

Reserved**CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH**
JABALPUR**Original Application No.200/00891/2013**Jabalpur, this Monday, the 24th day of August, 2020**HON'BLE SHRI NAVIN TANDON, ADMINISTRATIVE MEMBER**
HON'BLE SHRI RAMESH SINGH THAKUR, JUDICIAL MEMBERDr. Tripti Mishra Dixit, W/o Manoj Dixit, Aged about 39 years,
R/o Saanchi Complex, Board Office,
Bhopal (MP)-462001**-Applicant****(By Advocate** –Shri Abhay Mishra learned Senior Advocate
assisted by Shri Pratyush Tripathi)**V e r s u s**1. Union of India, through its Secretary, Secy. (Housing), Ministry
of Housing and Urban Poverty Alleviation, Nirman Bhawan, New
Delhi-1100012. Chairman-cum-Managing Director Housing & Urban
Development Corporation Limited, HUDCO Bhawan, 1HC
Complex, Lodhi Road, New Delhi-1100013. The Executive Director (HR), Housing & Urban Development,
Corporation Limited, HUDCO Bhawan, 1HC Complex, Lodhi
Road, New Delhi-1100014. Regional Chief, Housing & Urban Development,
Corporation Limited, Regional Office,
Paryavas Bhawan, Jail Road, Arera Hills,
Bhopal-462011 (M.P.)**-Respondents****(By Advocate** –Shri Naman Nagrath, learned Senior Advocate
assisted by Shri Varun Kumar Amar)

(Date of reserving the order:-23.04.2019)

ORDER**By Navin Tandon, AM:-**

The applicant is aggrieved that she has been promoted to the post of Senior Law Officer w.e.f. 31.08.2009 instead of date of entitlement i.e. 01.07.2008.



2. The applicant has made the following submissions in the Original Application:

2.1 She was initially appointed as Trainee officer (Law) after fulfilling the entire selection process w.e.f. 28.06.2000. Due to her excellent service record, she has been given all promotions timely.

2.2 Respondent Corporation vide Office Memorandum dated 04.09.2000 (Annexure A-2) formulated new scheme for granting promotions to Executives on the basis of their Annual Performance Appraisal Report (APAR). As per these guidelines, an Executive is entitled for next higher post on the basis of four years assessment of work.

2.3 She was promoted as Law Officer w.e.f. 01.07.2004. As per guidelines, she was due for further

promotion to the post of Senior Law Officer w.e.f. 01.07.2008. However, she was promoted w.e.f. 31.08.2009 vide office dated 23.04.2010 (Annexure A-4).

2.4 Thereafter, she approached the authorities in the respondent Corporation and obtained information under RTI Act, including copy of APAR for the year 2005-06.

2.5 The assessment by the reporting and reviewing officer was “Excellent” with a total awarded marks of 262. However, the rating was downgraded to “Very Good” by Shri Anil Sharma, Chief Law & HR without having any authority and also without giving any cogent reason.

2.6 Since the benchmark for next promotion is “Excellent”, the APAR of 2005-06 with “Very Good” grading should have been communicated to the applicant, which was not done.

2.7 She submitted representations to the respondents (colly. Annexure A-6 and A-7). When she did not receive any response, she approached this Tribunal in O.A. 1075/2012. This Tribunal in its order dated 22.01.2013



(Annexure A-8) directed the Chairman-cum-Managing Director of respondent Corporation to decide the representation within 120 days.



2.8 In compliance of the said orders of the Tribunal, the respondents have considered the representation and decision communicated vide letter dated 23.04/03.05.2013 (Annexure A-1), wherein her prayer has been rejected.

3. The applicant has prayed for the following relief:

“8. Relief sought:

(i) Summon the entire relevant record from the respondents for its kind perusal.

(ii) Upon holding that the endorsement in Part IV of the applicant's APAR by the said officer is bad in law, the entry made by the said officer may kindly be directed to be expunged/ignored as the said authority was not competent to write APAR of the applicant at the particular time.

(iii) Consequently, provide the applicant promotion on the post of Senior Law Officer from the date of her entitlement i.e. from 1.7.2008 with all consequential benefits including salary, arrears of pay and all other attendant benefits;

(iii) Any other order/orders, which this Hon'ble Court deems, fit proper.

(iv) Award cost of the litigation in favour of the applicant.

(v) The applicant most humbly prays that the order passed and contained in Annexure A-1 be also ordered to be declared illegal and accordingly be quashed.”



