

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO. 141/2000

New Delhi this the 10th day of April, 2003.

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN

HON'BLE SHRI V.K. MAJOTRA, MEMBER (A)

Shri S.K.Goel
Commissioner of (Customs & Central Excise)
R/o C-164, Sarvodaya Enclave
New Delhi-110017.Applicant

(By Shri K.K.Rai, Advocate)

-versus-

1. Union of India
Through the Secretary
Department of Revenue
Ministry of Finance
North Block
New Delhi-110001.
2. Department of Personnel and Training
Through the Secretary
Ministry of Personnel, Public Grievances
and Pensions, North Block
New Delhi-110 001.
3. Mr.Y.G.Parande
Commissioner of Central Excise, Mumbai-II
9th Floor, Piramal Chambers
Jijibhoy Lane
Lalbaug
Parel, Mumbai-400 012.
4. Hari Om Tiwari
Commissioner of Central Excise
Bhubaneswar
Central Revenue Building
Rajaswavihar
Bhubaneswar
Orissa.
5. C.Sathpathy
Commissioner of Customs (Valuation)
New Customs House
Ballard Estate
Mumbai-400 038.
6. Iype Mathew
Commissioner of Central Excise
L.B.Stadium Road
Basheerbagh
Hyderabad-500 004. Respondents

(By Shri R.N.Singh, Advocate)

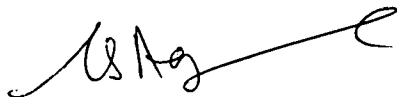
O R D E R

Justice V.S. Aggarwal:-

Applicant (S.K.Goel) joined the service i.e. the Indian Customs and Central Excise as a Probationer which is Group 'A' post in November, 1975. The respondents No.3 to 6 (for short, "the private respondents") were also appointed along with the applicant vide the same notification that was issued. The applicant had been promoted as Senior Superintendent of Central Excise and thereafter as Deputy Collector of Central Excise. Presently he is working as Chief Controller, Government Opium & Alkaloid Factories, Department of Revenue.

2. By virtue of the present application, he seeks a direction that in the grade of Commissioner, the seniority of the applicant over private respondents should be maintained and the impugned order in this regard should be set aside. In the alternative, it is claimed that the promotion of private respondents by virtue of which they have become senior to the applicant should be quashed.

3. It is asserted that the applicant had been promoted in the grade of Commissioner of Customs and Central Excise. He was senior to the private respondents but in the promotion order, he had been shown junior to them. The reason given which is



being challenged is that the confidential reports of the applicant were not better than those of the private respondents. Hence the present application.

4. In the reply filed, the application has been contested. The basic facts have not been disputed, but the order so passed is being justified. The respondents contend that on the recommendations of the Fifth Central Pay Commission, the matter had been considered. The Central Pay Commission had recommended that promotion in the Central Services should also held in the same manner as in the Indian Administrative Service and one batch should be taken for consideration at a time and inter se seniority as fixed by the Union Public Service Commission at initial entry should remain in tact despite supersession. The matter has been under consideration of the Government. The recommendations of the Fifth Central Pay Commission in this regard are yet to be accepted and, therefore, the Departmental Promotion Committee had dealt with the matter in accordance with the existing rules. So far as the proceedings of the Departmental Promotion Committee are concerned, it has been pointed that it is not guided by the overall grading, if any, that may be recorded but to make its own assessment on basis of the entries in the confidential reports. It has to devise its

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own methods and procedures for objective assessment of the suitability of the candidates. The committee meeting had been held on the principle of selection cum merit and it is in this back-drop that the private respondents had been placed senior to the applicant.

5. It was not disputed that the confidential report of the applicant for the year 1994-95 could not be sent to the Central Vigilance Commissioner for counter-signature. But it cannot be concluded that it had adverse impact on the findings of the Departmental Promotion Committee.

6. During the course of submissions, the learned counsel for the applicant had drawn our attention to the fact that the Fifth Central Pay Commission had recommended that promotions in Central Services should be effected on batch-wise basis retaining in the process, the inter se seniority as fixed by the Union Public Service Commission at the initial entry stage. To that extent, there is no controversy.

