

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

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O.A.No. 2879/1997

Date of Decision: 28 - 8 - 1998

Shri. Revati Badi

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APPLICANT

(By Advocate ~~Shri~~ Ms. Gesta Luthra

versus

Union of India & Ors.

..

RESPONDENTS

(By Advocate Shri Madhav Panickar & M. K. Gupta)

CORAM:

THE HON'BLE SHRI

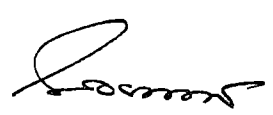
THE HON'BLE SHRI S.P. BISWAS, MEMBER(A)

1. TO BE REFERRED TO THE REPORTER OR NOT? YES

✓

2. WHETHER IT NEEDS TO BE CIRCULATED TO OTHER
BENCHES OF THE TRIBUNAL?

✓



(S.P. Biswas)
Member(A)
28.8.98

Cases referred:

1. M. Sasidharan V. A. P. Sudir (1988) 6 ATC 385
2. SBI & Ors. V. K. Kher & Ors. (1996) 8 SCC 762
3. State of UP V. Y.S. Misra 1997(2) SLJ 121
4. M. Sankaranarayanan V. State of Karnataka (1993) 1 SCC 54
5. Express Newspapers Pvt. Ltd. V. UOI (1986) 1 SCC 133
6. UOI & Ors. V. Basant Lal & Ors. SLJ 1992(1) SC 190
7. UP Jal Nigam & Ors. V. P.C. Jain & Ors. (1996) 2 SCC 363
8. Baikunth Nath Das V. Chief Dt. Medical Officer, Baripada 1992(20) SLR 2 (SC)
9. N. Pathak V. State of Orissa 1996(2) SLR 615 (SC)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.2889/97

New Delhi, this 28th day of August, 1998

HON'BLE SHRI S.P. BISWAS, MEMBER(A)

Smt. Revathi Bedi,
W/o Sh. H.S. Bedi,
Director on Training,
Indian Institute of Public
Administration,
New Delhi-2. Applicant

(through Ms. Geeta Luthra, Advocate)

versus

1. Union of India through
its Secretary,
Ministry of Finance,
Government of India,
New Delhi.
2. The Comptroller & Auditor
General of India,
10, Bahadur Shah Zafar Marg,
New Delhi-2.
3. Mr. Niranjana Pant,
Member, Audit Board II,
Office of the Principal Director
of Commercial Audit and Ex-officio
Member Audit Board II,
Illaco House,
Sir P.M. Road,
Mumbai-400 001.
4. Mr. Samir Gupta,
Dy. Comptroller and Auditor
General (C) and Chairman
Audit Board, 10, Bahadurshah
Zafar Marg,
New Delhi-2. Respondents

(through Sh. Madhav Panikar for respondents No. 1, 2
and 4 and Sh. M.K. Gupta for respondent No. 3)

ORDER

The applicant, a senior officer of IA&AS cadre
of 1982, is aggrieved by Annexure "D" order dated
2.12.97 by which the decision of the competent
authority (Comptroller & Auditor General of India -
R-2) has been communicated to her expunging only
some portions of the adverse remarks of the

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Reporting Officer, i.e. R-3 pertaining to applicant's Confidential Report (CR for short) for the period from 2.9.96 to 7.3.97 while retaining other portions. The reporting officer entered those adverse remarks on 1.6.97 which were countersigned by the Reviewing Authority (R-4) on 5.6.97.

2. To appreciate the issues involved, it would be apposite to mention the background facts in brief. Applicant, with an unblemished record of service, has served several important Government of India departments in different capacities, got all her promotions in time till September, 1996 when she was posted as Director, Commercial Audit at Mumbai under the respondents. Admittedly, earlier to September, 1996 she did not face any such eventuality ever before in her official career. The main plank of applicant's attack is that the remarks of the Reporting Officer is vitiated by malafide and is not based on actual facts. Whereas those remarks of reviewing officer are without personal knowledge and could have been made only after an appropriate independent enquiry. The applicant made statutory representation on 26.8.97 (A-3). The competent authority, through a reply received by applicant on 4.12.97, communicated the portions that have been expunged. Against the same reporting year, the applicant's CR has been written in two parts. For the period between April to August, 1996, Director of Audit, Air Force wrote the report. That part does not appear to have

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anything adverse. But for the remaining period of the same year i.e. September 1996 to March 1997, the applicant has been made to face adverse consequences arising out of the malafides on the part of R-3 while writing the report for the latter ~~said~~ part, the applicant alleged.