4. The respondents have submitted the following in the reply filed by them:

4.1 The applicant was initially appointed as Trainee Officer Law w.e.f. 14.05.1999 and not w.e.f. 28.06.2000 as stated by her in O.A.

4.2 The representation has been considered and decided by the respondents as per facts, appraisal guidelines issued and revised from time to time and concluded that the assessment done by Shri Anil Kumar Sharma, the then Chief Law & HR, for the year 2005-06 does not require any re-assessment.

4.3 Since there were no adverse remarks in the APAR 2005-06, no communication was sent to the applicant.

4.4 Four years of required service is only the minimum period required for being eligible to be considered for promotion. However, employees can be promoted after

a period of four years also. Promotion is not a matter of right and is subject to other selection criteria also which includes having requisite scores in APAR, vigilance clearance and the availability of a vacancy etc.



4.5 As per year wise rating of applicant's APAR since joining the organization (Annexure R-4), she is getting rating score of 4-6 in different years. That is why she got her first promotion in five years instead of four years.

4.6 As per guidelines (Annexure R-5), a cumulative score of 20 marks is necessary for consideration of promotion. She had scored 19 marks in the APARs after four years i.e.01.07.2008 and hence not recommended for promotion by Departmental Promotion Committee (DPC) (Annexure R-6).

4.7 The APARs are to be assessed by a functional Head as per guidelines. For the year 2005-06 the APAR was assessed by Shri Anil Kumar Sharma, Chief Law & HR, who was the senior most Law executive and heading the Law Department in the capacity of Functional Head. Since there was no ED Law at the

relevant time, the previous incumbent Shri S.K. Sinha having retired on 30.04.2005, the part IV of APAR was reviewed by Shri A.K. Sharma Chief Law & HR as per circular dated 04.08.2006 (Annexure R-8).



4.8 The APARs for last 3 years namely 2006-07, 2007-08 and 2008-09 were reviewed by Executive Director (Operation), who was equal in status with ED Law being the Functional Head.

4.9 Applicant is not entitled to any relief and the O.A. is liable to be dismissed.

5. The applicant has filed rejoinder wherein the main points of O.A. have been reiterated. She also submitted that all the Trainee Officer (Law) in her batch were given first promotion after five years of their joining (Annexure R-13). She also would have got 20 marks for promotion w.e.f. 01.07.2008 had her rating in APAR 2005-06 not being downgraded incorrectly. In spite of circular dated 04.08.2006, her APARs for 2006-07 was sent to ED/Operations and not to ED/Law.

6. We have heard the argument of learned counsels of both the parties and perused the pleadings and documents.



7. The applicant is aggrieved that she has been promoted to the post of Senior Law Officer w.e.f. 31.08.2009 instead of date of her entitlement i.e. 01.07.2008. The reason for the delay in promotion is attributed to the grading in the APAR for the year 2005-06 and the manner in which it has been finalized.

8. The issue raised by the applicant are, firstly, that she was not communicated the APAR 2005-06. Secondly, the assessment at the HQ level has been done by Shri A.K.Sharma Chief (Law & HR) who was not competent to do so. Thirdly, Shri A.K.Sharma has downgraded the grading from "Excellent" to "Very Good" without assigning any reason.

9. Learned counsel for the applicant brought our attention to Para 3 of the Office Memorandum dated 04.09.2000 (Annexure A-2) (also attached by respondents as Annexure R-5) which reads as under:

“With the intent to make the system transparent, all the Executives will be conveyed the overall assessment on regular basis in contrast to the earlier system of communicating only adverse/advisory entries. This will also motivate and encourage the employees to sustain outstanding performance/improve their performance levels.”



10. However, it is an undisputed fact that the APAR of 2005-06 was not communicated to the applicant. The respondents in their reply have stated that since there were no adverse remarks, it was not communicated.

11. Learned counsel for the respondents relied upon **Union of India and another vs. S.K.Goel and others** (2007) 14 SCC 641) to buttress the point that ACR is to be communicated only if there are adverse remarks or if grading is below the benchmark.

12. Learned counsel for the applicant cited the judgment of Hon'ble Supreme Court in **U.P. Jal Nigam and others vs. Prabhat Chandra Jain and others** (AIR 1996 SC 1661), **Dev Dutt vs. UOI** (2008 (8) SCC 725) and **Sukhdev Singh vs. UOI** (2013 (9) SCC 566) to aver that all the APAR entries should have been communicated.