7. The report of the Fifth Central Pay Commission on this count as yet has not been implemented; nor accepted. In fact, there is no controversy to the fact alleged by the respondents that it is under consideration. Once the matter is

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under consideration of the Government, necessarily during the interregnum period, the promotions have to be effected on basis of the existing rules. In the present case when promotions had been effected and as per the existing rules, it had been so done, it cannot be termed that there is deviation from the law for interference. *by this Tribunal.*

8. Confronted with that position, our attention was drawn to the fact that though the benchmark is "very good" for promotion still when persons having outstanding record have scored march over the applicant, the entries in this regard in his confidential report should have been communicated to him.

9. A Full Bench of this Tribunal at Mumbai had considered this controversy in the case of **Manik Chand v. Union of India & Ors.**, 2002(3) A.T.J.268. The question for consideration before the Full Bench was:-

"In the case of selection, where a particular bench mark has been prescribed, whether any gradings in the ACR which fall short of bench mark need to be communicated to the reportee even though the grading/report per se may not be adverse."

The Full Bench answered the same holding that it is not necessary to communicate the remarks/grading which are not adverse or not below the benchmark

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prescribed for promotion to a particular post in respect of selection post. In other words, if the applicant was meeting the benchmark, the question of communication of the entry which in no event can be termed as adverse would have arisen. This particular argument in that view of the matter, therefore, must be rejected.

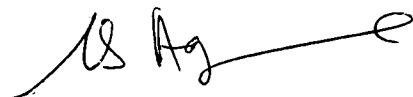
10. All the same, taking clue from the aforesaid, it was still urged that in any event, once the confidential reports of the applicant had been downgraded, it should have been communicated to him. The learned counsel relied upon a decision of the Apex Court in the case of **U.P. Jal Nigam and others v. Prabhat Chandra Jain and others**, AIR 1996 SC 1661. In the cited case, Shri Prabhat Chandra Jain who was respondent therein before the Supreme Court was downgraded at a certain point of time. Before the High Court, it was urged that downgrading of entries cannot be termed as adverse that it should be communicated. The U.P. Jal Nigam had rules whereunder an adverse entry was required to be communicated to the employee concerned but not downgrading of an entry. Before the Supreme Court, the argument advanced was that when the nature of the entry does not reflect any adverseness, it need not be communicated. The Supreme Court thereupon provided the following

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guide-lines and laid down the law as under:-

"As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading 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 be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure 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. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

This decision of the Supreme Court had been considered by the Punjab and Haryana High Court in the case of **Union of India & Ors. v. M.S.Preet and anr.** in Civil Writ Petition No.13024/CAT/2002 rendered on 22.11.2002. In the aforesaid case, certain decisions of this Tribunal including that



of the Principal Bench were taken into consideration and were not approved. The said High Court held:-

"It is also an admitted position that respondent No.1 was not promoted because he could not achieve the prescribed bench-mark and this was due to the fact that he had earned average entries in the ACRs for the years 1994-95 to 1998-99. The Tribunal was of the view that average entries recorded in the ACRs of respondent No.1 cannot be taken into consideration for assessing his suitability for promotion under BCR Scheme because the same had not been communicated to him. For this purpose, it is sought support from the judgment of the Supreme Court in U.P.Jal Nigam's case (supra) and three orders passed by Principal Bench in the cases of B.L.Srivastava (supra) R.K.Anand (supra) and A.K.Gupta (supra) apparently by relying upon the proposition laid down by the Supreme Court.

In our opinion, the reason assigned by the Tribunal for entertaining the plea of respondent No.1 is per se erroneous and legally unsustainable and the direction given by it for re-consideration of his case for promotion under BCR Scheme is liable to be set aside. It seems to us that the Tribunal laboured under a mistaken impression that the rules/instructions which regulate recording of ACRs provide for communication of even those entries which are not adverse. During the course of hearing, Shri I.S.Sidhu placed before us the instructions issued by the Government of India for recording the ACRs to show that only adverse remarks are required to be communicated to the officer/employee. This position was not contested by Shri R.K.Sharma. Unfortunately, the Tribunal completely over-looked this important aspect of the matter and interfered with the recommendations of the Departmental Promotion Committee by erroneously assuming that average entries were required to be communicated to respondent No.1."

