

OPEN COURT

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD

ORIGINAL APPLICATION NO. 555/98

THURSDAY, THIS THE 10TH DAY OF OCTOBER, 2002

HON. MR. S. DAYAL, MEMBER-A

HON. MR. A. K. BHATNAGAR, MEMBER-J

Rajeev Seth,
s/o Shri R.L.Seth,
r/o 188-B,
Diary Railway Colony,
near Kanji House,
Gorakhpur presently working
as Senior Commercial Inspector,
N. E. Railway,
Gorakhpur. Applicant.

(By Advocate:- Shri. S.K. OM)

Versus

1. Union of India,
through General Manager,
N.E. Railway, Gorakhpur.
2. Chief Personnel Officer,
N.E. Railway,
Gorakhpur.
3. Chief Commercial Manager,
N.E. Railway,
Gorakhpur.
4. Shri Baijnath Prasad,
Senior Commercial Manager,
N.E. Railway,
Gorakhpur.
5. Shri Umesh Mani Tripathi,
Commercial Manager,
N.E. Railway,
Gorakhpur.
6. Shri Naval Kishore Singh,
s/o not known
working as ACM,
N.E. Railway,
Samastipur.
7. Dr. V.K. Singh,
s/o not known,
working as ACM,
N.E. Railway,
Samastipur. Respondents.

(By Advocate:- Sh. D.C. Saxena)

[Handwritten signature]

Cont...pg.2

O R D E R

HON. MR. S. DAYAL, MEMBER-A

This application has been filed for setting aside viva-voce examination held on 15.4.1998 in pursuance to the Notification dated 26.11.1996 for the post of Assistant Commercial Manager and for setting aside the panel dated 27-4-1998 for the same post and directing the respondents to consider the training report of the applicant as Vth A.C.R and not to consider the malafide adverse report dated 26-11-1996.

2. The case of the applicant is that he joined the Railways on 14.3.1991 as Commercial Apprentice. He was given training for a period of two years and confirmed as Senior Commercial Inspector on 19-6.1993 in the scale of Rs. 1600-2660. He was promoted as Senior Commercial Inspector on 14.2.1996 in the scale of Rs. 2000-3200. The applicant claims that he got 'Very Good' entry in his C.R. for the year 1993-94, 'Out Standing' for the year 1994-95, 'Out Standing' for the year 1995-1996 and 'Below Average' for the year 1996-1997. He has claimed that respondent No. 4 and 5 were biased against the applicant because they have worked under the applicant's father and were not promoted during his time. They suspected that they had not ^{been} promoted because the applicant's father did not recommend their names nor provided any good entry. The applicant claims that he was awarded adverse remarks in the ACR for the year 1996-1997 against which he filed his representation. The applicant was communicated an ambiguous letter regarding consideration of his representation by a cryptic, 'considered and recorded' comment. The applicant claims that he requested that some specific order may be passed on his representation on 24.3.1998 which is still pending.

3. The respondents issued notification dated 26.11.96 for selection for three general posts of Assistant Commercial Manager against 30% LDCE quota. The applicant's name was not included due to negligence of the respondents. Another Notification dated 26-11-1997 was issued in which the name of the applicant had been given. It is claimed that in pursuance of notification dated 26-11-1996 a written test was held on 21-12-1997. The applicant was declared as passed on 17-3-1998. He was medically examined and declared fit, and subsequently directed to appear for viva-voce examination on 15.4.1998. The applicant found that the selection board was considering only four ACRs of the applicant while for other candidates five ACRs were being considered. The applicant pointed out the discrepancy and the matter was referred to Railway Board by CPO vide his letter dated 17-4-1998. The Railway Board directed that the practice as prevalent in the past and according to guidelines should be adopted. It is claimed that his ACR for the year 1996-1997 should not have been considered in the light of guidance given by the Railway Board. The applicant claims that notification for 70% selection as well as 30% LDCE should have been issued simultaneously and the selection should also have been held simultaneously. In the present case a notification for 70% selection was issued in May 1996. The respondents delayed the LDCE selection by two years due to which the benefit has been given to those candidates whose report for the year 1991-1992 have been replaced by 'Out standing' or 'Very Good' reports while the applicant has been put to a disadvantage