13. This issue has already attained finality. Hon'ble Supreme Court in **Dev Dutt** (Supra) has considered **S.K.Goel** (Supra) and has held that the 2-Judge Bench decision can not prevail over the 7-Judge Constitution Bench decision in **Maneka Gandhi vs. Union of India** (1978 (2) SCR 621) in which it has been held that arbitrariness violates Article 14 of the Constitution. Decision of **Dev Dutt** (Supra) has been affirmed by 3-Judges in **Sukhdev Singh** (Supra). **Dev Dutt** (Supra) has also been accepted by Govt. of India and communicated vide O.M. dated 14.05.2009 of Department of Personnel and Training (DoPT) to state that "the full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the Report is complete with the remarks of the Reviewing Officer and the Accepting Authority wherever such system is in vogue." Therefore, this needs no further deliberations.

14. Further, the respondent department's own O.M. dated 04.09.2000 (Annexure A-2) states that all the

Executives will be conveyed the overall assessment on a regular basis. Therefore, it can easily be concluded that respondent department has faltered in their approach regarding communication of APAR.



15. The Annual Performance Appraisal System for HUDCO Executives (Annexure A-2 and Annexure R-5) spells out detailed procedure. Various Performance Factors have been listed along with their respective weightage. Each of these factors has to be assessed on a 6-point scale and multiplied by the specified weightage for each factor. Assessment of each factor will be done separately by the Reporting Officer and Reviewing Officer. In arriving out of total weighted score, the assessment given by Reporting and Reviewing Officer is given a weightage of 40% and 60% respectively. In the event of wide variation in assessment between the Reporting and Reviewing officer i.e. a total factor score variation of more than 100, the next higher authority will discuss with both and try to moderate the variation.



16. The overall assessment is arrived at based on total weighted score (TWS). The rating is Outstanding (credit score 6) for TWS above 276. The rating is Excellent (credit score 5) for TWS between 226 to 275. The rating is Very Good (credit score 4) for TWS between 176 to 225. Similarly, ratings of Good, Average and Poor are specified for TWS lesser than 176, 126 and 76, respectively.

17. The Annual Performance Appraisal Report form (Annexure A-5) states the following: -

“4. Part-IV is applicable only in respect of the personnel belonging to various disciplines like Finance, Law etc. posted in the Regional Offices and additional assessment at the HQ will be done by the concerned Functional Director/Functional Head of Department e.g. DF for Finance Personnel, EDL for Law Personnel.”

18. Part IV of the applicant has been filled by ED/L (APAR 2004-05), Shri A.K.Sharma Chief (Law & HR) (APAR 2005-06), ED/O (APAR 2006-07) and ED/O (APAR 2007-08) respectively (colly. Annexure A-5).

19. In the APAR of year 2005-06 for the applicant (Annexure A-5) the weighted score is 112 and 150 as

assessed by the Reporting Officer and Reviewing Officer, respectively. In Part IV, the following undated remarks have been given by Shri A.K.Sharma, Chief (Law & HR):

“She can be rated as Very Good.”



20. The first issue raised by the applicant in the said APAR 2005-06 is that Shri A.K.Sharma was not competent to sign Part IV as he was not Executive Director. The respondents in their reply have submitted that Shri S.K.Sinha,ED/Law retired on 30.04.2005. The APAR 2005-06 was assessed by Shri A.K.Sharma, the then Chief Law & HR, who was the senior most Law executive and heading the Law Department in the capacity of Functional Head. There was no ED/Law at the relevant time. The respondents have also relied upon guidelines for APAR issued by the respondents on 04.08.2006 (Annexure R-8) wherein Chief (Law) has been designated as Functional Head of Law Cadre.

21. A point has been raised by the applicant as to why ED/Operations has countersigned the APARs for the



year 2006-07 and 2007-08. The reply of respondents submits that it is not relevant as no prayer has been made by the applicant in this regard. Further, it goes on to add that APAR for the years 2006-07, 2007-08 and 2008-09 were reviewed by Executive Director (operations) who was equal in status with ED Law being the Functional Head. The impugned order dated 23.04/03.05.2013 (Annexure A-1) states as under: -

“11. However, it is observed that there had been slight difference with respect to the assessment for the year 2006-07 and 2007-08 where the Part IV of the APAR are finally assessed by ED (Operations). The reports have been sent directly by Regional Office Bhopal to ED (Operations) taking his as next higher in the channel.

12. From the HR point of view, it is stated that since ED (Operations) and ED (Law) in the capacity of Functional Head were at par level officers, therefore no further review was taken from ED (Law) as by the general principles of assessments, the further assessment should have been by the next higher authority. In the instant case, both were at par level officers.

