

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.NO.436/2000

New Delhi, this the 23rd day of October, 2000

Hon'ble Mr. Kuldip Singh, Member (J)
Hon'ble Mr. S.A.T. Rizvi, Member (A)

A.K.Goel, 11/430, Lalita Park, Laxmi
Nagar, Delhi - 92.

****Applicant.

(By Advocate: Sh. G.K.Aggarwal)

VERSUS

1. Union of India through Secretary,
Ministry of Urban Development,
Nirman Bhawan, New Delhi-11.
2. The Director General (Works),
Central Public Works Deptt.
Nirman Bhawan, New Delhi-11.
3. The Secretary, Union Public
Service Commission, Shahjahan
Road, New Delhi-11

****Respondents.

(By Advocate: Sh. K.K.Patel)

O R D E R

by HON'BLE MR. S.A.T. RIZVI, M (A):-

The applicant in this OA, who is a diploma holder Assistant Engineer (Civil) made regular from 18.9.97, is aggrieved by the outcome of the DFC held in September, 1999 to promote AE (C) to EE (C) on regular basis. His contention is that although a number of his juniors have been promoted, he was not considered for promotion by the said DFC. The respondents have denied the claim of the applicant for promotion on several grounds.

2. The applicant had taken four grounds in the OA. Out of these, the applicant has pressed the last two only in view of the orders of this Tribunal's orders in OA-2134/99 dated 6.1.2000 and in OA-2095/99 dated 10.12.99. While giving this information in his rejoinder,

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the applicant has also stated that both orders are subjudice in the Hon'ble Delhi High Court. The corresponding grounds are as follows:-

- i) The 'diverted' posts of EEs ought to have been used only for the purpose stated in the 'diverting' letter A/4 and the remaining ones ought to have been filled under the 1996-Rules in terms of Rule 6 (3) of the 1996-Rules. 'Diverted' posts were used also extraneous purpose of making fresh promotions whereas the prescribed purpose was for 'regularising' adhoc promotions made prior to 29.10.96.
- ii) Change of criteria of eligibility was not, though required to be, communicated in advance to diploma-holders and their reporting officers, resulting in prejudice to diploma-holder AEs for promotion to regular EEs grade, because new criteria were not only more stringent but irrationally more stringent.

3. According to the learned counsel for the applicant, only one ground is left for the consideration and orders of this Tribunal and it is as follows (as shown in the rejoinder).

- i) The only issue is; whether an Annual Confidential Report which was graded below 'eligibility benchmark' for being considered for promotion to next higher grade, ought to be

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✓ treated as 'adverse report'. If so, whether such uncommunicated ACRs ought not be ignored while considering the employee for such promotion. The applicant's case is that such ACRs ought to be termed 'adverse' and, if uncommunicated, ought to be ignored while considering his case for regular promotion to next higher grade. 10

✓ In support of the above ground, the applicant has relied on the judgement of the Hon'ble Supreme Court in U.P. Jal Nigam Vs. Prabhat reported as JT 1996 (1) SC 641.

4. The applicant has, in his rejoinder, framed an alternative ground also which is to the same effect as the above ground. However, the same is also reproduced below:-

i) More specifically, if 'outstanding' ACR were treated as 'benchmark', as against index of comparative merit, every ACR below 'outstanding' ought to be treated and communicated as 'adverse' and, if uncommunicated, ought to be ignored while considering applicant's for regular promotion to next higher grade of Executive Engineers from the grade of Asstt. Engineers.

5. We have heard the learned counsel for both the parties and have perused the material placed on record.

6. It appears that regular promotion from the post of AE (C) to EE (C) used to be governed by the 1954-RRs right
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upto 28.10.96 and new rules, namely, 1996-RRs came into force w.e.f. 29.10.96. Under the 1954-RRs only those regular AEs (C) were eligible for regular promotion as EE (C) who possessed a degree in Civil Engineering and had put in atleast three years' regular service as AE (C). The said rules, however, contained a proviso which reads as follows:-

"Provided that Government in consultation with the Commission may promote an Asstt. Engineer of outstanding ability and record, to Group 'A' service in relaxation of the educational qualifications provided in clause (a)."