h

whose brilliant outstanding performance at training in 1991-92 has been replaced by the present below average report. The applicant claims that his report for the year 1996-97 should not have been considered because his representation was pending. The applicant refers to Railway Board's circular No. E (GP)/89/2/30 dated 29.9.1989 in which it is laid down that for selection to Group 'B' posts ACR proceedings for five years should be taken into consideration and where one or more confidential report have not been written, or not available, then confidential report of earlier year including those earned in the lower grade may be taken into account. The applicant has also mentioned that since the Railway Board by its circular letter dated 18-1-1993 allowed the period spent in training to be counted for appearing in the departmental examination, the training report of the applicant should have been considered. It is also claimed that viva-voce was held in a haphazard manner, on the basis of the service record and no marks were allotted for personality, leadership, address, academic/technical qualification. It is claimed that independent assessment of service record and confidential report of the applicant was not done by Members of the Selection Committee in separate sheets. It is claimed that the marks have been given ^{one} under one heading which combined both viva-voce and record of service. It is claimed that the candidates were required to possess 60% marks in written examination as well as in viva-voce but none of the candidates could secure 60% marks in each and especially in viva-voce. The relief has been claimed in the context of the above facts.

M

4. We have heard the arguments of Shri S.K.Om learned counsel for the applicant. Shri Umesh Narain Sharma learned counsel for the official respondents and Shri D.C.Saxena learned counsel for respondent no.6 and Shri V.K.Goel learned counsel for the respondents No.7.

5. Learned counsel for the applicant has intended that the date for consideration of eligibility in the selection in which the applicant participated was 31-5-1996 as it was the date of eligibility in notification of 70% quota. Yet his ACR for the year 1996-97 which goes beyond the cut off date has been considered leading to his non empanelment. It is claimed that the performance of training period should have been considered in case five years confidential reports were not available. It has also been contended that the ACR for the year 1996-97 was recorded on account of the ill will harboured by respondent No. 5, the reporting officer and respondent No.4 the reviewing officer. It is also claimed that the representation was pending against the adverse remarks and the meeting of the selection committee held before the representation was decided. It is contended that the report containing adverse remarks could not have been considered by the selection committee since the representation was pending. It is contended that against requirement of each member of Selection committee at the time of viva-voce should have been evaluated and a separate sheet with regard to the applicant, a common sheet was used for all the members of the Selection Committee. The Selection Committee did not award any marks for Personality, leadership, Address and Technical Qualification.

6. Learned counsels for the respondents have contended

M

that the applicant had not mentioned any date beyond which his ACRs could not have been considered for judging his eligibility in his pleadings, therefore he couldnot raise this issue later. It is mentioned that the performance has to be judged on a working post for promotion and not in the training institution and therefore the claim of the applicant for considering his performance during training period is not tenable. As regards the issue of malafide on the part of respondent No. 4 and 5, they have contended that the allegations are suspended and reflect only the opinion of the applicant in order to give colour to his contentions in the O.A. It is stated that the respondents had filed counter replies noticing the positive aspects of the applicant's performance and had recommended award for the applicant when such performance came to their notice. It is denied that marks were not awarded for personality, leadership, Address and Technical Qualification. As regards evaluation on a separate sheet the learned counsel for the respondents No.7 has referred to Railway Board's letter dated 1.5.1992 (CA-5) in which it has been mentioned that the procedure of independent assessment of candidates by members of Selection Committee was found combersome in practice and it was decided to revoke it and restore the earlier practice of having a single evaluation sheet.

7. Learned Counsel for the respondents Shri D.C.Saxena referred to the law laid down in Om Prakash Vs. Akhilesh Kumar and Others, AIR 1986 SC 1043 to contend that if the applicant had appeared for examination without protest and filed a petition in anticipation of failure, they cannot challenge the validity of Competitive examination. Learned counsel for the respondents has also relied upon the Judgement of Apex Court in

Dr. G. Sarana Vs University of Lucknow and others

AIR 1976 SC 2428 to contend that mere allegation of bias in respect of a member of an administrative Board or body is not enough and it has to be seen whether there is reasonable ground for believing that he was likely to have been biased.

