

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL  
ALLAHABAD BENCH ALLAHABAD.

Original Application No.587 of 1997.

Allahabad this the 24th day of May 2004.

Hon'ble Maj Gen K.K. Srivastava, Member-A.

Hon'ble Mr. A.K. Bhatnagar, Member-J.

A.K. Goel,  
S/o Shri P.C. Goel,  
R/o B-85, S.F.H. Scheme  
Sector-26, NOIDA-201 310.

.....Applicant

(by Advocate : Sri K.C. Sinha/  
Sri G. Gopal)

Versus.

1. Union of India through  
Secretary, Ministry of Urban  
Affairs & Employment, Government  
of India, Nirman Bhawan,  
New Delhi- 110 011.
2. The Director General of Works  
Central Public Works Department,  
Nirman Bhawan, New Delhi- 110 011.

.....Respondents.

(By Advocate: Sri Satish Chaturvedi).

O\_R\_D\_E\_R

By Hon'ble Maj Gen K.K. Srivastava, A.M.

In this O.A., filed under section 19 of the  
Administrative Tribunals Act 1985, the applicant has sought  
for the following relief(s):-

"(i) That in the light of the facts and circumstances  
detailed in the application and latest Rulings of  
the Hon'ble Supreme Court and Hon'ble C.A.T.,  
remarks which are below the Bench-mark 'VERY GOOD'  
and are *prima facie* not 'ADVERSE' in the relevant  
ACRs of the applicant as is clear from the  
impugned order (Annexure A-3) should not deny him  
promotion which he was to get from 31.12.1985 and  
his 'GOOD' Bench-mark be treated as 'VERY GOOD'.

(ii) That since the applicant is now already regularly  
promoted, the respondents may be asked to  
straightway give all the promotional benefits  
with back wages and seniority to the applicant on  
Regular basis with effect from 31.12.1985, the  
date from which his junior has been regularly  
promoted as Superintending Engineer in Junior

Administrative Grade below Sl. No.13, Shri Mohan Swaroop and above Shri J.B. Padia at serial No.14 in the seniority list 1994 (Part-II) circulated vide office order No.359 of 1994 on 25.11.1994 (Annexure A-1).

- (iii) That the applicant be given non-functional selection Grade w.e.f. 31.12.1992 like his juniors.
- (iv) To grant any other relief including costs which the Tribunal deems fit and proper in the circumstances mentioned above".

2. We have heard the counsel for the parties at length and perused records as well as the pleadings.

3. Sri Giridhar Gopal, learned counsel for the applicant submitted that the applicant, having distinguished educational career joined Group-A Central Electrical and Mechanical Engineering Service in the first attempt through All India Combined Engineering Services Examination conducted by Union Public Service Commission. He was confirmed and got his regular promotion as Executive Engineer in time because of his unblemished record and meritorious service. Applicant was promoted as Superintendent Engineer on adhoc basis due his hard work, good conduct and result oriented performance on 25.03.1987. The applicant has served the department very well for more than 31 years till date, with good conduct, without communication of any adverse remarks or any adverse performance, whatsoever. There has been no vigilance/ disciplinary case against him. The applicant earned appreciations during his unblemished and distinguished result-oriented-service. Applicant has already served for more than 17 years, as now, as Superintending Engineer and is stagnating now. If his promotion and seniority are justifiably restored, the applicant will be considered for promotion as Chief Engineer in September this year in retirement vacancy as his immediate senior in the list of Executive Engineers, Sri Mohan Swaroop, has already been promoted.

4. The grievance of the applicant is that he was

not promoted on regular basis as Superintending Engineer w.e.f. 31.12.1985 above Sri J.B. Fadia, his junior at Sl. No.14 in the Seniority List-1994 (Part-II) (Annexure A-1 of the O.A.) (Page 23 of O.A.) circulated by the respondents vide Office Order No.359 of 1994, which was made 'final' by the competent authority vide Office Memorandum No.30/11/1994-EC.1 dated 5.2.1997 (Annexure A-1, page 25 of O.A.). Subsequently consequent to this, the applicant has not been appointed to N.F.S.G as per Office Order No.166 of 1996 (Annexure A-5 of O.A.). Applicant made several representations against this injustice and finally the respondents intimated the applicant that the applicant has not been promoted in the list because 'The grading assigned to him on the basis of the service record was below bench mark for this level of post.' It was also found that there were no adverse remarks which might have been toned down or expunged' vide Office Memorandum No.30/43/95-EC. I dated 18.06.1996 (Annexure A-1 of O.A.) Page-26).