This implied that the Diploma holder Asstt. Engineer could also be considered on the basis of "outstanding ability and record". The respondents have admitted that some Diploma holders AEs have been promoted to the post of EEs in accordance with the aforesaid proviso. Feeling aggrieved by the promotion of Diploma holder AEs, the graduate AEs filed OA-704/98 before this Tribunal which was decided on 30.4.99 and the Tribunal held that the said proviso was "arbitrary and discriminatory". The Tribunal accordingly directed that until the rules were amended, no regular promotion of Diploma holders AEs should be made and that the adhoc promotions already made should be regularised in accordance with the amended rule. According to the respondents, the matter was subsequently taken to the Hon'ble Supreme Court in J.N.Goel and Ors. Vs. Union of India (Civil Appeal Nos.5363/90 etc.). In its interim order dated 20.10.90, the Supreme Court stayed the operation of this Tribunal's order dated 30.4.90. While the appeal before the Supreme Court was pending, the respondents took a decision on 6.4.92 that diploma holder

AEs, in order to be eligible for promotion in accordance with the aforesaid proviso, should have 60% "Very Good or above" reports. Following this, the diploma holder AEs were made EEs on adhoc basis by adopting the said criteria. Later on 10.1.96, the Supreme Court directed the Govt. to frame necessary rules in accordance with the directions of this Tribunal dated 30.4.90. The 1996-RRs were thus framed and notified by the Govt. w.e.f. 29.10.96. Later, the Supreme Court in J.N.Goel's case (supra) in its final order dated 14.1.97 laid down that regular promotion to the post of EE against the vacancies which occurred prior to promulgation of the 1996-Rules will be governed by the 1954-Rules. The sanctity of the 1954-Rules was thus upheld by the Apex Court. As a matter of fact, according to the respondents, the Supreme Court in the aforesaid case observed as follows:-

"14. We may now come to the proviso to Rule 21 (3) which was inserted in 1972. As noticed earlier, the proviso permits relaxation in the matter of educational qualifications for promotion of Assistant Engineers to the cadre of Executive Engineers and an Assistant Engineer though not a graduate could be promoted provided he had 'outstanding ability and record'. The said criterion of 'outstanding ability and record' prescribed by the proviso cannot be regarded as vague or arbitrary. In service jurisprudence 'Outstanding merit' is a well recognised concept for promotion to a selection post on the basis of merit. Such assessment of outstanding merit is made by the DPC on the basis of the record of performance of the employee. It cannot, therefore, be said that the proviso to Rule 21 (3) which enabled a diploma holder Assistant Engineer to be promoted as Executive Engineer if he had 'outstanding ability and record' suffers from the vice of arbitrariness. The only reason given by the Tribunal for striking down the said proviso as invalid is that in the matter of promotions which have been made on the

post of Executive Engineer, the DPCs have not correctly applied the said criterion and have made selections by applying selection norms uniformly irrespective of their being diploma holder Assistant Engineers or degree holder Assistant Engineers. The failure on the part of the DPCs, in the past, to correctly apply the norms laid down in the proviso and to make an assessment about the eligibility of the diploma holder Assistant Engineers on the basis of their 'outstanding ability and record' would not mean that the proviso which enables diploma holder Assistant Engineers having 'outstanding ability and record' being promoted as Executive Engineers is violative of Articles 14 and 16 of the Constitution on the ground of arbitrariness. The failure to implement the said proviso properly could only mean that the promotion which was made without properly applying the criterion laid down in the proviso would be open to challenge. But it does not mean that the proviso itself is bad as being arbitrary. We are, therefore, unable to hold that the proviso to Rule 21 (3) of the 1954 rules were violative of Articles 14 and 16 of the Constitution. This would mean that the promotions from the cadre of Assistant Engineers (graduates as well as diploma holders) to the cadre of Executive Engineers prior to the coming into force of 1976 Rules would be governed by Rule 21 (3) of the 1954 Rules, as amended in 1972 to include the proviso."

Arising from the above observations of the Supreme Court, the respondents have held the view that the criterion of "outstanding ability and record" needs to be applied properly while considering the cases of diploma holder AEs for promotion to the post of EE (C) meaning thereby that the criterion of 60% 'Very Good and above' reports for the promotion of diploma holder AEs would be improper in the eyes of law.

7. Further-more, this Tribunal in DA-2095/999 (A.K.Jain & Others) decided on 10.12.99 while dealing with the same matter, has observed as follows:-

"We are afraid that this contention of the learned counsel for the applicant cannot be accepted because if we interpret the term 'outstanding ability and record' as 60% of 'very good' or 'outstanding reports, then this Tribunal would be substituting the words in the proviso of Rule 21 (3) and would be putting the words '60% of very good or outstanding' in place of words appearing as 'outstanding ability and record' and this would amount to an act of legislation on the part of the Tribunal. So such type of interpretation cannot be allowed particularly so when the Hon'ble Supreme Court in J.N.Goel's case has found no fault in the proviso to Rule 21 (3) of the 1954 Rules which was added on 31.10.72."

