

**Central Administrative Tribunal
Jaipur Bench, Jaipur**

O.A. No.552/2016

Reserved on:10.08.2021
Pronounced on: 18.08.2021

**Hon'ble Mr. Dinesh Sharma, Member (A)
Hon'ble Mrs.Hina P. Shah, Member (J)**

Dr. Naina Meena W/o Dr.Siya Ram Meena, age 43 years, R/oJ-402, Krishna Kripa Apartment, City of Golden Domes, near Railway Over bridge, Jagatpura, Jaipur-302020 (Raj.) presently working as Specialist Grade – I at ESIC Model Hospital, Jaipur (Raj.).
...Applicant.

(By Advocate: Shri Saugath Roy)

Versus

1. The Employees State Insurance Corporation, Panchdeep Bhawan, CIG Road, New Delhi-02 through it Director General.
2. The Deputy Director, Medical Administration, Headquarter Officer, Employees State Insurance Corporation, Panchdeep Bhawan, CIG Road, New Delhi-02.
3. Dr. Ramesh Chand, Skin Specialist, ESIC, Model Hospital, Ram Darbar, Chandigarh.

...Respondents.

(By Advocate: Shri Kapil Sharma for Shri T.P. Sharma)

ORDER

Per: Dinesh Sharma, Member (A):

The main issue in the OA is the APAR of the applicant for the year 2007-2008, where she was rated as "Just Good" and

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this rating was downgraded to "Average" by the Reviewing Officer.

2. The applicant, who was recruited as Specialist (Junior Scale) Grade II in the year 2006, was promoted as Specialist Senior Scale Grade II in the year 2009. Her second promotion was in the year 2014. The applicant has claimed that she deserved to be given promotions in the years 2008 and 2012 respectively, and her delayed promotions were primarily because of the adverse APAR ratings of the year 2007-08. She has challenged delaying her promotion on ground of these adverse ratings since these were not communicated to her, in full, in time. Her representation against these ratings was wrongly rejected. She was not given any warning or suggestions before recording such adverse remarks. She was on maternity leave for almost 5 months during the period of assessment. The way adverse remarks are written itself shows that there was no application of mind. She has also alleged malice against the reporting/reviewing officers and stated that denying promotions on the basis of uncommunicated below benchmark APARs is against the decisions of the Apex Court in **Dev Dutt vs. Union of India & Others** 2008 (8) SCC 725 and **Sukhdev Singh vs. Union of India & Others** 2013 (9) SCC 566. The applicant has prayed for promotions as Specialist Senior Scale Grade II against the year 2007-08 w.e.f 28.4.2008

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by treating the adverse entry "average" as "good" and on the post of Specialist Grade-I w.e.f 28.4.2012 with all consequential benefits by convening of review DPC.

3. The respondents have denied the claims made by the applicant. They have stated that the adverse remarks were communicated well in time (in the year 2008) and the applicant's representation (dated 15.06.2008) was considered by the competent authority. It was decided to maintain the ratings given by the reporting and the reviewing officers. The DPC held on 05.05.2011 declared the applicant unfit for promotion in the year 2008-09 since her overall grading for the year 2007-08 was 'average', which is below benchmark. She was, however, found fit to be promoted against the year 2009-10 and was therefore promoted as Specialist Grade II w.e.f. 01.04.2009. The reason behind seeking the applicants representation against the APAR of 2007-08 is stated to be the new requirement under DoPT OM dated 13.04.2010, which now makes it mandatory for all ACRs prior to 2008-09 (whether adverse or not) to be communicated to the concerned employee, if those records were reckonable for assessment of fitness for promotion. For promotion to the scale of Rs 18400-22400 (the second promotion in this case) the prescribed benchmark is at least "Very Good" in all 5 ACRs under consideration. The DPC held on 1/1/2016 in relation to the

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years 2013-14 and 2014-15 considered the grading of the applicant and found only 4 ACR/APARs of "Very Good" or equivalent (7 marks) grading till the year 2011-12. The applicant could achieve the required number of benchmark ratings only by the year 2012-13 (since the APAR of the year 2007-08 was below benchmark) and hence the delay in promotion. The respondents have denied charges of malice or non-application of mind.

4. A rejoinder has been filed denying the statements made in the reply and reiterating the earlier stand of the applicant.

