

Fit for Reporting

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI.

REGN. NO. OA 1404/91

Date of decision: 21-2-1992

Shri A.K. Agarwal Applicant
versus..

Union of India & Ors.... Respondents

CORAM:

THE HON'BLE MR. JUSTICE RAM PAL SINGH, VICE CHAIRMAN (J)
THE HON'BLE MR. D.K. CHAKRAVORTY, MEMBER (A)

For the Applicant ... Sh. J.K. Srivastava
Counsel.

For the Respondents ... Shri P.H. Ramchandani,
Senior Counsel.

JUDGEMENT

(JUDGEMENT OF THE BENCH DELIVERED BY HON'BLE
MR. D.K. CHAKRAVORTY, MEMBER)

The applicant, who is an officer of the Indian Customs & Central Excise Service, Group 'A', has challenged the Department of Revenue office orders dated 23.5.1991 and 27.5.1991 under which a large number of Assistant Collectors of Customs and Central Excise have been promoted as Deputy Collector of Customs and Central Excise on purely ad hoc basis subject to the final results in Civil Appeal Nos. 257/88 and 4004-07 of 1987 with certain CMPs and WPs pending before the Hon'ble Supreme Court. The applicant's name is not included in either of these orders. He has prayed for the following reliefs:-

(i) the respondents be directed to hold a review DPC to consider the applicant for promotion after ignoring his CR for the year 1985 and to issue promotion order placing him at his appropriate seniority with arrears of pay etc; and

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(ii) to declare that the present procedure for writing of adverse CRs is violative of the principles of natural justice and to direct the respondent No.1 to frame a procedure for writing of adverse CRs in the light of the directions given by the Hon'ble Supreme Court in the case of Amar Kant Choudhari Vs. State of Bihar, AIR 1984 SC 631.

2. The applicant joined the Indian Customs and Central Excise Service in 1980 and is presently posted on deputation as Deputy Director in the Narcotics Control Bureau. This post is equivalent to the post of Deputy Collector of Customs & Central Excise but his substantive rank in the parent department continues to be that of Assistant Collector of Customs and Central Excise. According to the applicant, his name should have found place just below serial number 93 (Smt. V. Narayanan Sarna) in the list given in the impugned order dated 23.5.1991. The applicant contends that the DPC which met in November, 1990 had taken into consideration his CR for the year 1985 despite the fact that after expunction of all/ adverse entries many columns in the report became blank. This being not the confidential report in the eyes of law, the DPC ought to have considered his confidential report for the preceding year, i.e., 1984, as laid down in the Department of Personnel, Public Grievances and Pension, Office Memo. dated 10.4.1989. After expunction of the adverse entries, the Ministry of Finance had changed the overall assessment from "poor" to "adequate". Since the feeder entries had become blank, no conclusion should have been drawn from those entries regarding overall assessment. In this way, the DPC acted

with total non-application of mind and its findings in regard to the applicant's suitability are liable to be set aside with a direction for holding a review DPC. For this the applicant relies on the DGP&T letter dated 9.1.1984(Annexure A-2 of the paperbook).

3. The applicant believes that he has consistently good record of service as he was promoted to the senior scale in due turn, was deputed to the Narcotics Control Bureau as Assistant Director in July, 1990 where he was promoted as Deputy Director in April, 1991 and had been sent to U.S.A for specialised training on the criminal intelligence and analysis. While he was posted as Assistant Collector in Calcutta, he had raised many queries in respect of a case of import of machinery where there were heavy under invoicing. He was asked by respondents 2&3 to cancel his queries and to pass the consignment as valuing Rs.6.5 lakhs against what should have been about Rs.1 crore. He had expressed his inability to do as directed and soon thereafter he was shifted from his earlier post to that of Assistant Collector of Welfare and Sports. He alleges that as an act of vindictiveness respondents 2& 3 directly or indirectly conveyed to the CBI that the applicant had under assessed a postal parcel resulting in loss of about Rs.4400 to the Government. After investigation, the CBI filed closing report stating that no prima facie case could be found against the applicant. Despite this the Department issued a chargesheet to the applicant for imposing a minor penalty which was dropped after more than a year in December, 1990 by which time the DPC had already met in