5. The learned counsel for the applicant submitted that from the above communication two points emerge i.e.

- (i) GRADING IS BELOW BENCH MARK
- (ii) THERE ARE NO ADVERSE REMARKS.

These are contradictory remarks and service jurisprudence, which has developed on this point from the latest pronouncements of Hon'ble Supreme Court, Hon'ble High Court and C.A.T., leads one to the following clear and categorical conclusions:

- (i) Grading below bench-mark has to be treated as 'ADVERSE' and must be communicated within one month.
- (ii) Any downgrading from bench-mark has to be communicated.
- (iii) Uncommunicated adverse remarks have to be ignored.

6. Thus the law has developed that any remark which is below bench mark and affects the promotion adversely is an adverse remark, therefore, considering the above O.M. dated 18.06.1996 referred to in para 4 above, applicant sent representations dated 07.03.1997 to the respondent No.2. The representations were forwarded to the respondent No.2 by the Chief Engineer (Electrical), Northern Zone vide letter No.23/1/96 C.E. (E) NZ/875 dated 17.04.1997. These representations were to be decided within 3 months as per O.M. dated January 30, 1978 but as nothing was heard from the respondents, this O.A. was filed which has been contested by the respondents. However, the applicant forwarded the representations to the reporting officer also of relevant periods who were approaching retirement as any delay would have been prejudicial to the interest of the applicant.

7. The learned counsel for the respondents raised preliminary objections about limitation and non-joinder. The applicant's counsel gave reasons to justify the O.A. and cited numerous orders in its support, according to which those objections were not sustainable as detailed in paras (3) (A) (ii) and 3 (A) (iii) of the rejoinder affidavit. On the point of limitation, applicant's counsel further elucidated that the provisional promotion list of Superintending Engineers was made final on 05.02.1997 and the reason of non-promotion of the applicant was communicated on 18.06.1996. Thus the O.A. dated 28.05.1997 is well within one year of the period of limitation from both the dates of 05.02.1997 and 18.06.1996, when the cause of action had arisen. We find substance in the submission of the learned counsel for the applicant and reject the objection of the respondents in regard to limitation.

8. As regards non-joinder, the learned counsel for the applicant submitted that the present O.A. is not against promotion of any particular individual but against defective

writing of A.C.Rs. In-fact this is a case against the department. The Hon'ble Supreme Court has also held in the case of G.M., S.C.R. Vs. A.V.R. Siddhanti 1974 SCC (L&S) 290 that non-joinder is not fatal in such cases where selection of juniors is not challenged. This case is filed against the respondents because as per applicant, they have considered the invalid and baseless ACRs wherein unjustified, illegal and contradictory remarks, which were 'adverse' and have affected the promotion of the applicant adversely in contravention of rules. The learned counsel placing reliance on the judgment of Hon'ble Supreme Court in case of Janardan Vs. Union of India A.I.R. 1983 SC 769 submitted that the Hon'ble Supreme Court held that where relief is sought against the Union of India or a Ministry and not against any individual, even if technically some direct recruits (here juniors) were not before that Court, the petitioner need not make them parties. Besides in the case of N. Duttatri Vs. U.O.I. 1990 (2) SLJ (C.A.I) 294 it was held that when challenge is not against any individual but only against Govt. policy, question of Non-Joinder of parties does not arise. Similarly, in a recent case of Mrs. T.K. Aryavir 2003 (1) A.T.J. 130, it was remarked in para 18 that the applicant's case cannot be treated as prejudicial to the interest of the private respondents as they are admittedly her juniors and only correction of mistake has been prayed for by the applicant. We accept the arguments advanced by Sri Giridhar Gopal learned counsel for the applicant and hold that in the present O.A. the objection of non-joinder of parties raised by the respondents shall not hold good.