3. Mrs. Geeta Luthra, learned counsel for the applicant argued strenuously and brought a catalogue of events to establish malice on the part of R-3. These are:-

(A) Based on applicant's notes/reports, R-3 deliberately wrote letters/made comments on 11.3.97, 13.3.97 and 18.3.97 which were received by her only on 12.5.97 after her return from Australia and Nepal where she was officially deputed for audit work between 24.3.97 to 4.5.97. R-3 knew fully well that the applicant has proceeded on tour outside India and yet those letters were written/remarks passed behind her back. She was thus denied the opportunity to reply back in time. This is against principle of natural justice, the learned counsel contended.

(B) As per R-3, confidential file/notes were left on the table of applicant whereas as per the applicant all those important papers were kept in the cup-board. This issue was recorded in a letter dated 11.3.97 received by her on 12.5.97 after her reporting back to

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hqs. The said note was also written when the applicant was away on leave/official duty and that too without giving her any opportunity to reply thereto immediately. (14)

(C) By letter dated 5.5.97, applicant was asked to sit at the premises of Air-India in the Resident Audit Office which is the office of Audit Officer, who is subordinate to the applicant.

(D) R-3, in order to interfere with the effective performance of the applicant, shifted the officer of Resident Audit Party/BPCL, who was working under the applicant when the BPCL' auditing/accounts were in progress. This transfer was ordered at a very crucial stage since that auditing work was time-bound one. Another officer new to the office was posted causing difficulties for the applicant to complete her job of auditing on BPCL by the target time. Despite all these troubles, however, the applicant could finalise draft comments before proceeding on training.

(E) The applicant was given a confidential memo on 12.5.97 by R-3 stating that she had unreasonably delayed action on the finalisation of cash award proposals although list of suitable names were yet to be received from the outstation Unit located at Dehradun. No target date for finalisation of the said

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proposals was prefixed. Recommendations were received only on 12.3.97 though the applicant had taken initial action towards completion of this particular job as early as 19.2.97. The question of applicant not being able to finalise the same did not, therefore, arise. This was a positive act of bias on the part of R-3.

(F) R-3 recorded a confidential note dated 18.3.97 on a letter given to him by the applicant on 6.3.97. It was recorded that "It is also sad that inordinate long time has been taken to complete the basic administrative action against an employee who has been placed under suspension". Applicant submits that under the CCS(CCA) Rules, 1965 and also instructions in DOP&T's OM No. 39/39/70-Estt.(A) dated 4.2.71, a charge-sheet has to be issued within three months from the date of suspension of the individual. Charge-sheet against the suspended official in the present case was issued well within the stipulated period and by no stretch of imagination it could be said that the delay in handing over the charge-sheet was attributable to the applicant. It only showed bias and lack of fair play on the part of the reporting officer, the learned counsel submitted.

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(G) Out of four different "M" series of communications (5.5.97, 12.5.97, 14.5.97 and 16.5.97) one pertaining to 5.5.97 brings out clear evidence of malice on the part of R-3. A close scrutiny of details in para 5 of the note dated 5.5.97, respondents specific reply in para 15 of their counter dated 23.1.98 and the applicant's leave application at A-V (page 91-92 of the paper book) would indicate the clear bias of R-3. In short, it has been mentioned that "Mrs. Bedi did not leave behind any handing over memo as required". This runs contrary to the respondents' submissions in para 15 of the counter as well as applicant's positive averment on the instructions of R-3 himself.

4. Besides allegations of malafide, applicant has brought out that the Reviewing Officer (R-4) while endorsing the remarks of the reporting officer, noted as follows: "I do not have personal knowledge of her day-to-day performance, as the Reporting Authority has made specific comments, specially with regard to her self-appraisal, the report should be communicated".

Applicant argued that the said remarks is contrary to the guidelines of DoPT in OM No.51/3/74-Estt(A) dated 22.5.75. The said OM stipulates that "with a view to enabling the Reviewing Authority to discharge his responsibility, in ensuring the objectivity of the

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confidential reports, it has been decided that where he is not sufficiently familiar with the work of the officer reported upon, so as to be able to arrive at proper and independent judgement of his own, it should be his responsibility to verify the correctness of the remarks of the Reporting Officer after making such enquiries he may consider necessary, he should also give a hearing to the person reported upon for recording his remarks". It was thus evident that the reviewing officer abdicated his responsibilities which he was duty bound to discharge.

