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Central Administrative Tribunal
Principal Bench

O.A.No.976/2004

New Delhi, this the 17th day of August 2006

Hon'ble Shri Shanker Raju, Member (J)
Hon'ble Shri N.D. Dayal, Member (A)

A.B. Gupta, Staff No.8127
General Manager (West-I), MTNL
1st Floor, Jeevan Seva Extn. Bldg.
SV Road, Santacruz (West)
Mumbai – 400054

...Applicant

(By Advocates: Shri S.K. Gupta & Shri G.S. Lobana)

Versus

1. Union of India through
Secretary, Department of Telecommunication
Sanchar Bhavan, New Delhi
2. Shri P. Balgangadhara, Staff No.8128
GM (O), O/o GM TD, BSNL
BSNL Bhavan
Chuttugunta, Vijayawada-520004
3. Shri Ashok Rana, Staff NO.8129
GM Telephones, BSNL
Zilla Parishad Compound
Sultanpur, UP 228 001
4. Shri Ashok Kumar Kanojia, St.No.8130
GM (Mobile Services), BSNL
2nd Floor, Telephone Exchange, Mahanagar
Near Wireless Crossing, Lucknow, UP
5. Shri Shailendra Agarwal, St.No.8131
GM (Data Network), BSNL
Ratan Jyot Apartment
Vaishali, Ghaziabad – 201010, UP

..Respondents

(By Advocate: Shri A.K. Bhardwaj)

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)

(3)

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ORDER

Hon'ble Shri Shanker Raju, Member (J):

By virtue of the present OA, applicant assails the orders passed on 21.7.2003 and 29.9.2003 denying him promotion to Senior Administrative Grade (SAG) of ITS Group 'A'. Vide order dated



20.12.2004, the present OA was allowed with a direction to the respondents to hold a review DPC on the ground that there has been downgrading in the ACR with respect to the benchmark.

2. Respondents in OA assailed the Tribunal's order dated 20.12.2004 in W.P. (C) No.6908/2005. Vide order dated 25.10.2005, on the ground that whether the merit of the case was considered or not, matter is remitted back to the Tribunal for a fresh consideration on merits.

3. Applicant, who was appointed as JTS Group 'A' through UPSC on 17.1.1986, was promoted to senior time scale on 29.9.1989 and was thereafter promoted to Junior Administrative Grade (JAG) on regular basis on 20.8.2001. Once junior officers of the applicant have been promoted to SAG grade led to a representation filed by the applicant, which was turned down and thereafter he was promoted on ad hoc basis in SAG.

4. Learned counsel for applicant states that whereas the applicant, who was in the zone of consideration for the year 1998-2003, i.e., till the date the DPC had met in 2003, had obtained the benchmark in his ACR, yet supersession of the applicant is not only violative of Articles 14 & 16 of the Constitution but also the guidelines issued by the DOPT on 8.2.2002.

5. Learned counsel for applicant states that any remarks, which are now being recorded as below benchmark by the reviewing authority, would be a downgrading and it should have been



communicated to the applicant and has relied upon several pronouncements to substantiate his plea.

6. On the other hand, respondents' learned counsel vehemently opposed the contentions and stated that DPC, which has now been held in the UPSC, is independent to device its own methodology to grade the officers as "fit" or "unfit" and in this case, DPC is not restricted in its consideration to the grading given by the reporting officer or reviewing authority but would not be influenced with it and rather would consider all the parameters and the remarks given in the ACR to arrive at a grading to a person. As such, placing reliance on a decision of the Apex Court in **U.P.S.C. v. K. Rajaiah & others**, (2005) 10 SCC 15, it is stated that the Tribunal is not empowered in review to interfere in the matter of grant of grading by the DPC.

7. Learned counsel also relied upon a decision of a Lucknow Bench of this Tribunal in **Parmeshwar Sah v. Union of India & others** (OA-177/2005) decided on 24.5.2005 to substantiate the aforesaid plea.

8. In rejoinder, the contentions raised in the OA are reiterated by the applicant.

9. We have carefully considered the rival contentions of the parties and also perused the records of DPC as well as CR folder of the applicant.