14

8. Referring to the orders of promotion dated 3.11.99 (Annexure A/1) which is the subject matter of applicant's grievance, the respondents have mentioned that in order to implement the judgements of the Supreme Court for regularisation of adhoc promotions in accordance with the 1954-Rules, 430 vacancies of EE (C) and 120 vacancies of Executive Engineer (electrical) falling under the AEE's quota were diverted as vacancies for the AEs by relaxing the quota under 1954-Rules. Accordingly, a proposal for regular promotion to the post of EE in respect of vacancies for 1994-95, 1995-96, 1996-97 (upto 28.10.96) was sent by the respondents to the UPSC on 11.10.97. The DPC for regular promotion, the outcome of which has caused grievance to the applicant, was held in the UPSC from 13.9.99 to 29.9.99 and it is on the basis of this DPC's recommendations that the aforesaid orders dated 3.11.99 have been issued by the respondents.

9. The respondents have clearly mentioned that in the background of the judgements and orders of the Supreme Court and this Tribunal referred to in the preceding

✓ paragraphs, the applicant, who is a diploma holder AE, could be considered for promotion to the post of AE in relaxation of the educational qualifications provided he possessed 'outstanding ability and record' in accordance with the 1954-Rules. The applicant's case was indeed considered by the DPC held in September, 99 in respect of the vacancies for the year 1996-97 (upto 28.10.96). However, on the basis of his service record, he was not assessed as having "outstanding ability and record" and for this reasons, his name was not recommended for regular promotion to the post of EE. The respondents have admitted that some of his juniors with comparatively better service record, were indeed empanelled and promoted and their names figure in the order of promotion dated 3.11.99. 15

10. In regard to the plea of the applicant vide the ground taken in the rejoinder, we are in agreement with the approach and the thinking reflected in the observations of this Tribunal in OA-2095/95 reproduced in para 6. We have also noticed that the Supreme Court has upheld the sanctity of the 1954-Rules which contained the proviso referring to "outstanding ability and record". The Annual Confidential Report (ACR) reflects the higher authorities' assessment about the work and conduct including the quality of work of the officer concerned, and based on the overall performance, an officer is judged and rated as outstanding, very good, etc. This is a long established ^{ed &} system. In the circumstances, we cannot lay down a rule in the context of the applicant's plea that those graded below the eligibility benchmark whether rated

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U as outstanding or very good, should be deemed to have received adverse reports for the years in question. We are convinced, on the other hand, that once a criterion, in this case of "outstanding ability and record" has been laid down, it is for the DPC to take a proper decision after appraising the work and worth of the officers considered for promotion in the light thereof. It is certainly not open to this Tribunal to lay down any rule in this regard as any such intervention would be seen as an effort to legislate howsoever indirectly. Moreover, the Supreme Court has, as stated, already sanctified the "proviso" in question, laying down the requirement of "outstanding ability and record".

11. The applicant has also relied on the judgement of the Supreme Court in U.P. Jal Nigam Vs. Prabhat reported as JT 1996 (1) SC 641. The facts and circumstances of the present case are different from the facts and circumstances of that case and, therefore, the said ruling of the Apex Court will not find any application in this case. In this view of the matter, the grounds taken by the applicant and referred to in paras 2 & 3, fail as being devoid of merit.

12. The respondents have also raised the issue of exhaustion of departmental remedies and non-joinder of necessary parties. The applicant has, however, stated that there is no provision for a statutory appeal in the rules against non-promotion to group 'A' posts. We are inclined to look at this matter slightly differently. According to the applicant himself, he has been wrongly

superseded in the matter of promotion and, therefore, he could and should have filed a representation in the first instance with the departmental authorities. Further, the present DA, in case of success, would have affected the rights of Asstt. Engineers juniors to the applicant and, therefore, it was necessary to implead the juniors as necessary parties in this case. The applicant did not do this either.

13. In the result, the DA fails on merits as well as on the ground of non-joinder of necessary parties and is accordingly dismissed without any order as to costs.

✓ 2 S.A.T. Rizvi
(S.A.T. Rizvi)
Member (A)

Kuldip Singh
(Kuldip Singh)
Member (J)

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