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5. In support of her aforesaid contention, learned counsel drew my attention to the decision of this Tribunal in the case of **M.Sasidharan V. A.P.Sudir (1988) 6 ATC 385**. It has been held therein that reviewing officer should follow the instructions regarding personal knowledge about the employee. Adverse remarks cannot be made by a countersigning officer unless he has personal knowledge of reported employee's unsatisfactory work and conduct.

6. Respondents No.1 and 2 in their counter have denied that remarks of reporting officer were out of malice. It has been submitted that remarks in the ACR for the period 2.9.96 to 7.3.97 have been based on objective assessment of the performance of the applicant and the representation of the applicant against the adverse remarks were duly considered by the competent authority and the

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remarks by R-3 in part II of the ACR have been accordingly expunged. It was only in the interest of efficiency of service and also of officer/officers that the reports were written with the greatest possible care keeping in view the work, conduct, character and capabilities of the officers reported upon. During the said period, the work of the applicant was adversely commented several times and she was alerted in time with the issue of necessary memos. All these remarks in the ACR are only the culmination of several shortcomings noted in the applicant's performance in the period under question.

7. R-3 has filed a separate counter opposing, in general, the allegation of malafide against him.

8. The summarised position of adverse remarks expunged and those retained is as shown in the table below;

A	B
<u>SERIES OF ADVERSE REMARKS EXPUNGED</u>	<u>SERIES OF ADVERSE REMARKS RETAINED</u>
Part II, Para 2 Column Nos. 2, 3, 4 & 5 Part II Para 3	Part IIIA, Para 2 Para 3(4) Part III B(1) Part III C-para 1&2 Part IV para 3.

9. The issues that fall for determination are:

- (1) whether applicant's pleas of malice on the part of R-3 are sustainable in the eyes of law?; and
- (2) whether the aforementioned 'B' series of adverse remarks that have been allowed to stand could be finally retained in the background of "A" series of adverse remarks that have been expunged?

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10. Before examining the above mentioned issues in terms of law, it would be appropriate to mention the governing principles/guidelines, as enumerated by the apex court as also by DoPT in matters of writing ACRs. I touch upon only those relevant for the purpose of disposal of this OA.

11. In **State of Bank of India & Ors. Vs. Kashinath Kher & Ors.** (1996) 8 SCC 762 at page 771 in para 15, the apex court pointed out that the object of writing the CR is two-fold, i.e. to give an opportunity to the officer to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service.

12. Some other essentially important norms, relevant in this case, are available in the case of **State of UP Vs. Y.S. Misra**, 1997(2) SLJ 121. It has been mentioned therein that though sometimes, it may not be part of record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within reporting officer's knowledge. Before forming an opinion to be adverse, the reporting officers writing CR should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to giving an opportunity to the erring/corrupt officer to correct the errors of the judgement, conduct,

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behaviour and integrity. If, despite giving such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself/herself necessarily, the same may be recorded in the CR and a copy thereof supplied to the affected officer so that he/she will have an opportunity to know the remarks made against him/her. If he feels aggrieved, it would be open to him to have it corrected by representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standards of excellence in services constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.

13. I shall now elaborate the law on the issue of malafide/malice.

(A) In **M.Sankaranarayanan V. State of Karnataka (1993) 1 SCC 54**, the Supreme Court observed that it may not always be possible to demonstrate malice in fact with full and elaborate particulars and it may be permissible in an appropriate cases to draw reasonable inference which must be based on factual matrix and such factual matrix cannot remain in the realm of insinuations, surmises and conjectures. In other words, malice

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cannot be established by documents/evidence, it has to be reasonably presumed from antecedent facts, events and circumstances.

(B) In **Express Newspapers Pvt. Ltd.V. UOI (1986) 1 SCC 133**, the Hon'ble Supreme Court has observed that where malafides have been alleged, it is necessary that the person against whom such allegations are made should come forward with an answer rebutting or denying such allegations. For otherwise, such allegations remain unrebutted and the court would be constrained to accept the allegations so remaining unrebutted and unanswered on the basis of probability.

14. In the present case, R-3 has filed an affidavit contesting most of the specific charges of malice. From the materials placed before the Tribunal, it is not possible to accept applicant's contentions of malafide in respect of issues raised at paras 3(A), (B), (C) and (D). This is because memos of R-3 could be replied by applicant only on her return. So nothing was wrong in handing them over to her on return from tours. As regards item 4(B) it is not for the tribunal to make roving enquiries to find out if the list of important items was left on the table or cupboard. Again, if the applicant was asked to sit (but separately) in the office of Resident Audit Officer

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temporarily, no motive could be imputed on R-3. Similarly, shifting of the Resident Audit Officer/BPCL cannot be questioned. Need of the organisation was more important to R-3. Respondents cannot be faulted on these grounds.

