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ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.1959/2004

New Delhi, this the 3rd day of August 2005

**Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. S.A.Singh, Member (A)**

Shri J.R. Panigrahi
Joint Commissioner
Office of the Commissioner of Custom &
Central Excise
Vadodara – I, Race Course Circle
Vadodara. Applicant

(By Advocate: Sh. S.K. Gupta proxy for Sh. B.S.Gupta)

Versus

1. Union of India
Through Secretary
Ministry of Finance
Department of Revenue
North Block
New Delhi.
2. Member (P&V)
Central Board of Excise & Customs
Department of Revenue
North Block
New Delhi.
3. Chief Commissioner (JZ)
Customs & Central Excise
Jaipur (Rajasthan).
4. Commissioner
Central Excise & Customs
Central Revenue Building
Civil Lines, Raipur
Chhatisgarh.
5. Shri C.Sen
Director General
Directorate of Housing & Welfare
Customs & Central Excise
D-Block, I.P. Estate
New Delhi – 110 002.

6. Shri H.A. Bhatt
 Joint Commissioner
 Flat No.42, Building No.1
 Tarangan, Pokhran Road No.1
 Eastern Express Highway
 Thane (W)
 Mumbai. ... Respondents

**(By Advocate: Sh. Madhav Panikar for Respondents 1 to 4 and
 None for Respondents 5 and 6)**

O R D E R

By Mr. Justice V.S. Aggarwal:

Applicant (Sh. J.R. Panigrahi), by virtue of the present application, seeks setting aside of the letters of 15.7.1999, 26.7.2000 and 21.7.2003 by virtue of which his representation has been rejected and also the communication of 6.2.2004 by virtue of which his request for expunging of the remarks has been rejected. He also prays that a direction should be given to the respondents to hold a review Departmental Promotion Committee and consider his case for grant of Non-Functional Selection Grade ignoring ACRs of 1996-97 and if he is found fit, he may be granted the same from 1.1.2003.

2. Some of the relevant facts are that the applicant had been working as Deputy Commissioner (Customs) and posted at Probander, Gujarat. He was communicated certain adverse remarks which are to the following effect:

"The following adverse remarks in your Annual Confidential Report for the year 1996-97 are reproduced below:

"PART - III (To be filled in by the Reporting Authority)

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A. NATURE AND QUALITY OF WORK.

1. PLEASE COMMENT ON PART-II AS FILLED OUT BY THE OFFICER AND SPECIFICALLY STATE WHETHER YOU AGREE WITH WHAT HAS BEEN STATED.

"The Resume submitted by the Officer does not indicate targets set by him, nor his corresponding achievements, and it is vague and exaggerated, and does not reflect the true and correct performance and deeds of the Officer. I do not agree with the Resume substantially. Further, the specific details of his contribution and role as Divisional A.C. are not mentioned. He functioned more as a figurehead than as a responsible, mature, and experienced officer in proper control and knowledge of the Division."

2. QUALITY OF WORK AND OUTPUT.

(PLEASE COMMENT ON THE QUALITY AND OUTPUT OF WORK OF THE OFFICER WITH REFERENCE TO KNOWLEDGE OF LAW AND PROCEDURES, INTELLIGENCE, ATTENTION TO DETAILS, ABILITY TO ANALYSE PROBLEMS AND FIND SOLUTION, JUDGEMENT AND SENSE OF PROPORTION.)

"He surely lacked proper knowledge of Laws and procedures and their utility and application. He was not careful and pain taking in devoting his time and attention to the facts and merits of the case. Instead of arresting and solving difficulties and problems, he added to these. He lacked sense of priorities and proportion. A number of his Orders-in-Original were required to be reviewed, due to improper application of mind on his part. He had not shown the true and correct position of pendencies of various items of work and various subjects, and, in fact, actively suppressed the figures of pendencies. For example, he has shown the pendencies of adjudication cases (at his level) at 340 nos. whereas the actual figure is 835. Similar position obtains for pendencies under the subjects, such as, Refund cases, CL declarations, Price declarations, RT-12 returns, MODVAT declarations under Rules 57G/57T, MODVAT claim under Rule 57-II, etc. His total



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inaction and failure in deciding property the Classification Declaration of M/s. M.P. State Mining Corporation Ltd., Raipur has turned this into a serious objection by the A.G.M.P. and has resulted in substantial loss of Revenue. In a Rule 57-II case also, he has directly caused huge revenue loss. Another problem case relates to M/s Hanuman Agro Industries Ltd., Raipur.

3. QUALITY OF INSPECTIONS.

“Not conducted, as per Resume.”