13. In this context, attention is drawn to the APAR of 2004-05 and 2005-06 wherein, in Part IV both the officers i.e. the Functional Head and Departmental Head i.e. EDL and ED (Operations) respectively have assessed simultaneously but since there was no material difference in the assessment, therefore, the reports were accepted as it is. It is pertinent to mention here that though the provision of assessment of

Functional Head was there prior to 06.08.2006 guidelines but as no specific instructions were available/notified for the movement of the reports.

14. It may be noted that prior to the revision of the guidelines in May 2012 the adherence to the assessment channel was not very structured due to working arrangements and hierarchy issues in assessment channel.”



22. In any Performance Appraisal System, it is necessary that the Key Performance Indicators (KPI) are clearly communicated to the appraisee in the beginning of the assessment period. Further, it should also be known to the appraisee as to who will do the assessment. As a natural corollary, the assessors should also know who the persons are whose assessment is to be done. Absence of any of the above will not result in fair and objective assessment.

23. It is amusing to note that a company, which was set up in 1970 and conferred with *Miniratna* status in 2004, has to say that prior to the revision of the guidelines in May 2012, the assessment channel was not structured.

24. The APAR format very clearly specifies that Part IV has to be filled by EDL for Law Personnel. The respondent department has not produced any document to show that the powers of EDL were to be exercised by Shri A.K.Sharma, Chief Law & HR.



25. Reliance placed upon the guidelines issued on 04.08.2006 (Annexure R-8) will not come to the rescue of the respondents because these are issued after the conclusion of assessment period 2005-06 and it can not have any retrospective effect.

26. From the above, it is clear that respondent department has not delegated the powers of EDL to Shri A.K.Sharma. The APAR format very clearly specifies that Part IV has to be filled in by EDL.

27. Learned counsel for the applicant placed reliance on **Pushpagadoan vs. Gwalior Rayon Silk** (1980(2) MPWN 110), which has held that :

“It is a well established principle of law (either having its origin in a statute or subordinate legislation which includes, among others, order, rule, regulation and notification, and even a precedent) that when a manner for exercising a

particular power or performing a duty has been specified, it has to be exercised or performed in that particular manner or not at all.”



28. Fortified by the above views of Hon'ble High Court of Madhya Pradesh that power can be exercised only in the prescribed manner or not at all, we have no hesitation to conclude that Shri A.K.Sharma, Chief Law & HR was not competent to fill in Part IV of the applicant's APAR for 2005-06.

29. The second issue raised by the applicant in the said APAR 2005-06 is that since the total weightage score of the applicant, based on the assessment of Reporting Officer and Reviewing Officer, is 262 (Excellent) and the total score variation of the two assesses is not more than 100, there was no occasion for Shri A.K.Sharma, Chief Law & HR to downgrade the grading to "Very Good".

30. Respondents in their reply have submitted that as per extant rules, the variation of scores by the assessor (i.e. reviewing/function head) up to 100 marks or 1 level was permissible as per APAR guidelines. The same

point was also spelt out in the impugned order (Annexure A-1).



31. Learned counsel for the respondents tried to explain that the Function Head assessment of Very Good (Total Weighted Score of 176 to 225) is within 100 points of 262 awarded by Reporting/Reviewing Officers, and therefore, as per rules and guidelines dated 04.08.2006 (Annexure R-8).

32. It has already been held earlier that the guidelines dated 04.08.2006 (Annexure R-8) is not applicable for the assessment period 2005-2006.

33. The guidelines are very specific that only in case where there is a difference of more than 100 between the assessment of Reporting Officer and Reviewing Officer will the next higher authority try to moderate the variation. In the present case, the Total Factor Score/Weighted Score is 280/112 and 250/150 by the Reporting and Reviewing Officer, respectively. Very clearly, the variation is not more than 100.



34. It is seen that the Total Weighted Score of 262 is more towards the higher end of the range 226 to 275. However, one short sentence of “She can be rated as Very Good” by the person filling Part-IV has undone the entire labour and effort put forth by the applicant during the entire year. No reasons have been given for not agreeing to the assessment of Reporting and Reviewing Officers. Coupled with the fact that no date has been written while filling up Part-IV, this will definitely be categorized as filling up the report in a casual manner, which is against the concept of Performance Appraisal.