15. A scrutiny of records reveal completely a different picture in respect of other items at para 3(E) (F) and (G). R-3 had mentioned that the applicant has caused unreasonable delay in cash award proposals. The specific charge against the applicant is with reference to casual manner of making the proposals and in not constituting the Committee as required. I find she had initiated appropriate action well in time. The proposals could be finalised only on receipt of recommendations from outlying offices. It is also not in dispute that Dehradun branch of the department had sent the proposals only on 12th March, 197. Admittedly, no target date was fixed. Under these circumstances, the delay in finalisation of the cash award proposals could not have been attributed to the applicant entirely. This is particularly so, when she had only prepared a draft list and was awaiting details from other organisations. This draft was subsequently discovered by R-3 on applicant's table and comments about applicant's failure were recorded on 11.3.97, whereas the final proposal were received from Dehra dun on 12.3.97.

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16. Again, the applicant has been blamed for not handing over the charge sheet to the suspended official in time. The applicant could not be held responsible for this as the work was done within the stipulated time as provided under CCS(CCA) Rules, 1995 as well as DoPT's instructions dated 4.2.71. It eludes comprehension as to how the applicant could be blamed on this account. It is necessary to mention here the affidavit filed by R-3 has not controverted this charge of malice in particular. Law is well settled that where a point raised in the application is not specifically denied, it amounts to its admission. This has been so held by the apex court in the case of **UOI & Ors. V. Basant Lal & Ors. SLJ 1992(1) SC 190.** R-3's action, therefore, has to be held as arbitrary.

17. It was equally not proper on the part of R-3 to have put the blame on the applicant in not leaving the handing over the note/list of important items while proceeding on duty outside headquarters. On 11.3.97, R-3 recorded "This list was discovered on the Director(Hqrs.)'s table after she left for Embassy audit, leave etc.", whereas in Annexure M dated 5.5.97, it has been recorded that "before proceeding on long stint of her leave and Embassy audit, Smt. Bedi has not left behind any handing over memo as is commonly required". This has to be seen in the background of the submissions of the official respondents in para 15 of their counter wherein they have mentioned that "applicant submitted only a note indicating the

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pending items". This item of allegation against the applicant does not, therefore, require any further details.

18. It may be mentioned that the controlling officer before writing adverse remarks should give sufficient opportunity in writing by informing him/her of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/official does not improve then it would be an obvious fact and that forms material basis in support of adverse remarks. If, however, the reporting officer comes to the conclusion that despite such warning/reprimand, the officer has not improved, he may make appropriate mention of such warnings/displeasures, as the case may be, in the relevant column of the CR relating to the assessment by the reporting officer and in that case a copy of the warning/reprimand referred to in the CR should be placed in the CR dossier as Annexures to the CR for the relevant period. In the instant case, adverse remarks have been duly communicated to the officer with warnings having been recorded but copies of warnings/reprimands have not been kept with the CR as Annexures to the CR for the relevant period. Viewed from this, the reporting officer appears to have violated the instructions of DP&AR's OM No.21011/1/81-Estt(A) dated 5.3.81.

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19. In UP Jal Nigam & Ors. Vs. P.C. Jain & Ors. (1996) 2 SCC 363, the apex court has held that while writing the CR if the officer were to be downgraded from the previous report all that is required by the authority recording the CR in that situation is to record reasons for such downgrading in the personal file of the officer concerned and inform him/her of the change in the form of an advice (emphasis added). I do not find that the respondents have followed this law laid down by the apex court in the aforementioned case.

20. The adverse remarks in Part II, para 3 (A & B) include the following: "Reported officer failed to take any conclusive action even after 3 months of putting the accused official under suspension. Even charge-sheet could not be issued by her in time. This is a very sad example of mismanagement. Exaggerated claims. Reported officer had little hand in any of these 'achievements' most of which were possible only during her absence". These remarks have since been expunged but what has been allowed to stand in part III para (3) is "Officer has not so far responded to specific explanation asked of her by me regarding mismanagement". This is contradictory. Again in part C, para 2, it is mentioned that "there was not a single item of personal contribution from her in the sphere of audit". When the remarks in part II para 3 (A & B) aforesaid have been expunged, it is difficult to

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sustain continuation of the remarks in part 'C' as aforesaid. It is well settled in law that remarks in the ACR should not have contradictions.