5. The matter was heard through video conferencing on 10.08.2021. Both the learned counsels of the parties re-stressed the points raised in their respective pleadings. The learned counsel for the applicant also filed a written submission, after the hearing, where he has relied on the following judgments:

1. Director General E.S.I.C. vs. Dr. Satish Kumar Azad & Another (Delhi High Court in WP(C) No.7193/2015.
2. Sukhdev Singh vs. Union of India & Others (2013) 9 SCC 566.
3. Ashes Kiran Prasad vs. Union of India & Others (CAT Principal Bench OA No. 2848/2014 decided on 07.04.2015)

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4. Dev Dutt vs. Union of India & Others 2008 (8) SCC 725
5. Abhijit Ghosh Dastidar vs. Union of India & Others (2008) 16 SCC 146
6. S.T. Ramesh vs. State of Karnataka & Another (2007) 9 SCC 436

6. After going through the pleading and hearing the argument, it is clear that the applicant's case mainly rests on getting the adverse remarks in her APAR of 2007-2008 ignored or expunged and her "average" rating improved. We have gone through this APAR (Annexure A/8). We find that while reducing the grading of the applicant from "Good" to "Average", the Reviewing Officer had made the following remarks:

"There have been frequent reports of arguments with fellow colleagues by the Medical Supdt."

7. The learned counsel for the applicant argued that this remark is made against the column (Column No.4) where the Reviewing Authority should have commented about the reporting officer's attitude towards the officer reported upon, if the officer reported upon happened to be belonging to SC/ST or other backward classes. This fact, and the fact that the Reviewing Officer has downgraded the APAR while agreeing with the Reporting Officer, itself shows that there was no

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application of mind by the Reviewing Officer. We find that though the remark appears to have been made against the wrong column, we cannot consider it to be a conclusive evidence of non-application of mind. The applicant herself had no such impression when she made the representation (dated 20.07.2008) against the adverse remark as she has herself shown this remark to be against Column No.3 (refer Annexure A/6, page 7 of the paperbook). The fact remains that there were adverse remarks against the applicant and her performance was rated below the benchmark. These were communicated to her in that year itself (2008) and her representation, if any, was sought. The concerned authority found the reasons given by the applicant not sufficient to change the grading or expunge the remarks. This APAR was again communicated to her, before her second promotion became due, her representation sought again, and remarks and grading still kept intact. While we agree with the contention of the applicant's counsel that the applicant should have been appropriately warned before writing adverse remarks affecting her career, we do not have any evidence that no such oral warnings/suggestion were given. The fact of the applicant being on maternity leave for about 5 months also does not make the ACR entries irrelevant since there was still sufficient time remaining in that period of assessment to judge her performance. The applicant has alleged that she had

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complained against her superior authorities for adopting different standards while dealing with cases of medical negligence. She has also alleged, in her representations against the adverse APAR, about differences between her superior officers and her husband with respect to some adverse reporting in the press alleged at her husband's instance. All these matters were taken into consideration by the competent authority looking into her representation and the authority found it not necessary to expunge the remarks. The applicant did not choose to agitate the matter further at that time and has come to this Tribunal only now when her second promotion was delayed based on the adverse APAR. Such delayed challenge before us shows acquiescence by the applicant with the decisions of the authorities on her representation against the APAR ratings of the year 2007-08, and is apparently barred by time. The authorities chose to seek her further comments on the same APAR, when her next promotion was due, to be extra fair, and to avoid further legal challenge. The competent authorities have chosen to keep the remarks intact even after seeking further representation against them. Such independent confirmation, spread almost five years apart, should remove any doubt about malice against the applicant. We also do not find the facts of this case to be falling within the ratio of the cases cited by the applicant.

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8. We have also gone through the copies of the judgments produced and relied upon by the learned counsel for the applicant, along with his written submissions. Most of these judgments, as discussed earlier in this decision, make it mandatory for communicating the whole ACR when the gradings in the ACRs are likely to affect a person's promotion. As noted earlier in this decision, we do not find a violation of the ratios of these judgments in this case. In the case decided by the Principal Bench (Ashes Kiran Prasad case, *supra*), the Tribunal decided to set aside the grading since it did not match with the general assessment made in the relevant columns. The facts of the case in S.T. Ramesh and State of Karnataka case materially different from this case. In that case the record of the reported officer was found consistently outstanding, very good and excellent in entire career except for a period of about 150 days. Looking into all the circumstances (including that the use of intemperate language by the reported officer might have led to a bias) the Hon'ble Apex Court though it fit not to treat the appellant performance (in that case) as average. In the present case the ACR in question relates to the applicants conduct at the beginning of her career and there is no inconsistency in the overall findings and other comments in the remaining parts of the ACR. It has been communicated twice and her representation against it considered. Hence, we do not

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think the action of the respondents has violated the ratio of any of these judicial pronouncements.

9. As discussed above, we find that the delayed promotions were a direct result of the adverse remarks and below benchmark APAR of 2007-08, which was communicated to her in time. The applicant failed to give sufficient reasons to get them expunged and her rating enhanced. The applicant has failed to establish malice, non-application of mind or any other serious legal failing on the part of the respondents. In this situation, we cannot substitute our judgment for the judgment of the authorities or the DPC. We are, therefore, unable to grant the reliefs sought by the applicant. The OA is, hence, dismissed. No costs.

(Hina P. Shah)
Member (J)

(Dinesh Sharma)
Member (A)

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