Whether there is substantial possibility of bias animating the mind of the member against the aggrieved party. It has also been laid down that where a candidate for selection, knowing fully well the relevant facts about the members of the Selection Board, voluntarily appeared for interview without raising any kind of objection against the constitution of the Selection Board and took a chance of favourable recommendation in his favour, it was not open to him to turn round and question the constitution of the Board when the decision was unfavourable to him.

Learned counsel for the respondents has also relied upon the Judgement of Tariq Islam Vs Aligarh Muslim University and others 2002 SCC(L&S) 1 to contend that where lower ranking selectee was appointed on account of doubts as to eligibility of higher ranking rival selectee and allowed to continue for as long as 2 years it would not be appropriate to disturb the lower ranking selectee who should also be accommodated in an appropriate post. Learned counsel for the respondents has also relied upon Union of India and another Vs Ashutosh Kumar Srivastava and another. The Civil Appeal No. 1567/96 decided by the Apex Court on 3-10-2000 requires that the person alleging malafides should produce sufficient material to suggest of the malafides of the concerned Authority.

8. The learned counsel for the applicant on the other hand, relied upon the case of N. Ramjayram Vs. General Manager, South Central Railway

AIR 1996 SC 3126 in which it has been held that where the candidates come from different seniority units and appearing for a Selection/non selection post in higher grade, the total length of continued service shall be the determining factor for assigning inter-se seniority. The Apex Court held that in which situation weightage of 15 marks for seniority given to respondents was illegal.

9. The learned counsel for the applicant has also relied upon Union of India and Others, N.R.Banerjee and Others 1997 SCC (L&S)1194 [✓] who contend[✓] that ACR up to the year March 1996 should only have been considered in cases where there was delay in convening DPC and especially in view of the fact that 70% and 30% selection proceedings for promotion as well as promotion by limited competitive examination should have been held at the same time. Learned counsel for the applicant has also relied upon the Judgement of [✓]Chandigarh Bench in Naresh Chandra Vasishta Vs. Others (1989)10 ATC 713 which [✓]lays down that if C.R for a particular period was not written because the employee happened to be on training, educational or professional qualifications acquired during that period of training will have to be taken into consideration while assessing relative merit. This case would not be relevant because the context in which the said Judgement was pronounced, was different.

10. We have considered the rival submissions as regards the question of the period up to which ACR of the candidates should have been considered. The contention of learned counsel for the respondents that the applicant had not raised the issue of considering the CR, ACR up to March 1996 is not valid. The applicant in para 4.15 has stated that his CR for 1996-97 ~~xxx~~ have been considered while they should not have been considered because

N

examination for 70% selection and 30% selection, according to instructions, should have been held simultaneously. Since notification for 70% selection^{was} issued in May 1996 and finalised in November 1996, the LDCE should have been finalised alongwith it. Since part selection of 30% was delayed by 2 years, the candidates, who received good reports during 1991-92 were benefitted and those who received bad or in different reports in 1996-97 were put to loss. Again in para 4.17 this issue has been raised. Hence, it could not be said that the applicant had not raised the issue of challenging appropriateness of concerned CR for year 1996-97.

11. Another issue raised by the applicant alongwith the above was that his representation made against the adverse remarks awarded to him in the CR for the year 1996-97 was pending with the respondents. The respondents have denied and referred to the reply dated 5-1-1998 in which they have informed the applicant that representation dated 26-12-1997 in connection with the adverse remarks in the confidential Report for the period ending 31-3-1997 had been considered and recorded by the Competent Authority. We have seen the original record in which note before the said communication was sent to the applicant is placed and we find that the CCM who was the Competent Authority to decide the representation of the applicant, had merely signed the note without recording any order. The learned counsel for the respondents mentioned that the note dated 30-12-1997 did not record the order of CCM but the orders were put on the CR of the applicant for the year 1996-97. We have seen the CR of the applicant in the original Record for the year 1996-97. The remarks are put as remarks of reviewing authority. They have

no relations to the representation of the applicant or remarks against various columns in the CR. Therefore, it is hard to accept that the representation of the applicant had been decided merely on account of communication dated 5-1-1998.