21. I shall now examine presence of antecedent facts and events, if any, preceding the communication of adverse remarks that could lend additional support to applicant's allegation of malice.

I find that though the first warning memo was given on 22.11.96, the relationship between the applicant and R-3 started taking unhappy turn only after middle of January, 1997 when the applicant had complained to AC & AG(P) regarding R-3's harassment. Thus, such memos started pouring in after 5.1.97 and in fact mounted increasing further after she had left hqrs. for Mission audit. There is nothing legally wrong in issuing those memos. But the principles of natural justice was denied since she did not get reasonable opportunity to show her improvement after the receipt of these communications. These memos were received spreading over a period of little over three months from end of November, 1996 to beginning of March, 1997 when she was ordered to go on official tours for about 2 months. There are no materials to support the view that the applicant got sufficient opportunity and yet could not improve upon her past performance. The case is, thus, one of denials of natural justice.

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22. R-3 was very much well aware that the applicant will be required to proceed for higher training in IIPA in July, 1997. It is not denied. Yet "M" series office orders (5.5.97, 12.5.97, 14.5.97 and 15.5.97) were issued fixing and refixing duties and responsibilities of the applicant even before she could return back to hqrs. There appears to be some "indecent haste" in fixing her further responsibilities and that too with the knowledge that Director (Hqrs.) will be there only for about a month-and-a-half.

23. Applicant has been blamed for "mess in the administrative" wing under her control. This has to be seen in the background of comments of R-3 indicating that "I did not know how huge backlog of work which the outgoing AO(Admn.)/DV was allowed to leave behind by Director(Admn.)". This was as per R-3's note dated 30.5.97. It is evident that the applicant had inherited yet another mess created by her predecessor.

The above events stand testimony to the facts and circumstances of the present case.

24. The sequence of events, as aforementioned, prior to the recording of the CR does not augur well in terms of an unbiased handling of the affairs or even fair treatment to the applicant. The totality of aforementioned events and the antecedent facts (paras 21 to 23) and further

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details (paras 16 to 20) of this order establish beyond doubt that there was an unfairness and malice.

25. There is another factor which has not been denied by the respondents. This is with reference to the duty cast upon the reviewing authority in complying with the instructions of DoPT. It is mentioned that "with a view to enabling the reviewing authority to discharge his responsibility in ensuring the objectivity of the Confidential Reports it has been decided that where he is not sufficiently familiar with the work of the officer reported upon so as to be able to arrive at a proper and independent judgement of his own, it should be his responsibility to verify the correctness of the remarks of the reporting officer after making such enquiry as he may consider necessary. He should also give a hearing to the person reported upon before recording his remarks". This requirement does not appear to have been fulfilled by the R-4 while endorsing his remarks in para 2 of Part V of the report. He has thus clearly violated instructions under item 16(11) in DP&AR's OM No.51/3/74-Estt(A) dated 22.5.74. This has not been denied.

(Authority: Swamy's compilation on
CRs-2nd Edition of 1991 pages 20-21).

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26. Respondents also submitted that the relevant Departmental Promotion Committee has also met on 18.12.97 and considered the applicant for promotion to Senior Administrative Grade. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, the scenerio takes a different shape, more so if the promotion is based on the basis of selection and not alone on seniority. In the law laid down by the Supreme Court in the case of Baikunth Nath Das V. Chief District Medical Officer, Beripada 1992(20 SLR 2(SC)), it has been held that promotion takes away the sting from adverse entries in CR. Similar view has been taken in the case of N. Pathak V. State of Orissa 1996(2) SLR 615 (SC). The appellant therein was promoted as CE in 1984 after adverse remarks as SE earlier. The apex court held that adverse reports of the previous years cannot be sustained in such cases. The same situation prevails here.

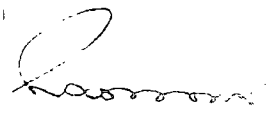
In summary, the applicant's plea of malice stands established in this OA. The respondents have faltered by not only ignoring DoPT's instructions but also the principles laid down by the apex court on the subject of writing of ACRs.

27. In the light of the detailed discussions aforesaid, the OA is allowed with the following directions:

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- (a) The order at Annexure 'D' dated 2.12.97 shall stand quashed;
- (b) With malice having been established, the ACR for the period between 2.9.96 and 7.3.97 is set aside;
- (c) If the applicant has not been promoted to SAG as yet, the DPC shall consider applicant's candidature for promotion, alongwith others, by ignoring the CR for the period as in sub-para (b) above;
- (d) There shall be no order as to costs.


(S.P. Biswas)
Member(A)

/gtv/