9.2010 of the review DPC as well as the order of promotion of respondent No.4, dated 17.9.2010, to the post of Assistant in the Arunachal Pradesh Public Service Commission, (in short hereinafter referred to as 'Public Service Commission') with a prayer for direction to the respondents authorities to consider the case of the petitioner for promotion holding a further DPC.

2. Heard Mr. D. Lazi, learned Counsel for the petitioner as well as Mr. R. H. Nobam, learned senior Govt. Advocate appearing for the State respondents. Also heard Mr. N. Tagia, learned Standing Counsel for the respondent 2 and 3, the Public Service Commission and Mr. P.K. Tiwari, learned Counsel for the respondent No.4.

3. The pleaded case of the petitioner needed to be discussed is as follows:

The petitioner is working as Upper Division Clerk (UDC) in the office of the Public Service Commission, Itanagar since 1995 and she became eligible for promotion to the post of Assistant in the year 2000, but from 2000 to 2010, the said post was not filled up. On 20.5.2010,

by a letter (Annexure-E), the Secretary of the Public Service Commission informed the petitioner that a DPC was held on 11.3.2010 and her case for promotion was not considered because of adverse remarks in her ACRs for the period 2006-07, 2007-08 and 2008-09 and she was also advised to improve her performance.

4. In response to the said communication, dated 20.5.2010, the petitioner made a representation on 31.5.2010 ( Annexure-F) wherein she stated that she was completely in dark about her adverse ACRs for the year 2006-07, 2007-08 and 2008-09 and she also assured the authority that she will improve her performance up to the satisfaction of the authority and ultimately the authority set at naught the recommendation of the DPC held on 11.3.2010 and constituted another DPC for consideration of the cases of the eligible candidates for promotion to the post of Assistant.

5. The review DPC as constituted considered the cases of the eligible candidates on 10.9.2010 including the petitioner before disposal of her representation and ultimately recommended the name of the respondent No.4 for promotion to the post of Assistant and consequent thereto, the respondent No.4 was promoted to the post of Assistant vide order dated 17.9.2010 (Annexure-G). Being aggrieved by the action of the respondents, the petitioner filed the instant writ petition.

6. The State respondents did not file any counter-affidavit as the petitioner is an employee of the Public Service Commission. The respondent No. 2 and 3 filed their affidavit in opposition wherein it is stated that filling up of one post of Assistant had arisen only in the year

1998 due to promotion of one Assistant to the post of Section Officer on officiating capacity and the promotion of the petitioner on officiating capacity could not be considered because she was completely found unsuitable/ unfit to be promoted to the higher grade on the basis of her performance. Therefore, despite of her several representations, her case was not considered to be promoted to the next higher grade by the authority.

7. It is also stated that as per provisions of Rule 6 of the Arunachal Pradesh Public Service (Amendment) Rules, 1993, (hereinafter for short referred to as "Rules"), appointment to the post of Assistant shall be made from the select list prepared under Rule 10 of the said Rules from amongst the UDCs who have rendered not less than five years for general categories and three years in the grade of UDC for Arunachal Pradesh Schedule Tribes on the first day of the year in which selection was made on the basis of seniority cum merit failing which on deputation from Arunachal Pradesh Secretariat/other Heads of Department under the Government of Arunachal Pradesh and in fact, a deputationist was brought for a period of two years.

8. Further case of the respondent No.2 and 3 is that one Smt. Koyang Panor was promoted to the post of Assistant against the reserve category vacancy and one R.K.Singh was promoted to the post of UDC against the unreserved category. Since the petitioner, an UDC is a non-Arunachal Pradesh scheduled tribe, her case could not be considered against the reserved vacancy.

9. In para-10 of the affidavit in opposition, it is also stated that no record is found regarding any assurance given to the petitioner by the Commissioner for granting her promotion and her adverse remark was also not expunged or struck off after receiving her representation dated 31.5.2010.

