

Central Administrative Tribunal
Principal Bench, New Delhi

(92)

O.A.No.1101/2004

New Delhi, this the 20th day of September 2005

Hon'ble Shri V.K. Majotra, Vice Chairman (A)
Hon'ble Shri Shanker Raju, Member (J)

Dr. R.K. Srivastava

..Applicant

(By Advocates: Shri Arun Bhardwaj and Shri A.K. Shukla)

Versus

Union of India & others

..Respondents

(By Advocates: Shri VSR Krishna and Shri Vikas Goel)

1. To be referred to the Reporters or not? Yes
2. To be circulated to other Benches of the Tribunal or not? Yes

S. Raju
(Shanker Raju)
Member (J)

**Central Administrative Tribunal
Principal Bench**

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New Delhi, this the 20th day of September 2005

**Hon'ble Shri V.K. Majotra, Vice Chairman (A)
Hon'ble Shri Shanker Raju, Member (J)**

Dr. R.K. Srivastava
Plastic Surgeon
Dept. of Burns & Plastic Surgery
Safdarjung Hospital
New Delhi-29

.Applicant

(By Advocates: Shri Arun Bhardwaj and Shri A.K. Shukla)

Versus

1. Union of India
through its Secretary
Govt. of India
Ministry of Health & Family Welfare
Nirman Bhawan, New Delhi
2. The Medical Superintendent
Safdarjung Hospital
New Delhi-29
3. Dr. Jagdish Prasad
Former Medical Superintendent
Safdarjung Hospital
New Delhi
(to be served through respondent 1)
4. Dr. S.P. Bajaj
Former Head of the Department
Department of Burns & Plastic Surgery
Safdarjung Hospital
New Delhi
R/o A-122, Vikas Puri
New Delhi

.Respondents

(By Advocates: Shri VSR Krishna for respondents 1 to 3 and Shri Vikas Goel for
respondent 4)

O R D E R (ORAL)

Shri Shanker Raju:

By virtue of the present OA, the applicant, inter alia, has sought for the following reliefs:-

“(i) allow the instant application and expunge the adverse remarks communicated and confirmed by the impugned orders dated 10.10.2002 & 24.7.2003 and

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(ii) direct the respondents to convene a review DPC consequent upon the aforesaid prayer and consider the case of the applicant for promotion w.e.f. the date his junior was promoted."

2. Brief matrix of the case transpires that the applicant is a qualified Specialist Doctor and Plastic Surgeon working in the Safdarjung Hospital. Vide order dated 10.10.2002, he was communicated the adverse remarks incorporated in his ACR for the year 2001-02. A representation preferred against the said adverse remarks was turned down by the respondents vide 24.7.2003.
3. Against the above order, the applicant preferred a Memorial to President of India, which is still to be responded to, gives rise to the present OA.
4. Learned counsel for the applicant contends that as the Memorial has yet not been disposed of, taking cognizance of any order to be passed by now, would not be in consonance with Section 19 (4) of the Administrative Tribunals Act, 1985, according to which on admission of an application, any proceedings under the relevant Service Rules as to redressal of grievance i.e. the subject matter of application before the Tribunal, shall abate.
5. On merits, it is stated that whereas the adverse remarks recorded in the ACR, whereby the applicant has been graded 'Average', no opportunity to improve upon the performance by virtue of any written communication such as memos, warnings, etc. had been afforded, which makes the remarks without objectivity and are illegal.
6. Learned counsel would also contend that 'Good' grading given by the reporting officer and on review, 'Average' grading given by the reviewing authority without affording a reasonable opportunity to show cause would amount to downgrading. However, if it is not supported by any reason, adverse remarks cannot be sustained in law. The applicant has impleaded the reviewing authority and reporting officer as party. Whereas the reviewing authority is still in service, the reporting officer, who has since retired on superannuation, is represented by counsel. The applicant has alleged malafides against respondent 4.
7. On the other hand, respondents 1 to 3 are represented through Shri VSR Krishna, learned counsel, who vehemently opposed the contentions and stated that while writing the ACR of the applicant, his work and conduct was taken into consideration. Though it is submitted that the reporting officer has given verbal warning but no written communication, etc. to improve upon the performance has been communicated to him. Whereas respondent 4's learned counsel vehemently opposed the contentions and by citing the following judgments stated that it is not necessary that all adverse remarks are communicated and even if the written



communications are not made on the assessment, the adverse remarks can be sustained.

1. **Baikuntha Nath Das & another v. Chief District Medical Officer, Baripada & another**, 1992 (079) AIR 1020 SC;

2. **Major General LPS Dewan v. Union of India & others**, 1995 (003) SCC 0383 SC;

3. **Swatantra Singh v. State of Haryana & others**, 1997 (SC) 2105; and

4. **State of UP & another v. Bihari Lal**, 1995 (082) AIR 1161 SC

8. Learned counsel relies on the charges leveled against respondent 4 as being baseless and misconceived.

9. We have carefully considered the rival contentions of the parties and perused the material placed on record. One thing we may at the outset state that because of the adverse remarks, applicant's promotion as Senior Plastic Surgeon has been withheld.

