

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1477/1997

New Delhi, this 4th day of July, 2000

Hon'ble Smt. Lakshmi Swaminathan, Member (J)
Hon'ble Smt. Shanta Shastry, Member (A)

Manoj Kumar Shrivastava
Qr.No.P/10/2, NAD Residential Colony
Sunabeda, P.O. 763004
Dist. Koraput (Orissa)

.. Applicant

(Applicant in person)

versus

Union of India, through

1. Secretary
Ministry of Defence
New Delhi
 2. Chief of Naval Staff
Naval Headquarters, New Delhi
 3. Director of Civilian Personnel
Naval Headquarters, New Delhi
 4. G.S. Naidu
DASO Gr.I, Naval Armament Depot
Visakhapatnam
 5. J.L. Jonwal
DASO Gr.I, Naval Armanent Depot, Goa
Chicalam P.O., Vascodagama, Goa
 6. S.P. Sharma
DASO Gr.I, Naval Armament Depot, Trombay
Beonar P.O., Trombay, Bombay
- .. Respondents

(By Shri R.P. Aggarwal, Advocate)

ORDER

Smt. Shanta Shastry

The applicant is aggrieved by the order dated 2.9.94 promoting/posting some officers to the exclusion of the applicant. He is therefore seeking to quash the impugned order and to consider his promotion from the date his juniors were promoted to the post of Naval Armament Supply Officer (OG) [NASO(OG), for short] with all consequential service benefits and payment of arrears.

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2. The brief facts are that the applicant joined service as Deputy Armament Supply Officer Grade II (DASO-Gr.II, for short) at Naval Armament Depot, Visakapatnam on 5.1.1982 after being selected through the Union Public Service Commission. He was later on promoted to the post of DASO-Gr.I on 9.10.87 in the pay scale of Rs.3000-4500.

3. A DPC was held sometime in 1993-94 to consider officers for promotion to the post of NASO(OG). There were four vacancies reported. Based on the recommendations of the DPC, three officers junior to the applicant namely S/Shri G.S.Naidu, J.L.Jonwal and S.P.Sharma, i.e. Respondents No.4 to 6, were promoted vide the impugned order dated 2.9.94.

4. It is the case of the applicant that there were actually five vacancies. When the DPC was held, the anticipated 5th vacancy was not taken into consideration. Had it been taken into consideration, the zone of consideration would have been larger and the applicant would have had a chance. Secondly, the bench mark for promotion to the post of NASO(OG) is 'very good'. It is arbitrary as it results in non-consideration of a candidate for promotion whose ACRs are below the bench mark of 'very good' i.e. though the candidate obtained 'good', 'above average' or 'average' remarks he will not be considered though such remarks are not adverse. According to the applicant, even though such ACRs are not adverse they should have been communicated in writing. The applicant has every

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right to know about his shortcomings to enable him to improve his performance. He therefore pleaded that in the absence of any communication of the remarks in the ACR he should be reconsidered for promotion.

5. Respondents have filed their counter reply in which it has been clearly stated that the applicant was considered for promotion along with others but could not meet the requisite minimum grade of 'very good' and therefore was superseded by his juniors from within the zone of consideration. The promotion to the grade of NASO(OG) had been made on the basis of the recommendations of the DPC held under the chairmanship of a member of the UPSC. Only those who had completed 5 years service as on 1.10.93 in the post of DASO Gr.I were considered for promotion and accordingly only 8 officers who were in the zone of consideration including the applicant were considered. According to the respondents, they have followed the instructions laid down by the DoP&T in their OM dated 10.3.89. Further it is a selection post and the selection is based on merit. Even though the applicant did not have any adverse entries in his ACRs, he failed to achieve the bench mark of 'very good'. In selection the relevant merit counts and therefore the respondents' action in denying promotion to the applicant was in order. The learned counsel for the respondents contends that it was not necessary to communicate the remarks in the ACRs to the applicant as there were no adverse remarks. The learned counsel further explains that the vacancy which arose due to voluntary retirement of Shri S.K.Mittal could not

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be taken into consideration as vacancies only upto 1st October, 1993 were reported to the DPC. Shri Mittal was allowed to take voluntary retirement from 1.4.94.

6. Applicant has alleged that the respondents deliberately postponed acceptance of the voluntary retirement of Shri Mittal so that another DPSO Gr.I who would complete qualifying service of 5 years for promotion on 7.10.93 could be included in the zone of consideration. Also the applicant argued vehemently that it was absolutely necessary to communicate even good ACR though not adverse, when the minimum bench mark for promotion is 'very good'. For this the applicant is relying on the judgement of the Hon'ble Supreme Court in the case of U.P.Jal Nigam & Ors. Vs. P.C.Jain & Ors. (AIR 1996 SC 1661). In this judgement the apex court upheld the order of the High Court that if there is steep downgrading in the ACR of an officer then the authority recording that CR should record reasons for such downgrading on the personal file of the officer concerned and inform him of the change in the form of advice.