10. The respondent No.4, who was promoted by the impugned order of promotion, by way of filing the affidavit in opposition stated, inter alia, that the petitioner could not be promoted to the post of Assistant as she was found totally unsuitable. It is further stated that prior to holding the DPC on 18.8.2010, the petitioner was communicated the adverse remarks made in her ACRs for last three years and in response to which, she also made a representation, but in the said representation, she nowhere stated either for striking out her adverse remarks in the ACRs or for consideration of her case by the DPC, rather she assured the authority that she would improve her performance up to the satisfaction of the authority. More so, the petitioner has not challenged the recommendation of the DPC, dated 11.3.2010, thus the factum of the said DPC considering the un-communicated adverse remarks in the ACRs of the petitioner is of no consequence.

11. Mr. Lazi, learned Counsel for the petitioner while urging for relief sought for would contend that by this time it is a settled position that the adverse remarks in the ACRs have to be communicated to the employee concerned before considering the same for the purpose of promotion in the next higher post and in the instant case, before 11.3.2010, admittedly, the authority did not communicate the adverse

ACRs of the petitioner for the period of 2006-07, 2007-08 and 2008-09 which was considered for promotion by the subsequent DPC for promotion to the post of Assistant from the post of UDC. He again contended that question for challenging the recommendation of the DPC dated 11.3.2010 does not arise as the same was set at naught by the authority concerned upon receipt of representation of the petitioner and the authority also constituted review DPC on recommendation of which, the respondent No.4 was given promotion. He further contended that before disposal of the representation of the petitioner (Annexure-F) addressed to the Secretary, Public Service Commission, holding of subsequent DPC is bad in law. He finally contended that the Court should quash the recommendation of the DPC dated 18.8.2010 as well as the recommendation of the review DPC dated 10.9.2010 and consequent thereto, the order of promotion of the respondent No.4.

12. Mr. Tagia, learned Counsel for the respondents-Public Service Commission while resisting the contention of Mr. Lazi, submits that promotion is not a matter of right, only consideration for promotion is a right. In the instant case, the case of the petitioner was considered by the DPC while recommended the name of the respondent No.4 and as ACRs of the petitioner was found unsatisfactory and not up to the mark i.e Bench mark as required, the petitioner was not recommended for promotion. He again contended that Rule 6 of the Rules made a prescription for promotion to the post of Assistant on the basis of seniority cum merit meaning thereby the seniority alone is not the criteria, the DPC has to see seniority as well as the merit also and in

the instant case, admittedly the respondent No.4 though junior was found by the authority meritorious one and whose Bench mark was better than the petitioner and thus her name was recommended. He finally contended that the representation of the petitioner was neither for striking out the adverse remarks in the ACRs nor for consideration of her case for promotion, rather that was a letter of assurance that she will improve herself for future so that her case can be considered by the DPC for promotion to the next higher post. Therefore, it would be proper for this Court to dismiss the writ petition in limine.

13. Mr. Tewari, learned Counsel for the respondent No.4 though echoed in the same manner as contended by Mr. Tagia, would further contend that promotion is not an absolute right to a person holding the feeder post, rather consideration is a right. In the instant case, admittedly, the case of the petitioner was considered by the DPC. He further contended that the petitioner did not file any proper representation either for setting aside the recommendation of the DPC dated 11.3.2010 or for striking out the adverse remarks in her ACRs given by the Reporting Officer and affirmed by the Reviewing Officer. Therefore, question of disposal of the said representation does not arise at all.

14. Mr. R.H. Nobam, learned senior Govt. Advocate restricted himself from making any submission being the petitioner is not an employee of the State Govt. More so, the State Government is a formal party.

15. Before dealing with the submission of the learned Counsel for the parties, it would be proper for this Court to reproduce the Rule 6 of the Rules. Accordingly, the same is reproduced hereunder:

*" 6. **Appointment of Assistant:** Appointment to the post of Assistant shall be made from the select list prepared under Rule 10 from amongst the Upper Division Clerks who have rendered not less than five years for general categories and three years for Arunachal Schedule Tribes regular service in the grade of Upper Division Clerk on the first day of the year in which selection is made on the basis of seniority-cum-merit failing which on deputation from Arunachal Pradesh Secretariat/other Heads of Departments under the Government of Arunachal Pradesh."*

16. Bare reading of Rule 6 of the Rules, it can be said that appointing authority shall refer the names of the eligible persons to the Departmental Promotion Committee (DPC) with the character rolls and other detailed particulars and the said authority is also to follow the Rule 10 of the said Rules as the criteria for promotion to the post of Assistant from the post of UDC is seniority cum merit. The Committee is also supposed to see not only the seniority but also merit of the eligible candidates as referred by the appointing authority.