10. It is trite law that the claim of promotion is not a fundamental right but right to consideration is a fundamental right. In the promotion



to senior scale, selection process is involved. In the DPC guidelines, as revised by the DOPT vide OM dated 27.3.1997, the procedure adopted for a selection method is evaluation of CRs, as contained in the OM in paragraph 6.2.1. CRs are the basic inputs on the basis of which the assessment is to be made. It is mandatory under paragraph 6.2.2 to give grading to each officer. The DPC in paragraph 6.2.3 before making overall grading after considering the CR should also take into account any major or minor penalty or displeasure issued to the concerned as reflected in the ACR and also remarks against the column of 'integrity'. Insofar as the benchmark is concerned, as per OM dated 8.2.2002, the following principle has been laid down:

"6.3.1. Principles to be observed and preparation of panel. – The list of candidates considered by the DPC and the overall grading assigned to each candidate, would form the basis for preparation of the panel for promotion by the DPC. The following principles should be observed in the preparation of the panel:-

(a) Mode of Promotion. – In the case of 'selection' (merit) promotion, the hitherto existing distinction in the nomenclature ('selection by merit' and 'selection-cum-seniority') is dispensed with and the mode of promotion in all such cases is rechristened as 'selection' only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion.

(b) 'Benchmark' for promotion. – The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed benchmark and accordingly grade the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e., who meet the prescribed benchmark) by the DPC shall be included and arranged in the select panel in order to their inter se seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded 'fit' (in terms of the prescribed benchmark) by the DPC.

(c) Although among those who meet the prescribed benchmark inter se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/Service Rules, including the conditions that one should be the holder of the relevant feeder post on regular basis

and that he should have rendered the prescribed eligibility service in the feeder post.

(d) Promotion to the revised pay scale (grade) of Rs.12,000-16,500 and above.

- (i) The mode of promotion, as indicated in Paragraph (a) above, shall be 'selection'.
- (ii) The benchmark for promotion, as it is now, shall continue to be 'Very Good'. This will ensure element of higher selectivity in comparison to selection promotions to the grades lower than the aforesaid level where the benchmark, as indicated in the following paragraphs, shall be 'Good' only.
- (iii) The DPC shall for promotions to said pay scale (grade) and above, grade officers as 'fit' or 'unfit' only with reference to the benchmark of 'Very Good'. Only those who are graded as 'fit' shall be included in the select panel prepared by the DPC in order of their inter se seniority in the feeder grade. Thus, as already explained in Paragraph (b) above, there shall be no supersession in promotion among those who are found 'fit' by the DPC in terms of the aforesaid prescribed benchmark of 'Very Good'."

11. If one has regard to the above, the procedural aspect of the matter in case of pay scale of Rs.12000-16500/-, the benchmark would be "Very Good". The DPC would declare a person "fit" or "unfit" and in order of seniority, one has to be empanelled and promoted.

12. It is also trite that DPC would not be influenced by the grading given by the reporting officer in the ACR but free to evaluate its own methodology to assess the comparative merit of the candidates whose cases are to be considered in selection for promotion.

13. The Apex Court in **Badrinath v. Government of Tamil Nadu & others**, (2000) 8 SCC 395 with regard to consideration of the DPC, observed as under:-



"40. Unless there is a strong case for applying the Wednesbury doctrine or there are mala fides, courts and Tribunals cannot interfere with assessments made by Departmental Promotion Committees in regard to merit or fitness for promotion. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, then the powers of judicial review under Article 226 of the Constitution are not foreclosed.

41. While the courts are to be extremely careful in exercising the power of judicial review in dealing with assessment made by Departmental Promotion Committees, the executive is also to bear in mind that, in exceptional cases, the assessment of merit made by them is liable to be scrutinized by courts, within the narrow Wednesbury principles or on the ground of mala fides. The judicial power remains but its use is restricted to rare and exceptional situations. We are making these remarks so that courts or Tribunals may not – by quoting this case as an easy precedent – interfere with assessment of merit in every case. Courts and Tribunals can neither sit as appellate authorities nor substitute their own views to the views of Departmental Promotion Committees. Undue interference by the courts of Tribunals will result in paralyzing recommendations of Departmental Promotion Committees and promotions. The case on hand can be a precedent only in rare cases."