12. The applicant had claimed in Para 4.13 that his ACRs of other candidates for 5 years. In response to it, the respondents in Para 15 had mentioned as follows:-

" Since the petitioner had earned only 4 years ACR at the time of Viva-Voce test held on 15-4-98 therefore, the selection committee considered his 4 year ACRs taking average of 4 years ACRs to arrive at the marks for 5th years. A part from applicant's case, all other candidates, 5 years ACRs were available. Hence, their 5 years ACRs were considered."

13. The same contention is made in para 16 of the counter reply. We have seen the proceedings of DPC. The proceedings show that the applicant's ACRs for the year 1993-94, 1994-95-1995-96 and 1996-97 were considered but the CR for 5th year had not been considered. The applicant was further given weightage of 3.4 marks on the basis of average of 4 years ACRs and his total points were calculated on this basis. The adverse CR for the year 1996-97 made a difference in the evaluation of the applicant for selection.

14. The notification for selection for the post of ACM Group B against 30% vacancies mentioned the eligibility conditions which ^{required} the Group C employees to hold the post in a grade the minimum of which was Rs.1400 or higher with 5 years non-fortuitous service in the grade and the date from which eligibility conditions for the above LDCE were to be reckoned was 31-5-1996 (i.e. the date of notification of 70% selection) Annexure A-4.

Therefore, the contention of learned counsel for the applicant that the CRs only up to the year 1995-1996 should have been considered is valid. This would leave a gap of 2 years in the case of the applicant instead of one year as was considered by DPC. The DPC would thus have to bridge 2 years period instead of one year before as it is clear that the performance up to 31-5-1996 should have been judged which could only be available from the CRs up to 1995-96.

15. We find that the issue of bias raised by learned counsel for the applicant against respondents No.4 and 5 is not substantiated because the allegation of bias is based on conjectures. The respondent No. 4 and 5 have filed their counter replies. The respondent No. 4 has mentioned that he was promoted as Assistant Commercial Manager during the regime of the applicant's father. It is also mentioned that the respondents had rewarded the Brother of the applicant for his good work. The respondent No. 5 has also made averments of similar nature.

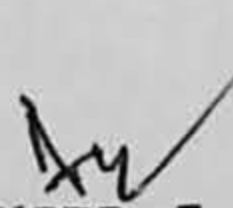
16. It appears from the notification of LDCE for the post of ACM Group B that qualifying marks were 90 each in two professional papers in the written examination and 30 out of 25 marks prescribed for viva-voce and 25 marks prescribed for record of service (including atleast 15 marks in the record of service). It is clear that the marks regarding record of service ^{were} the marks based on the CRs of the candidates and the marks for Personality, Address, Leadership and Academic Qualifications are based on viva-voce. The applicant's name was not included in the list of suitable candidates because of the marks obtained by him based on record of service i.e. the marks calculated on ^{the} basis of his ACRs. Since it is clear that the date

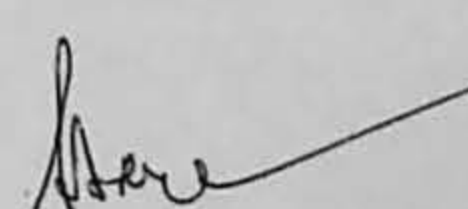
2

and
for eligibility was 31-5-1996/ the CR for the year
1996-97 should not have been considered in calculating
the marks of the applicant. Just as the selection
committee has devised a method for filling up the
gap of one year, ^{had to} it would have/ similarly devised
a method for filling up the gap of two years.

17. We, therefore, direct the respondents to hold
a review DPC for considering the case of the applicant.
The review DPC shall in this regard see his ACRs
for the year 1996-97 and award him marks for record
of service on the basis of other available CRs.
The review DPC shall be convened within 6 months for
considering the case of the applicant and if the applicant
is found suitable on the basis of marks obtained by
him in the record of service and personality, leadership
etc. , he shall be included in the panel and be granted
promotion to the post of ACM.

18. With this direction, the OA stands disposed of.
There shall be no order as to costs.


MEMBER-J


MEMBER-A

madhu/