B. ATTRIBUTES.

1. EXECUTIVE ABILITIES.

(EVALUATE WITH REFERENCE TO INITIATIVE, DRIVE, READINESS TO ASSUME RESPONSIBILITY AND QUALITIES OF LEADERSHIP.)

“His personality and bearing was not conducive to inform abilities at all. He was led, more often than not, by his subordinates, than leading them. His attitude towards work and results was somewhat casual and he was careless in his approach in all matters. He allowed matters to drift. He lacked sense of urgency and seriousness. He often ignored directions and guide-lines issued by Headquarters Office. Position of actual pendency amply demonstrates these attitudes.”

2. PROMPTNESS IN ATTENDING TO WORK.

(EVALUATE WITH REFERENCE TO FIELD DUTIES AS WELL AS OFFICE WORK.)

“Promptness and preparedness were never his forte. He failed to decide many important issues, bearing high revenue implication, and often, simply ignored them. For example, he did not decide promptly a large number of Classification, Price and MODVAT Declarations, as was required.”

3. INDUSTRY AND CONSCIENTIOUSNESS.

“He did not care to exert himself, even, in the face of glaring omissions, pendencies, etc.

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where huge revenue was involved. For example, the inordinate delay in submission of Draft S.C.N. for approval to Hdqrs."

4. DISCIPLINE.

"He was not properly disciplined, as instances of his failure to reply and take necessary action, in time, as per directions from Headquarters Office was often noticed".

P A R T - IV

2. GENERAL ASSESSMENT.

(PLEASE GIVE AN OVERALL ASSESSMENT OF THE OFFICER WITH REFERENCE TO HIS STRENGTH AND SHORTCOMINGS AND ALSO BY DRAWING ATTENTION TO THE QUALITIES, IF ANY, NOT COVERED BY THE ENTIRE ABOVE.)

"As already noted earlier, the shortcomings and weaknesses are predominant and substantial. There is hardly any saving grade. His almost total lack of control of the Division led to confusion and created a mess, for example, MODVAT Credit being allowed on inadmissible goods, improper valuation of goods, taking of wrong and illegal credit based on invoices issued by dealers, provisional assessments being made without passing of AC's Order, improper scrutiny of documents, etc. all potential aids to duty evasion."

3. G R A D I N G

(OUTSTANDING/VERY GOOD/ GOOD /AVERAGE / BELOW AVERAGE) (AN OFFICER SHOULD NOT BE GRADED OUTSTANDING UNLESS EXCEPTIONAL QUALITIES AND PERFORMANCE HAVE BEEN NOTICED; GROUNDS FOR GIVING SUCH A GRADING SHOULD BE CLEARLY BROUGHT OUT). GRADING GIVEN WITHOUT ADEQUATE JUSTIFICATION WILL NOT BE TAKEN INTO ACCOUNT.

"The Officer's performance is deficient and bad, in almost all areas of work, as noted above. The grading awarded is "BELOW AVERAGE."

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P A R T - V

(REVIEWING AUTHORITY'S REMARKS.)

2. IS THE REVIEWING AUTHORITY SATISFIED THAT THE REPORTING AUTHORITY HAS MADE HIS REPORT WITH DUE CARE AND ATTENTION AND AFTER TAKING INTO ACCOUNT ALL THE RELEVANT MATERIAL?

"I substantially agree with the remarks of the Dy. Commissioner I/C of the Division. He has taken into account the facts and statistics while making assessment about the Officer."

3. DO YOU AGREE WITH THE ASSESSMENT OF THE OFFICER GIVEN BY THE REPORTING AUTHORITY?

(IN CASE OF DISAGREEMENT, PLEASE SPECIFY THE REASONS. IS THERE ANYTHING YOU WISH TO MODIFY OR ADD?)

"I substantially agree with the remarks of Sh. H.A. Bhat, the Reporting Officer.

Shri J.R. Panigrahi's overall performance was 'POOR'."

3. The applicant submitted a representation and challenged the same on various grounds with respect to the remarks of the year 1996-97.

4. On 26.7.2000, the applicant was informed that the Chief Commissioner of Customs and Central Excise found that the remarks were justified. However, on 10.9.2001, considering the memorial of the applicant, following adverse remarks had been expunged:

A. Nature and Quality of Work:-



1. Agreement of the reporting Officer with what has been stated in the resume:

"He functioned more as a figurehead than as a responsible, mature, and experienced officer in proper control and knowledge of the Division."