14. What is discerned from the above is that Wednesbury doctrine of reasonableness if on application results in a finding that the DPC has considered irrelevant material on the influences that no reasonable person can reach such conclusion, the matter can be interfered by the Tribunal. However, in a recent decision of **K. Rajaiah's** case (supra), in a case where it is alleged that no proper assessment on merit has been done by the Selection Committee and its outstanding grading had not been considered, the following has been held:-

"9. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the 1st respondent. The High Court relied on the decision of this Court in National Institute of Mental Health & Neuro Sciences Vs. Dr. K. Kalyana Raman & Ors. [AIR 1992 SC 1806]. Far from supporting the view taken by the High Court, the

said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed

"[E]ven the principles of natural justice do not require an administrative authority or a Selection Committee or an Examiner to record reasons for the selection or non selection of the person in the absence of statutory requirement. This principle has been stated by this Court in R.S. Das Vs. Union of India [1986 (Suppl.) SCC 617] at Page 633....."

In the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words:

"[W]e may state at the outset that giving of reasons for decision is different from, and in principle distinct from the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administration action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary."

That being the legal position, the Court should not have faulted the so called down gradation of the 1st respondent for one of the years. Legally speaking, the term 'down gradation' is an inappropriate expression. The power to classify as 'outstanding', 'very good', 'good' and 'unfit' is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-94. Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government's decision.

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12. We have also gone through the records of assessment placed before us by the learned counsel for the UPSC. The



arguments in the additional affidavit coupled with the contents of the record make it clear that the 1st respondent could not be selected for the reason that he did not get the gradation of 'outstanding' for four years in a block of five years that was taken into account for the purpose of evaluating the merits of the candidates. The learned counsel for the 1st respondent points out that for the year 1993-94 which falls within the five year range, the first respondent ought to have been graded as 'outstanding' in conformity with the grading in the ACR. However, the selection Committee graded him as 'very good' in view of the difference of opinion expressed by the reporting officer and the reviewing officer. We do not find any unfairness or arbitrariness in grading the 1st respondent as 'very good' for the year 1993-94. If so, as he gets 'outstanding' grading only for three years, his overall grading cannot be 'outstanding' in view of the existing guidelines adopted by the Commission. Normally, the Court will not interfere with the evaluation done by the Commission on a consideration of relevant material. However, we have some doubts on the validity of guidelines evolved in this behalf. The procedure of assigning the overall grading as 'outstanding', only if an officer was classified as such in the ACRs of four out of five years, seems to dilute the procedure of selection by merit and give primacy to seniority to some extent. For instance, if a junior officer gets three 'outstanding' grades and two 'very good' gradings, the officers senior to him, though they might not have got 'outstanding' even for one year, will be selected by virtue of their seniority. Whether this result that follows from the application of the criterion that is being adopted by the Commission is contrary to the statutory Regulations or whether such criteria would be violative of Articles 14 & 16, is a matter which might deserve serious consideration. But, in the absence of specific challenge to the rule or the procedural guidelines spelt out in the additional affidavit filed by the UPSC and the arguments not having been advanced on this aspect, we are not inclined to express a definite opinion on this aspect."

12. DOPT OM dated 8.2.2002 forbids supersession in selection and on a revised guideline regarding benchmark, the following has been laid down:

“3.2 ‘Bench-mark for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se-seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded 'fit' (in terms of the prescribed bench-mark) by the DPC.



3.2.1. Although among those who meet the prescribed benchmark, inter-se-seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/Service Rules, including the conditions that one should be the holder of the relevant header post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post.

3.3 Promotion to the revised pay-scale (grade) of Rs.12,000-16,5000 and above

- (i) The mode of promotion, as indicated in paragraph 3.1 above, shall be 'selection'.
- (ii) The bench-mark for promotion, as it is now, shall continue to be 'very good'. This will ensure element of higher selectivity in comparison to selection promotions to the grades lower than the aforesaid level where the bench-mark, as indicated in the following paragraphs, shall be 'good' only.
- (iii) The DPC shall for promotions to said pay-scale (grade) and above, grade officers as 'fit' or 'unfit' only with reference to the bench-mark of 'very good'. Only those who are graded as 'fit' shall be included in the select panel prepared by the DPC in order of their inter-se-seniority in the feeder grade. Thus, as already explained in paragraph 3.2 above, there shall be no suppression in promotion those who are found 'fit' by the DPC in terms of the aforesaid prescribed bench-mark of 'very good'."