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November, 1990. The DPC was kept in dark about the closing of the chargesheet against the applicant. In order to pursue their malicious and mala fide designs, the respondents 2&3 sent another complaint to the CBI that the applicant was having assets disproportionate to his known sources of income. On his explanation this charge was also closed in January, 1990. As a further means to harm the applicant's career, respondents 3& 2 as reporting and reviewing officers made adverse entries in his confidential report for 1985. Only the adverse entries were communicated to him and not the rest of the record which is in violation of the existing instructions and this caused material prejudice to the applicant in defending himself. On his representation and then a memorial to the President, the adverse entries were ultimately totally expunged. As there were several adverse entries after pasting blank paper over these many feeder columns became blank. The applicant contends that in such a situation there was no legal validity of the applicant's confidential report for the year 1985 and, therefore, the column for overall grading should also be treated as blank. However, the respondents gave him overall grading as "adequate" which according to the applicant has no legal validity at all. He contends that in such a situation the DPC should have gone one year back and considered his ACR for the year 1984. His case before the DPC was further damaged by the fact that a confidential note given by respondent No.2 saying that the applicant's integrity was doubtful was still attached with his CR although all the adverse entries had been expunged and both the CBI enquiries had been

dropped. This latest position was not brought to the notice of the DPC. In the promotion order issued on the basis of the DPC held in November, 1990 the applicant's name did not find a place. The totality of the circumstances in the applicant's case clearly show that there is no other explanation except mala fide for the damage done to the applicant's career. The findings of the DPC were vitiated as they took into account the invalid CR and they were kept in dark about the dropping of the charges against him.

4. The applicant has also contended that the present procedure of writing of the ACRs under which the grounds on which adverse remarks are given are not disclosed and the reported officer is not given an opportunity to explain the correct position is violative of the principles of natural justice. The respondents have not observed the directions given in this regard by the Hon'ble Supreme Court in the case of Amar Kant Choudhari Vs. State of Bihar (AIR 1984 SC 531).

5. The application has been contested by the official respondents and they have stated that at the time the DPC was held, disciplinary proceedings against the applicant were pending and, accordingly, the findings of the DPC were kept in sealed cover. The sealed cover was opened after the applicant was exonerated but he could not be promoted as the DPC had not included his name in the panel for the year 1989 as also 1990 because he had failed to obtain the prescribed bench mark grade; namely "very good". The overall assessment of the DPC in respect of the applicant was "good" only. They have denied the contention

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that applicant's CR for the year 1985 is blank because even after expunction of the adverse entries his overall grading has been indicated in the appropriate column. Para 6.2.1(c) of the instructions dated 10.4.1989 is applicable only in those cases where CR had not been written at all. This is not so in the present case. They have averred that no injustice whatsoever has been done to the applicant and, accordingly, the application be dismissed.

6. Respondents 2&3 have filed separate counters. Respondent No.2 has denied the allegations made against him and has also stated that the long chargesheet dated 28.7.1988 was issued / after he had left Calcutta in May, 1986. Respondent No.3 has explained at considerable length the circumstances leading to the CBI enquiries against the applicant and denied the allegations of mala fide.

7. We have heard the learned counsel for both parties and have gone through the records of the case carefully. The respondents also made available the minutes of the DPC, OCT.-NOV., 1990 and Character Roll of the applicant and we have perused the same.

8. We may now consider the various contentions raised by the applicant challenging the order of his supersession in promotion to the post of Deputy Collector of Customs & Central Excise. After carefully going through the counter-affidavits filed by the respondents 2&3 and hearing the learned counsel for the respondents, we do not find any merit in the allegations of mala fide. We, accordingly, reject these contentions. The main ground of challenge by the applicant is

that the DPC should not have taken into consideration his CR for the year 1985 in which many important columns were blank because the adverse remarks were totally expunged. We find considerable force in this contention of the applicant that in terms of para 6.2.1(c) of the Office Memorandum dated 10.4.1989 issued by the Department of Personnel and Training, the DPC should not have used the CR for 1985 but instead should have considered the CR for the preceding year, 1984. Para 6.2.1(c) is reproduced below:-

"Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account."

We reject the submission of the respondents that the above quoted provisions of OM dated 10.4.1989 are not applicable in this case because the applicant's CR for 1985 cannot be considered to be blank. In a matter like this, one has to be guided not just by the letters but the spirit of the instructions. Paragraph 19 of DGP&T letter dated 9.1.1984, which is reproduced below, lends further support to the contention of the applicant:-

"(19) Column of report should not be kept blank after expunction of adverse remarks-

It has been observed that in a few cases, after the expunction

of the adverse remarks, the relevant column(s) was/were left blank, i.e., without any remarks, thus making the report incomplete.

It may be appreciated that an incomplete report cannot be relied upon for a fair and objective assessment of the officer concerned for his confirmation, promotion, etc. It is essential that the annual confidential reports are complete in all respects. In the circumstances, where on consideration of a representation against adverse remarks, the competent authority comes to the conclusion that the remarks deserve to be expunged, it should see whether/ total expunction of the remarks will leave the relevant column(s) blank; and if it finds the position to be so, it should order modification of the relevant remarks in a suitable manner so that the column(s) in question does/do not remain blank."