This decision of the Punjab and Haryana High Court was followed by this Tribunal in the case of Shri

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M.S.Reddy v. Union of India & Ors. in OA No.1768/2001 rendered on 4.3.2003 and it was held further that it was not shown that the confidential reports had been downgraded and once they are not so downgraded, the question of communicating or relying upon the decision of the Supreme Court in the case of U.P.Jal Nigam (supra) does not arise.

11. From the aforesaid, it is obvious that reasons for downgrading should be recorded and the person concerned should be informed. These observations of the Supreme Court had been made in the back-drop of the fact that downgrading had been done therein by comparison but where in a specific case the downgrading is still meeting the benchmark though on hypothetical presumption that it may affect his promotion, it cannot be termed that still confidential remarks should have been communicated. We have already referred to above that the applicant had met the benchmark and in that view of the matter simply because certain other persons who had been assessed by the Departmental Promotion Committee to be better than the applicant, it does not imply that the same should have been communicated. In the peculiar facts, therefore, the decision of the U.P.Jal Nigam (supra) will not apply.

12. In that event, it was urged that for the

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year 1994-95, the confidential report of the applicant had not been sent to the Central Vigilance Commissioner for his remarks as the accepting authority. At the relevant time, the applicant was working as Executive Director (Vigilance) and, therefore, it was mandatory to send the confidential report for remarks to the Central Vigilance Commissioner as the accepting authority.

13. Our attention had been drawn to the instructions of the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) dated 13.4.1993 which are to the following effect:-

" In continuation of this Department's circular of even number dated 3rd March, 1993 on the above subject, I am directed to say that para 3 of the circular referred to above may be read as follows:-

3. It is, therefore, considered that the Annual Confidential report of Chief Vigilance Officers of Public Sector Undertakings/Organisations, whether working on a full-time or part-time basis should be initiated by the Chief Executive (Chairman/Chairman- cum- Managing Director/Managing Director, as the case may be) of the concerned organisation/undertaking, reviewed by the Secretary of the Administrative Ministry/Department (wherever such review is presently being done depending on the level of the CVO) and will be sent to the Central Vigilance Commissioner for adding his remarks as the accepting authority."

In the present case, admittedly the confidential

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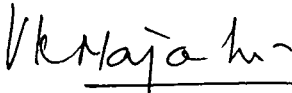
report of the applicant had not been sent to the Central Vigilance Commissioner. However, one fact that cannot be ignored is that it is too late now to send the same to the Central Vigilance Commissioner because the person concerned still may not be holding that office. When the matter had not been sent to the Central Vigilance Commissioner but the confidential remarks had been recorded in the absence of their being a patent illegality in the recording of the same, we do not deem it appropriate, in the facts of this case to interfere because the net result as is apparent from the perusal of the confidential report is not adverse to the applicant. We have already recorded above that the entry so recorded is not adverse. Ignoring the same, would not make much difference and it is on these facts when grave injustice has not been done which may prompt us not to interfere. There is no arbitrariness herein. In addition to that, it is well-known that the Departmental Promotion Committee meetings unless held illegally or there is gross violation of the rules not to be interfered with but if they misread the confidential reports, this Tribunal will interfere. In the present case, the Departmental Promotion Committee had made overall assessment of the relevant confidential reports. We have seen the said reports where the reporting officer had given 'outstanding' assessment to the applicant but the


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reviewing officer had felt that there is over-assessment in this regard. There is application of mind for those years and in face of these facts, there is little scope for interference.

14. No other argument has been advanced.

15. For these reasons, the application being without merit must fail and is dismissed.


(V.K. Majotra)
Member (A)


(V.S. Aggarwal)
Chairman

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