7. Applicant is also drawing support from another case of Gurmahan Singh, DSP reported in 1976 SLWR 338. He was however unable to produce a copy of this judgement for our perusal. Applicant also referred to para 9 of the summary of recommendations of the report of the 5th Central Pay Commission wherein it has been recommended that 'any performance below bench mark laid down for promotion should be treated as adverse. Final grading should be communicated to the employee'. Applicant is

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also placing reliance upon a communication of Mukhyalaya, Poorv Nausena Kaman, Visakhapatnam dated 17.10.89 addressed to all the concerned establishments that as per the observations of the Hon'ble Supreme Court in one of the cases, it is necessary that the employees should be made aware of the defects in their work and deficiency in their performance as timely communication of the assessment of work which may put the employee on the right track. All the concerned establishments have been directed to strictly follow this procedure laid down. The applicant maintains that the various judgements of the Hon'ble Supreme Court and the instructions issued by his own Ministry, weigh heavily in favour of communicating remarks which are below bench mark even though they may necessarily be down right adverse.

7. We have heard both the applicant in person and the learned counsel for the respondents and perused the pleadings. We find that the only short point for consideration is whether the applicant should have been denied promotion on the ground that his ACRs were below the bench mark of 'very good' in the absence of communication of the remarks in his ACRs. According to us, this being a selection post, comparative merit matters and therefore if the applicant could not come to the bench mark, there being better officers there is nothing wrong in not considering the applicant for promotion.

8. In the case of U.P.Jal Nigam (supra) the main issue was of communication of downgrading of entries in the ACRs of the petitioner concerned. The apex Court observed that:

"The High Court to justify its view has given an illustration that if an employee legitimately had earned an 'outstanding' report, in a particular year which, in a succeeding one, and without his knowledge, is reduced to the level of 'satisfactory' without any communication to him, it would certainly be adverse and affect him at one or the other stage of career"

The above observations are made justifying the illustration given by the High Court, which is as under:

"All what is required by authority recording confidential in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would not be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secured by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such"

9. Further the Hon'ble Supreme Court has also clearly observed that if the gradation is going down from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. This clearly indicates that the question of communicating non-adverse grading arises only when there is a steep downgrading in the ACR and not if the gradings are positive and consistent. Besides the observation made in this judgement, in our view, appears to be confined to the employees of the U.P.Jal Nigam. In the instant case, it is not that the applicant has obtained outstanding gradation in one year and subsequently for the next year his gradation has come down to the lower level. The

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applicant has got gradation of 'good' which is below the bench mark of 'very good'. Therefore the judgement in the case of U.P.Jal Nigam (supra) is distinguishable and cannot be made applicable to the applicant's case.

10. The applicant cited para 9 of the summary of recommendations of the 5th Central Pay Commission. This report was given much after 1994 and also we are informed that the recommendation has not been accepted by the Government. In the circumstances, this recommendation cannot assist the applicant. In regard to the letter of dated 17.10.89 of Mukhyalaya, it has been advised therein that if there are any shortcomings they should be communicated. In the case of the applicant, there were no shortcomings. It is only that he could not get the overall grading of 'very good'. In the circumstances, these instructions are not of much assistance in supporting the case of the applicant. Our view that it is not necessary to communicate 'good' grading as it is below bench mark is supported by the judgement in the case of B.P.Singh Vs. UOI 1994(28) ATC 601-Patna. In this order the Patna Bench of the Tribunal observed that 'good' grading in the ACR does not by itself pose a threat to the continuance of the employee in the post, he is holding. It cannot, therefore be termed as adverse remark. Administrative grade posts are filled by a process of selection on merit. In such selection, person graded even 'very good' may not be promoted when a person with 'outstanding' grading is in the field. If a person is duly selected in accordance with the rules and not selected because of availability of person with superior

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merit, he cannot assail the selection. The post to which the applicant is seeking promotion is a selection post and therefore it has to be filled on merit. Comparative merit weighs in such cases; therefore we are not impressed with the argument of the applicant that he should have been communicated his grading it being adverse because it is below the bench mark. We are therefore unable to accept the pleas of the applicant.

11. In the facts and circumstances of the case, we do not find any merit in the OA. The same is accordingly dismissed. No costs.

Lawa J.
(Smt. Shanta Shastry)
Member(A)

Lakshmi Srinivasan
(Smt. Lakshmi Swaminathan)
Member(J)

/gtv/