9. The applicant has further alleged that although he had been cleared of the case registered against him as RC 8/86 under final report dated 13.2.89 and the case RC 16/86 vide letter dated 20.12.89 and also of the departmental chargesheet under Hon'ble Minister's order of September, 1989, a note written by respondent No.2 was still attached to the applicant's CR for the year 1985 which cast adverse shadow about his integrity. The respondents have not specifically denied this submission.

10. On going through the CR for the year 1985, it is seen that against item 12(a) which relates to "Fitness for Promotion", it is recorded "Regarding his integrity, a separate note is attached". And, in the CR produced before us



now in late 1991, the note still remains attached.

The note with the heading " Note on integrity of Shri A.K.Agarwal, Asst. Collector" is dated 4.4.1986 and has been signed by the Reviewing Officer. The note is indeed damaging as it casts serious aspersions on the applicant's integrity and, refers to filing of FIR by the CBI and search of his house-allegations which were not established and have long since been dropped and closed.

11. According to the procedure prescribed in the Ministry of Home Affairs OM dated 21.6.1965, if there is any doubt or suspicion about the officer's integrity, the column relating to integrity should be left blank and a separate secret note should be recorded and followed up. A copy of the note should also be sent together with the Confidential Report to the next superior officer who will ensure that the follow up action is taken expeditiously. If, as a result of the follow up action, the doubts are cleared, the integrity should be certified and an entry made accordingly. If the doubts are confirmed, this fact should also be recorded and communicated to the officer concerned. In the instant case, in the integrity column the Reporting Officer recorded " Nothing adverse noticed during the reporting period" but the Reviewing Officer used the column for "Fitness for Promotion"- which, incidentally, was to be deleted from the CR form under DPA&R OM dated 16.5.1985- for attaching the secret note. The general principles which are required to be observed by the reporting officer for writing annual reports, as laid down in para 174(9) of P&T Manual, Vol.III, do not permit remarks like "Doubtful character", "complaints received about

his taking illegal gratification". These principles have been violated in writing the note. Further the secret note should not have been attached and made an integral part of the CR. A CR with expunged columns left blank, i.e., without any remarks, thus making the report incomplete cannot be relied upon for a fair and objective assessment of the officer for his confirmation, promotion etc. (vide DGP&T letter dated 9.1.1984). We are of the view that placement of such a CR, with a secret note annexed in violation of the guiding principles, before the DPC caused serious prejudice to the applicant's prospects for promotion (vide Gurudial Singh Fijji V. State of Punjab and others, 1979 SLJ 299 SC). In the light of the above discussion we direct that the "secret note" attached to the applicant's CR for 1985 be removed and the column 12 be pasted over. We further direct that the expunged and incomplete CR for 1985 shall not be placed before any DPC in future.

12. Coming to the applicant's contention that the Respondent authorities kept the DPC in dark about the closure of the departmental proceedings and the mind of the DPC was thus prejudiced by a propaganda that there were disciplinary proceedings against the applicant, a perusal of the records indicate that the chargesheet was finally dropped only on 19.12.90 whereas the DPC had already held its last meeting on 29th November, 1991. In the circumstances, the respondents cannot be faulted for keeping the DPC informed of the proceedings against the applicant so that its recommendations are kept in a sealed cover.

13. The applicant has also prayed for declaring

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the present procedure for writing of adverse CRs as violative of the principles of natural justice and fair play and has sought for issue of a direction to respondent No.1 to frame a procedure for writing of adverse CRs in the light of the directions given by the Hon'ble Supreme Court in Amar Kant Choudhari Vs. State of Bihar, AIR 1984 SC 531. In view of our findings on the specific prayer of the applicant in regard to his CR for the year 1985, we refrain from going into these matters.

14. In the facts and circumstances of the case, we direct and order that the respondents shall hold a review DPC to consider the applicant's case afresh for promotion to the post of Deputy Collector of Customs & Central Excise against the vacancies which arose in 1989 and 1990. In the CR dossier of the applicant placed before the DPC, the CR for the year 1985 shall not be included and the DPC shall be advised to consider the CR of the preceding year, 1984. The DPC shall also be specifically informed that no disciplinary enquiry or vigilance cases are pending against the applicant for the period in question. In case, the review DPC finds the applicant suitable for promotion against any vacancy that arose in 1989 and 1990, he shall be promoted with retrospective effect and be given appropriate seniority. He shall also be entitled to all consequential benefits. The above orders shall be implemented as expeditiously as possible but preferably within a period of three months from the date of receipt of this judgement.

There will be no order as to costs.

D.C. Chakraborty
21/2/1992
(D.K.CHAKRAVORTY)
MEMBER(A)

14-21-2-92
(RAM PAL SINGH)
VICE CHAIRMAN (J)