35. There is no merit in the arguments of the respondents that downgrading upto 100 marks or 1 level was permissible as per APAR guidelines. The guidelines have clearly specified that in case of variations of assessment between Reporting and Reviewing Officer exceeds 100 points, the next higher authority will try to moderate the variation. It does not give any authority to next higher authority to write any grading ignoring the

assessment done by the Reporting and Reviewing Officer without assigning any reason.



36. One of the established principles in an appraisal exercise is that if a higher authority wants to upgrade/downgrade the ratings given by the lower authority, clear reasons have to be recorded for doing so. In the present case, no reasons have been given for downgrading the assessment for Excellent to Very Good.

37. In view of the above, clearly the cryptic remarks of Shri A.K.Sharma, Chief Law & HR in Part IV of applicant's APAR of 2005-06 are invalid.

38. The next point is regarding the applicant's promotion w.e.f. 01.07.2008. The respondent's argument is that as per guidelines, a cumulative score of 20 marks is necessary for promotion. The applicant had 19 marks in the APARs after four years i.e. as 01.07.2008, hence not recommended for promotion by Departmental Promotion Committee (DPC) as per minutes (Annexure R-6). The year wise rating of the applicant since joining

HUDCO (Annexure R-4) indicates she has been getting APAR rating score from 4 to 6 in different years. Had she attained “outstanding” (Score 6) in the successive year, it would have offset lack of one mark as “Very Good” (Score 4).



39. Perusal of APAR rating from 1999-2000 to 2012-13 (Annexure R-4) indicates that she got Total Weighted Score of less than 226 (threshold for Excellent) only in the first two years of her service viz 1999-2000 and 2000-2001. Subsequently, the scores in all the years from 2001-2002 to 2010-2011 are between 226 to 275 (Excellent) and are 287.5 and 287 (Outstanding) for the years 2011-2012 and 2012-2013, respectively. However, she has been graded as Very Good (Marks 232) in 2003-2004 as well as 2005-06 (Marks 262). We do not know the reason for “Very Good” grading in 2003-04. The present case is for the APAR 2005-06. It is evident that she has been rated very highly by her Superiors throughout her career.



40. DoPT in its Office Memorandum dated 06.01.2010, dealing with “Effect on modification/expunction of adverse remarks in the ACRs and upgradation/ down-gradation of the overall grading prior to the period 2008-09” has communicated that, “it has also been decided that where the authority has upgraded/downgraded the overall grading without giving sufficient reasons, the DPC shall treat such an exercise as non-est/invalid.” The instant case is covered by these guidelines.

41. Learned counsel for the respondents relied upon judgment on Hon’ble High Court of Delhi in Sumitra Mehra vs. Secretary of Education (2018 SCC Online Del 12805) to say that if the APAR of 2005-06 was adverse, the DPC could have ignored this APAR and gone one year earlier. **Sumitra Mehra** (Supra) case deals with two uncommunicated ACRs which were “Average” whereas the benchmark for promotion was “Good”. The present case is different where “Excellent” rating has been downgraded to “Very Good” without assigning any reason. Therefore, it is easily differentiated.

42. The deliberation in the above paragraphs can be summarized as under:-



(a) Not communicating the APAR 2005-06 to the applicant was against the respondent's own guidelines and was arbitrary action as held by Hon'ble Supreme Court.

(b) Shri A.K.Sharma, Chief Law & HR was not competent to fill the entries of Part IV of applicant's APAR for 2005-06.

(c) The downgrading of the applicant's rating in Part IV of APAR 2005-06 without assigning any reason makes the entry therein as invalid.

43. Respondents have decided the representation of the applicant on 23.04/03.05.2019 (Annexure A-1). While rejecting the request, they have taken shelter in circular dated 06.08.2006 and guidelines issued in May 2012. It has already been held in earlier paragraphs that these circulars/guidelines are having prospective effect and are not relevant to the applicant's case of APAR 2005-06. The remaining points have been dealt with in

earlier paragraphs. We are unable to find any merit in the impugned order.

44. Accordingly, the Original Application is allowed. The impugned order dated 23.04/03.05.2013 (Annexure A-1) is quashed and set aside. The entry made in Part IV of APAR 2005-06 is declared non-est/invalid. Respondents are directed to hold supplementary DPC for the applicant to consider her promotion to Senior Law Officer from the date of her entitlement i.e. from 01.07.2008. If found fit for promotion, she would be entitled for all consequential benefits including salary, arrears of pay and attendant benefits. The said exercise should be completed within 60 days from the date of receipt of certified copy of this order. No order as to costs.



(Ramesh Singh Thakur)
Judicial Member
rn

(Navin Tandon)
Administrative Member