9. The learned counsel for the applicant submitted various points before us which are as under:-

"(i) The ACRs are to be written on the basis of the Ephemeral Rolls as per para-6 of Section 5 of CPWD Manual Volume-1 (1986-Edition) but the respondents have not maintained any Ephemeral Roll. The Ephemeral roll of the official concerned should be consulted and all entries in the confidential reports should be made after assessing the remarks in the ephemeral roll. Instances of defects in the work, character and conduct, if any, should be quoted briefly. The reporting officer should also give an indication of the efforts he had made, by way of guidance, admonition etc., to get the defects removed and results of such efforts. All the adverse ACRs written without maintaining the Ephemeral Roll are baseless and unjustified, therefore liable to be upgraded on representation or ignored. In Girija Shanker Misra Vs. U.O.I (1996) 34 ATC 43 the Tribunal was highly critical of non maintenance of Memorandum of Service (Ephemeral Rolls).

(ii) The reports which affect the service prospects adversely, should be communicated and officer should be guided to improve the performance as per the Ministry of Home Affairs Office Memorandum No.51/3/68-ESTS (A) dated 02.03.1968 circulated vide office memorandum No.51/5/72/ESTS (A) dated 20.05.1972 under para 8.3 (c) on page-7 but the respondents have not communicated anything adverse to him throughout his service and denied promotion without any notice and chance to represent.

(iii) Hon'ble Justice Pandian (Retired Judge of the Hon'ble Supreme Court) has also observed in the 5th Pay Commission Report that any grading below the bench mark, prescribed for promotion to the next higher post, should be treated as adverse and communicated.

(iv) As per Para-12.1 contained in Office Memorandum No.22011/3/88-Estt (D) dated 11.5.1990 of Department of Personnel & Training it may not be quite appropriate that an officer is passed over only on the basis of adverse remarks against which he has had no opportunity to represent as they have not been communicated."

10. In order to appreciate the above points we consider it appropriate to reproduce para 12.1 of D.O.P&T O.M. dated 11.05.1990 as under:-

"12.1 where the D.P.C finds that the adverse remarks in the CRs of an officer have not been communicated to him but the adverse remarks are of sufficient gravity to influence their assessment of the officer concerned, then the committee shall defer consideration of the case of the officer, provided these remarks have been recorded in any of the CRs pertaining to three immediately preceding years prior to the year in which the DPC is held and direct the cadre controlling authority concerned to communicate the adverse remarks to the officer concerned so that he may have an opportunity to make a representation against the same. Where the uncommunicated adverse remarks pertain to a period

earlier than the above or where the remarks are not considered of sufficient gravity to influence the assessment of the officer concerned, the DPC may proceed with the consideration of the case but may ignore the remarks while making assessment".

In view of the above memo, we are of the view that the applicant should not have been denied promotion by DPC on the basis of the reports up to 1985 as these were more than 3 years prior to the year of DPC (1994) and there was no other option for the DPC but to ignore the negative effect of the ACRs and DPC should have granted the promotion to the applicant. DPC has erred in denying promotion to the applicant in contravention of above O.M. dated 11.05.1990.

11. It is a well settled fact that promotion is normal incidence of service. Every employee has right for consideration for promotion. This right cannot be snatched away without any notice. Natural justice demands that any such eventuality like grading him below benchmark is required to be conveyed, if such grading deprives him of promotion. Non-promotion in mid-service is stigmatic and the sufferer feels hurt, as if, it is a social-death and as such must be cared for, in the interest of equity and natural justice, following due process of law.

12. We would like to observe that the applicant after denial of promotion in one D.P.C, was given promotion in the very next D.P.C. and in Narayan Vs. Maharashtra (W.P. No.45/1984) dated 30.06.1990 (pr. 13)-H.C. Bombay found that similar non-promotion in the immediately preceding D.P.C. was unjust and unfair and should be restored.

13. The upgrading/modifications in ACRs have been upheld by the Hon'ble Supreme Court in the case of K. Prasad Vs. U.O.I. 1988 SCC (L&S) 710. The modification and upgrading have been held to be legal by Hon'ble High Court, Madhya Pradesh in the case of S.R. Kesharwani Vs. State of M.P. 1978 SLJ 173 (MP).