10. In the service career of a Government servant, confidential reports, which are recorded by the controlling authority and reviewed by the reviewing authority, plays an important role. In the career progression, the mirror of performance apart from other factors is the performance reported in the ACR. There may be instances where marring of ACR and recording of adverse remarks are actuated with malafide. Some instances are when the officers act in utter disregard to the rules and guidelines to be followed, which are though directory but are to be adhered to for transparency and fair play. In the event, the performance is not reflected in its true perspective and the adverse remarks are not supported by any reasons, the very object of writing ACR is frustrated.

11. The purpose of assessment of the performance of an officer before adverse remarks are recorded, the opportunity to improve upon by way of written communication has an object to be achieved. The concerned officer is confronted with written material in the form of an advice and memo with a sole purpose to afford him an opportunity to improve upon or else to explain the conduct.

12. In the above backdrop, the Apex Court in **State of U.P. v. Yamuna Shanker Misra & another** (1997) 4 SCC 7, has observed as under:-

“7. It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A (j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual



employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes, it may not be part of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidentials 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 an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate 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 standard 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. In another case, the Apex Court in **Swatantra Singh's case (supra)** has observed as under:-

“6. It is sad but a bitter reality that corruption is corroding, like cancerous lymph nodes, the vital veins of the body politic, social fabric of efficiency in the public service and demoralizing the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke. Sometimes, there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported by evidence, like the remarks made by the Superintendent of Police. More often, the corrupt officer manipulates in such a way and leaves no traceable evidence to be made part of the record for being cited as specific instance. It would, thus, appear that the order does not contain or the officer writing the report could not give particulars of the corrupt activities of the petitioner. He honestly assessed that the petitioner would prove himself to be an efficient officer, provided he controls his temptation for corruption. This would clearly indicate the fallibility of the petitioner, vis-à-vis the alleged acts of corruption. Under these circumstances, it cannot be said that the remarks made in the confidential report are vague without any particulars and, therefore, cannot be sustained. It is seen that the officers made the remarks on the basis of the reputation of the petitioner. It was, therefore, for him to improve his conduct, prove honesty and integrity in future in which event, obviously, the authority would appreciate and make necessary remarks for the subsequent period. The appellate authority duly considered and rejected the contention of the petitioner. Repeated representation could render little service. Rejection, therefore, is neither arbitrary nor illegal.”



14. If one has regard to the above, the very object of writing ACRs would be frustrated if the employee concerned is not afforded an opportunity to improve upon. The transparency is reflected from the administrative authorities to bring in fair play in their action. If a person starts performing in a manner, which is not well suited of being a Government servant and rather unbecoming, by resort to the opportunities in writing, not only one is accorded an opportunity to improve upon but also the same is a defence when the matters are challenged before the Court to justify the action. Before forming an opinion to be adverse, if an opportunity to improve upon is not afforded to the concerned employee, the said remarks are not tenable. Be that as it may, the fact remains that the person should have been afforded an opportunity and that opportunity should in black and white duly communicated to him.

15. In the above background, respondent 4, who was reporting officer and has since retired, though admitted in the reply not to have followed the above procedure but maintained to have verbally advised the applicant, we are afraid, that this is not the valid compliance.

16. Another aspect of the matter, on perusal of the records produced by the respondents, is that whereas in the ACR of the applicant for the year 2001-02, the reporting officer has graded him as 'Good', yet the reviewing authority has downgraded him as 'Average' and has not recorded the reasons, except stating that some complaint has reached to them. For want of such material, even the reasons are not reflected. There is no logic or rational to disagree with the grading given by the reporting officer without reasons and also without material in support. The similar situation had arisen before the Apex Court in **State of U.P. v. Narendra Nath Sinha**, 2002 (1) ATJ SC 118, where the reviewing authority downgraded the officer in his ACR. It was observed that without following the principles of natural justice, such remarks are not tenable. We do not find any reasons in support of such an action by the reviewing authority.

17. We have also perused applicant's earlier ACRs and find that the authorities have not disagreed, therefore, the above disagreement cannot stand scrutiny of law.

18. As held by the Apex Court in **Union of India & others vs. E.G. Nambudiri**, AIR 1991 SC 1216 when a representation is preferred against the adverse remarks, though no reasons are to be recorded in the order but they are to exist in the records. On perusal of the record, we find that when the representation has come for consideration before the concerned authorities, the case of the applicant has been considered on the basis of comments given by the reviewing authority. There is no reasons recorded by the authority dealing with the representation and this mechanical agreement with the comments shows lack of application of mind and for want of reasons, even the order passed on the representation cannot be sustained in law.



19. As regards malafides alleged against respondent 4, we do not find any substance and moreover on the above issues, once we have come to a conclusion, this exercise would be in futility.

20. In the result, for the foregoing reasons, the OA is allowed. Impugned orders are set aside. Respondents are directed to expunge the adverse remarks in the ACR of the applicant. If the applicant is not otherwise unsuitable, he should be considered for promotion for the post of Senior Plastic Surgeon. On expunction of adverse remarks, as a consequence thereof, the respondents are directed to hold a review DPC to consider the claim of the applicant for promotion from the date of his junior had been promoted, as per rules and instructions and if otherwise found fit would have to be accorded promotions with all consequential benefits. These directions shall be carried out by the respondents within a period of three months from the date of receipt of a copy of this order. No costs.

S Raju
(Shanker Raju)
Member (J)

V.K. Majotra
(V.K. Majotra)
Vice Chairman (A)

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