2. Quality of work and output:

"He surely lacked proper knowledge of laws and procedures and their utility and application"

"Instead of correcting and solving difficulties and problems, he added to these. He lacked sense of priorities and proportion. A number of his Orders in original were required to be reviewed, due to improper application of mind on his part."

"For example, he has shown the pendencies of adjudication cases (at his level) at 340 nos. whereas the actual figure is 835."

"His total inaction and failure in deciding properly the classification declaration of M/s M.P. State Mining Corporation Ltd., Raipur has turned this into a serious objection by the A.G.M.P. and has resulted in substantial loss of Revenue. In a Rule 57-H case also, he has directly caused huge revenue loss."

B. Attributes

1. Executive Abilities:

"His personality and bearing was not conducive to inform executive abilities at all. He was led, more often than not, by his subordinates, than leading them."

"He often ignored directions and guidelines issued by Headquarters office."

2. Promptness in attending to work:-

"Promptness and preparedness were never his forte. He failed to decide many important issues, bearing high revenue implications, and often ignored them."

3. Industry and conscientiousness:-

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For example, the inordinate delay in submission of draft S.C.N. for approval to Headquarters."

Part IV - General Assessment by reporting authority:-

2. General Assessment:-

"There is hardly any saving grace. His almost total lack of control of the Division led to confusion and created a mess, for example. MODVAT credit being allowed on inadmissible goods, improper variation of goods, taking of wrong and illegal credit based on invoices issued by dealers, provisional assessments being made without passing of AC's order, improper scrutiny of documents etc. all potential aids to duty evasion."

4. Grading:-

"The officer's performance is deficient and bad, in almost all areas of work, as noted above."

5. In this process, some of the adverse remarks have not been expunged.

6. The grievance of the applicant is that he was promoted as Joint Commissioner on ad hoc basis but he has been ignored for Non-Functional Selection Grade. According to the applicant, when he was promoted as Joint Commissioner, his Annual Confidential Reports for the year 1996-97 must have been considered and, therefore, there was no justification for ignoring his claim for Non-Functional Selection Grade. He also contends that no warning has been given while recording the said Confidential Reports. In any case, the same were not communicated to the applicant within time and, thus, adverse remarks in any case should be expunged.

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7. The application is being contested.

8. The first and foremost question that comes up for consideration is as to whether while recording the adverse remarks, to which we have referred to above, a warning should have been given to the applicant or not. Reliance on behalf of the applicant is being placed on the decision of the Supreme Court in the case of **SRI M.A. RAJASEKHAR v. THE STATE OF KARNATAKA & ANR.**, 1996 (5) SLR 643. The Supreme Court was concerned with the matter where the adverse remarks communicated were "**Competent, good at getting work done, but does not act dispassionately when faced with dilemma.**" The Supreme Court noted that most of the aspects of the work were satisfactory. His integrity was not doubtful. It was held that in such like remarks, firstly they should have been pointed and an opportunity should be given to correct the remarks. The findings of the Court read:

"5. It was found that his integrity was not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances, the remark that he "does not act dispassionately when faced with dilemma" must be pointed out with reference to specific instances in which he did not perform that duty satisfactory so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in dilemma and lacked objectivity, in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not been done by the respondents, it would be

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obvious that the above adverse remark was not consistent with law."

9. It is obvious from the aforesaid that the findings referred to above were arrived at in the peculiar facts. In the present case, initially adverse remarks clearly show that it pertained to his discipline. He was not prompt in work. There is total lack of control on his part and that he is shown to lacking proper knowledge of law and procedure. In peculiar facts, even when resume was submitted, it did not indicate the targets set by him and once it was so, no purpose would be served by giving an opportunity to contemplate. The decision of the **M.A. Rajasekhar** (supra), therefore, does not apply in the peculiar facts of the present case. In the case of **STATE OF UTTAR PRADESH v. YAMUNA SHANKER MISRA & ANR.**, JT 1997 (4) SC 1, somewhat similar findings were arrived at which are:

"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 51A(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 the facts or circumstances. Though sometimes, it may not be part of record, but the conduct,

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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 should 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 given giving 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 standards of excellence in services constantly rises to higher levels and it becomes successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

10. Here also, the Supreme Court observed that opportunity should be given to the erring officer to correct the error and improve his conduct. But as already referred to above, a fault was right from the time the resume was submitted. Besides other factors to which we have referred to above, when such was the default, no purpose would be served in this regard and therefore, we find that the applicant cannot rely on the said decisions.

11. So far as the non-communication of the remarks in time is concerned, it appears that the same had been communicated not with any undue delay that the applicant can claim prejudice to

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have been caused. The remarks pertain to the year 1996-97. When the applicant represented and subsequent part of the remarks even expunged, it is obvious that the applicant who has not been prejudiced in this regard, cannot make a grievance on that ground.