13. If one has regard to the above, what is obligated upon the Selection Committee is to grade the officers "fit" or "unfit" only with difference to the benchmark of "Very Good", then the seniority would have to place its role in empanelment.

14. The Apex Court in **K. Rajaiyah's** case (supra) has clearly held that the DPC or the Selection Committee is not bound by the grading given by the reporting officer, yet in case of variance in the grading, though the statutory rules do not envisage recording of reasons, non-recording of reasons would not vitiate the outcome of the Selection Committee. In this view of the matter, Regulation 5(4) of the Indian Police Service (Appointment by Promotion) Regulations, 1955 was considered.

15. In the present case, there is no such regulation, which the Selection Committee shall classify the eligible persons as "Outstanding", "Very Good", "Good" or "unfit" but DOPT OM dated 8.2.2002, which is the only piece of guidelines to operate apart from the DOPT instructions of 1997, though the benchmark is "Very Good", the DPC would make promotions on the basis of their grading of "fit" or "unfit" as per the benchmark. To arrive at such a benchmark, guidelines of DOPT of 1997 and 2002 ibid under para 6.2.1 gives importance to the CRs as basic inputs. The DPC is obligated as per DOPT dated 6.10.2000 to assess the suitability of employees for promotion on the basis of their service records and with particular reference to the CRs for five preceding years. It was also provided that DPC should not be guided merely by the overall grading recorded in the CR but all assessments have to be made because the overall grading in CR may be inconsistent under various parameters or attributes. In such an event, paragraph 6.2.2 provides for grading of an officer, the CRs as well as various other parameters have to be considered.

16. Having regard to the above, the revised guidelines stipulated that once there is a benchmark of "Very Good" for the scale in which promotion is to be made in the present case, the merit is to be assessed with reference to the prescribed benchmark only then one is to be graded "fit" or "unfit". What has been held in **K. Rajaiah's** case (supra) is non-interference with the evaluation done by the Committee on consideration of the irrelevant material. In **K. Rajaiah's** case (supra), the methodology adopted has not been commented upon because of non-challenge to the rules or the procedural guidelines, in view of **Badrinath's case** (supra), if it is found that

unreasonableness have cropped in the administrative action, the same has to be interfered.

17. On perusal of the record, what we find that in the meeting held on 30.6.2001 and 2.7.2003 for the vacancy years 2002-03 and 2003-04, what had been before the Selection Committee were the CRs of the eligible officers, which had been assessed by them with an underlined grading of "Very Good", the candidates have been graded either "fit" or "unfit".

18. We have also perused the ACR folder of the applicant, which has been reflected in the remand order by the High Court in writ petition where, except seven months' ACR for the period 1.4.1998 to 27.11.1998, which is "Very Good", the record of five months from the holding of the DPC, the ACR grading was "Very Good". It is not a case that any minor or major punishment was ever awarded to the applicant. Various parameters in his ACR clearly show that the applicant has been commented synonymously with the grading given. However, his seven months' ACR, which was graded "Good" observed by the reviewing authority and the rest of being "Very Good" for that year, even going by the reasonableness as per the Wednesbury principle, we are satisfied that the applicant has not attained the benchmark. Assuming an exception to **K. Rajaiah's** case (supra), the grading has to be the basis for grading of the DPC. Though the procedure has been separately laid down, yet the wisdom of Selection Committee, which does not suffer from any procedural or legal infirmity and in absence of any challenge to the rules, we are precluded from assuming the role of the review DPC to scan through the consideration of DPC to re-assess the entire process. On the face

of it, keeping in light the record of the applicant, the unfitness reported by the DPC in selection cannot be found fault with.

19. In the result, for the foregoing reasons, this OA is found bereft of any merit and is accordingly dismissed. No costs.

(N.D. Dayal)
Member (A)

(Shanker Raju)
Member (J)

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