17. In the instant case, admittedly before 20.5.2010, the adverse remarks in the ACRs of the petitioner was not communicated to her either by the Reporting Officer or by the Reviewing Officer. Therefore, the petitioner has rightly raised her grievance to the appropriate authority by filing a representation.

18. Now question is as to what has been stated by the petitioner in her representation; whether she asked for re-assessment by way of

striking out her adverse remarks in the ACRs or she requested the authority to promote her in the post of Assistant ignoring her adverse ACRs. For better appreciation, it would be proper to reproduce the representation of the petitioner dated 31.5.2010. Accordingly, the same is reproduced hereunder:

"

*Dated Itanagar, the 31 May, 2010*

*To*

*The Secretary  
Arunachal Pradesh Public Service Commission  
Itanagar.*

*Sub: Representation*

*Sir,*

*In response to your intimation No. PSC-13/92 dated 20<sup>th</sup> May, 2010, I have the honour to inform you the following few facts for favour of your kind consideration please.*

*Sir, since my appointment in the Commission in the year 1989 as LDC I have been performing all the duties assigned to me at my level best and till date I was completely in dark about my adverse ACR for the year 2006-07, 2007-08 and 2008-09. I should have been informed/ intimated about the adverse remarks in my ACR so that I could have improved my performance at that very time.*

*However, keeping in mind to the above referred intimation I assure you that from now on I will improve my performance up to the satisfaction of the authority and deliver my given task in a proper and correct manner.*

*This is for favour of your kind information and necessary action please.*

*Yours faithfully,*

*Sd. Illegible  
(Mrs. B. Kalita),UDC!  
APPSC, Itanagar"*

19. From bare reading of the representation of the petitioner, it appears that both the learned Counsel appearing for the respondents-Public Service Commission as well as the respondent No.4 rightly pointed out that the petitioner neither asked for re-assessment of her adverse ACRs nor prayed for striking out the adverse remarks in the ACRs. Therefore, the authority did not respond to the same, but at the same time, the authority rightly placed her case before the Departmental Promotion Committee (DPC) for consideration as consideration for promotion is a right.

20. This Court is of opinion that the Departmental Promotion Committee, upon consideration of the case of the petitioner and the case of the respondent 4 when found that the petitioner is admittedly senior to the respondent No.4, but the respondent No.4 is suitable on consideration of her merit and the petitioner was found unsuitable due to adverse remarks in her ACRs, rightly recommended the name of the respondent No.4.

21. The Appointing authority is not always bound by the decision of the committee, but when he is to decide not to act as per recommendation of the committee, he has to give reasons. In the instant case, the Appointing authority accepted the recommendation of the DPC. Therefore, the question of giving any reason for accepting the same does not arise at all, as it is a settled position that promotion is not a right, rather consideration for promotion is a fundamental right but whether a person is to be promoted or not is a managerial function

because the question of promotion is mainly based on evaluation of the quality of an employee. In the instant case, the petitioner was admittedly considered. In case of seniority cum merit, though seniority is the first criteria, but merit cannot be ignored and when both the person are equal on merit, then seniority will prevail.

22. It appears from the record that the petitioner was considered by the Departmental Promotion Committee (DPC), an expert body and the petitioner was found not suitable. The Court should not interfere with such consideration and consequent thereto, the recommendation on the basis of which, the respondent No.4 was promoted. Therefore, according to this Court, the petitioner fails to make out a case for interference with the decision of the DPC and consequent thereto, the order of promotion dated 17.9.2010 issued in favour of the respondent No.4 by the respondents-Public Service Commission.

23. In view of the above, the writ petition is dismissed being devoid of merit. No order as to costs.

JUDGE

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