12. From the record, it appears that there are no mala fides in this regard nor the applicant has been able to *prima facie* show the same. Resultantly, there is no ground to interfere, so far as the remaining remarks which have not been expunged.

13. However, the learned counsel for the applicant contended that the applicant has been promoted in the year 2002 as Joint Commissioner. There is no ground that non-functional selection grade should have been denied to him. Perusal of the order, copy of which is at Annexure A-11, indicates that the promotion order to the grade of Joint Commissioner had been issued on ad hoc basis until further orders.

14. If it was a simple case of ad hoc promotion, without considering the relevant merits in accordance with the Rules, probably the applicant's case deserves no merit but the applicant has specifically pleaded that his Annual Confidential Reports were considered and he was promoted as Joint Commissioner, may be on ad hoc basis. The applicant's plea finds mention in Para 4.12:

"4.12 It is further submitted that as already stated when the Applicant was working as Deputy Commissioner of Customs & Central

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Excise was promoted to officiate as Joint Commissioner of Customs in the scale of Rs.12000-16500 by the Order dated 24.9.2002, for which a copy is at **ANNEXURE A-11**, and from the perusal of the letter it is clear that the name of the Applicant is figuring at Sr. No.60 and below him there is a mention of names of Shri Rajeev Jain, M.M. Prathiban etc. and at that time the applicant was declared fit to be promoted to the post of Joint Commissioner of Customs & Central Excise on the consideration of five years ACRs effective from 1.3.2002 as per the Govt. of India instructions and the ACR of 1996-97 must have been considered then while promoting.”

and the ground at Para 5 B.

“B. BECAUSE as regards the non grant of Non Functional Selection Grade to the Applicant with effect from the date when his juniors Shri Rajeev Jain and M.M. Prathiban were granted the same i.e. with effect from 01.01.2003, it is submitted that the ACR of the year 1996-97 has no role to play, as, as per the instructions of the Govt. of India, the five years ACRs are required to be considered, and when the case of the applicant was considered for promotion to the post of Joint Commissioner, Customs & Central Excise in the year 2002, the ACRs of five years ending 31.3.2002 were considered and the Applicant was found suitable and subsequently promoted and in the same manner when the case of the applicant for the grant of N.F.S. Grade w.e.f. 01.01.2003 was considered by considering the ACRs of five year ending 31.3.2002, the Applicant was not found suitable and thus, the stand of the respondents is a contradictory, unbelievable in as much as while considering the case of the applicant for the grant of N.F.S. Grade, the ACR for the year 1996-97 has no role to play.”

In reply to Para 4.12, the answer given was that it is a matter of record and in answer to Para 5B, it has been stated that the



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answer as given to Para 4.15. The answer to Para 4.15 reads as under:

“4.15 The Departmental Screening Committee considered the ACRs from 1996-97 to 2000-2001 since the vacancies pertained to 2002-03. Hence the contention of the applicant that the ACR of the year 1996-97 had no role to play in evaluation is baseless. As per DOP&T's guidelines formulated for DPCs, it is stated that the DPC should consider CRs for equal number of years in respect of all officers considered for promotion and the DPC should assess the suitability of the employee for promotion on the basis of their service record and with particular reference to the CRs for five preceding years irrespective of the qualifying service prescribed in the Service/Recruitment Rules. The guidelines also state that only such ACRs should be considered which became available during the year immediately preceding the vacancy/panel years even if DPCs are held later than the schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of date of convening of DPC. Since, the vacancies pertained to 2002-2003, the CRs of the preceding five years i.e. 2000-2001, 1999-2000, 1998-99, 1997-98 & 1996-97 were rightfully considered by the respondent for assessing the suitability of the applicant for grant of NFSG.”

15. These pleadings clearly show that for promotion to the post of Joint Commissioner, the ACRs of the applicant were considered and he was still promoted. There is no denial. The denial has to be specific. Consequently, it is somewhat ambiguous as to how the applicant was able to earn promotion to the post of Joint Commissioner on ad hoc basis but was being ignored for Non-Functional Selection Grade in the next year. It is entirely for the Department to reconsider in the light of the findings arrived at.

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16. For these reasons, we dispose of the present application holding:

- a) There is no ground to expunge or set-aside the adverse entries against the applicant.
- b) The claim of the applicant for Non-Functional Selection Grade should be reconsidered in the light of the findings arrived at above.


(S.A.Singh)
Member (A)


(V.S.Aggarwal)
Chairman

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