14. The learned counsel for the applicant during arguments submitted a set of sixteen rulings from 1995 to 2003, all, in one way or the other, holding what is 'adverse', what is 'downgrading' both to be communicated in time, and if not communicated to be ignored. Wherever necessary, benchmarks have been upgraded, D.P.C's recommendations quashed, review D.P.C ordered and also, if necessary, relief/promotion was granted straightway. The counsel, for the sake of brevity, has given the list with brief 'ratio' which are being gainfully reproduced below:-

- (1) Udai Krishna Vs. U.O.I. (1996) 33 ATC 80, para 7- "To sum up the entry which adversely affects the interest of a person is adverse" to be communicated.
- (2) (1996) 34 ATC 43-Girija Shanker Misra Vs. U.O.I quoting Jugul Kishore Goyal's case found this 'pigeon holing' of an officer, into the category of 'good', 'very good', 'outstanding', resulting in supersession, without opportunity of rebuttal, punitive (hits Art. 311) against the principle of natural justice; not to be condemned unheard. Pr. 13, 16.
- (3) Bhaktadas Roy Vs. UOI OA No.125/9- Bombay CAT-para 21, 22, following Gurdyal Singh Fijji Vs. Punjab 1979 SCC (L&S) 197; if good is not enough "GOOD", it is treated as adverse and had to be conveyed to the applicant. Uncommunicated adverse remarks to be ignored.
- (4) U.P. Jal Nigam Vs. Prabhat- JT 1996 (i) SC para 3 "Even a positive confidential entry in a given case can perilously be adverse".
- (5) Shivanad Prasad Vs. UOI-CWP No.4066 of 1989 decided by Jabalpur High Court gives similar views.
- (6) Gurmehan Singh Vs. UOI-1976 SLWR 338 para 19, a report even though not strictly adverse but may prejudicially affect his chances of promotion of future prospects, should be communicated.
- (7) Krishna Vs. UOI-(1993) 30 ATC 10, para 12- "Just adequate treated as GOOD".

(8) G.Chenkamalam Vs. UOI-(1998) 37 ATC (345) Pr.H.N.,8, 9, 19-even a Good grading, if bench mark is VERY GOOD, has to be communicated.

(9) Thanwala Vs. UOI-(1998) 37 ATC 601-para 7-Gradation from 'outstanding to very good should also be communicated'.

(10) State of Gujarat Vs. S. Tripathy-1986, SCC (S&S) 273 pr.4 relief granted straightway without review DPC.

(11) Bani Singh Vs UOI 1989 9 ATC 849 pr.32 (3) Relief granted straightway without review DPC.

(12) M.P. Vs. Bani Singh-1991 SCC (L&S) 638 pr.7 Upholds ATC above.

(13) Narayan Vs. Maharashtra-W.P. No.45/1984 dt. 30.05.1990 Bom. HC @ Nagpur, pr. 13-If selected in next D.P.C., why placed below?

(14) Dr. Binay Gupta Vs. UOI-ATJ 2002 (3) p.7-HC-DR pr. Last- "Where communication of downgrading has not been made, vitiates the proceedings; directed for review DPC; and if found suitable, give promotion from the dates of others.

(15) Dr. J.P. Srivastava Vs. UOI-ATJ 2003 (2) p.392 (relying HC, SC, CAT and distinguishing CAT's FB Manik Ch Vs. UOI-2002 (3) ATJ p.268) pr. 16-19, 26, 27, 29 'hold review DPC after ignoring adverse remarks and down grading, in two months.

(16) Smt. T.K. Aryavir Vs. UOI ATJ (1) p.130-CAT, Pr. 16-19 'To convene review DPC, ignoring the ACRs which were adverse being below the bench mark but were not communicated. If found fit, promote her from the date of her immediate junior, Kailash Pd. with consequential benefits, arrears of pay etc.'

In view of the law laid down in above cases there is no reason, in our opinion, to deny the rightful and legal claim of the applicant.

15. The learned counsel for the applicant invited our pointed attention to the fate of applicant's representation dated 07.03.1997 against the communication of reasons for his non-promotion vide O.M. dated 18.6.1996 (Annex. A-3).

Since the representation dated 07.03.1997 was to be decided

within three months by the respondents but having heard nothing from the respondents, the applicant has also forwarded his representation to his reporting officers of relevant periods. All the reporting officers of the relevant period have confirmed that the overall performance was either 'outstanding' or 'very good' as depicted in Annex. RA-15 to the rejoinder affidavit. For the last seven months of the relevant period, actual production details have been given as better than that of his successor, who has already been promoted; therefore performance of the applicant for this period will also not be below benchmark.

Sri V.A.D. Kutty, Chief Engineer and the then reporting officer was in service when he had communicated comments on the representation vide his letter No.1/5/CE/E/WZ/97/Conf/101 dated 23.12.1997 for the periods 1983-84, 1984-85 classing the applicant 'very good' (Annex.RA-3).

Sri M.B. Kednani, the then reporting officer has sent his comments on the representation within a month of retirement vide his letter dated 15.11.1997, for the periods 1980-81, 1982-83 and 1983-84, classing him 'VERY GOOD'. (Annex. RA-2) Sri G.K. Khemani, the then reporting officer sent his comments on the representation vide letter dated 22.10.1997 for the periods 1978-79 and 1979-80 and classed him 'outstanding' (Annexure RA-1).

Cumulative effect of the above comments (Annex. RA-1-4) as tabulated in Annex. RA-5 to the rejoinder affidavit is reproduced below:

S.No.	year	Grading
1.	1978-79	Outstanding
2.	1979-80	Outstanding
3.	1980-81	Very good.
4.	1981-82	Very good

5.	1982-83	Very good
6.	1983-84	Very good
7.	1984-85	(i) Very good (ii) performance 26% above successor.

16. On perusal of record, we find that none of the above facts contained in Annex. RA-153 to the rejoinder affidavit has been denied or refuted by the respondents and as such they stand admitted. Neither they have been challenged in oral arguments on behalf of the respondents.

17. The counsel for the applicant further urged that the applicant has already <sup>suffered</sup> humiliation for no fault of his for a very long period and the counsel has cited various judgments of Hon'ble Supreme Court and High Court in the case of S. Tripathy, Bani Singh and Narayan, detailed in the list at Sl. No.10, 11, 12, 13 respectively (in para 14 above) wherein relief of promotion etc. has been ordered directly in similar circumstances and as such this is also a fit case for issuing the orders for promotion straightway.

18. The learned counsel for the applicant finally submitted that if, with good-luck, this O.A. succeeds; for expediency, it may kindly be ordered that, since the next promotion of Chief Engineers is likely <sup>to take</sup> place shortly, the decision of this O.A. may be implemented before the next promotion of Chief Engineers, so that the applicant with his modified/latest ACRs and seniority is considered in the interest of 'just justice' and fair play.

19. Having heard the learned counsel for both the parties in detail and perused the records, we are of the view that controversy in this case is short, facts are brief and, by passage of time, law on the point has crystallized, O.M. dated 18.06.1996 (Annexure A-3) is contradictory, in as much as, it says that the applicant

was denied promotion 'because he was below bench-mark' and 'there was nothing adverse to be communicated'. The law is absolutely settled that any ACR below bench-mark is adverse and has to be communicated, and if not communicated in time, has to be ignored by D.P.C. This Rule of law has been flouted with impugnity in this case. This by itself is enough to justify acceptance of the prayer of the applicant.

20. In the facts and circumstances and our aforesaid discussions, the O.A. is allowed. Since the latest assessment about the applicant, as depicted in Annexures RA-1-5 to the rejoinder affidavit for seven relevant years, contains two 'outstanding' and five 'very good' grades, there is no justification in denying promotion to the applicant, when it was granted to his next junior w.e.f. 31.12.1985. This is a mistake of law coupled with the mistake of fact, which is ordered to be rectified. The office order No.359 of 1994 dated Nov. 25, 1994 may be modified to the extent that the applicant be placed below Mohan Swaroop (Sl. No.13) and above J.B. Fadia (Sl. No.14) with consequential benefits including non-functional selection grade from the date 31.12.1992, his junior was given. However, the applicant shall not be entitled for any back wages. This order should be implemented before the next promotion of Chief Engineers (Electrical) takes place in which the applicant may also be considered with his modified/latest ACRs and seniority.

21. There shall be no order as to costs.

bh  
Member-J

Manish  
Member-A.

Manish/-