

(Through video conferencing)

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH, KOLKATA



No. O.A. 350/00944/2021

Date of order: 27.7.2021

Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Soma Datta,
Wife of Tarun Kumar Sardar,
Daughter of Late Murari Mohan Datta,
Aged about 44 years,
Working as ANM Staff as ESI-PGIMSR & ESIC Hospital
& ODC (EZ)/Joka,
Residing at Amtala Adarsha Pally,
Amtala,
P.S. – Bishnupur,
South 24 Pgs,
Kolkata – 700 104.

.... Applicant

- V E R S U S -

1. Union of India,
Service through the Secretary,
Ministry of Labour and Employment,
Rafi Marg,
Shram Shakti Bhawan,
New Delhi – 110 001.
2. The Director General,
Employees State Insurance Corporation,
Hqrs. Office at CIG Marh,
Panchadeep Bhawan,
New Delhi – 110 002.
3. The Additional Commissioner & Regional Director,
Employees State Insurance Corporation,
Regional Office,
Grant Lane,

A handwritten signature in black ink, appearing to read "Banerjee".

Kolkata - 700 012.

4. The Medical Superintendent,
ESI-PGIMSR & ESIC Hospital & ODC (E.Z.),
Diamond Harbour Road, Joka,
Kolkata - 700 104.
5. Dr. Parimal Maji,
The Dy. Medical Superintendent,
ESI-PGIMSR & ESIC Hospital & ODC (E.Z.),
Diamond Harbour Road, Joka,
Kolkata - 700 104.
6. The Assistant Director (Admn),
ESI-PGIMSR & ESIC Hospital & ODC (E.Z.),
Diamond Harbour Road, Joka,
Kolkata - 700 104.
7. Rita Sarkar,
The Assistant Nursing Superintendent,
ESI-PGIMSR & ESIC Hospital & ODC (E.Z.),
Diamond Harbour Road, Joka,
Kolkata - 700 104.

.... Respondents

For the Applicant : Mr. Arpa Chakraborty, Counsel
Ms. P. Mondal, Counsel

For the Respondents : Mr. S. Chowdhury, Counsel

O R D E R (Oral)

Per Dr. Nandita Chatterjee, Administrative Member:

Aggrieved at non-receipt of MACP benefits, the applicant has approached this Tribunal under Section 19 of the Administrative Tribunals Act, 1985, praying for the following relief:-

[Signature]

- "(i) Office Order being No. 412-A-11/20/MACP/2014-Estt. dated 17.8.2020 issued by the respondent No. 6 is not tenable in the eye of law and as such the same may be quashed and thereby an order do issue directing the respondents to ignore the benchmark given in the APAR of the applicant for the year 2017-2018 and/or upgrade the same for the purpose of grant of MACP and promotion.
- (ii) An Order do issue directing the respondents to include the name of the applicant in Office Order No. 46 of 2020 dated 18.5.2020 and/or Office Order No. 86 of 2019 dated 19.7.2019 issued by the respondent No. 6 and thereby to grant the applicant the 1st financial upgradation in the next grade pay under Modified Assured Career Progression Scheme with effect from 04.08.2019 at an earliest and thereby to grant all the arrears in favour of the applicant along with all consequential benefits along with revision of pay and interest accrued thereon.
- (iii) Grant all consequential benefits.
- (iv) Pass such further or other order or orders."

2. Both the parties are present and are satisfied with the quality of audio/video during hearing.

Heard both Ld. Counsel, examined documents on record. This matter is taken up for disposal at the admission stage.

3. Ld. Counsel for the applicant would submit that the applicant had joined the services of the respondent authorities on 4.8.2009. On 19.7.2019, a list was published comprising similarly situated employees who had been granted 1st financial upgradation under MACP Scheme, but the applicant, despite her legitimate expectations, was not included in the said list. Thereafter, on 18.5.2020, another list was published disclosing the grant of MACP benefit in favour of another batch of similarly situated employees but the applicant was excluded therefrom.

Being aggrieved, the applicant represented to the authorities but her representation was rejected vide communication at Annexure A-2 to the O.A., which states as follows:-

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ESI-PGIMSR AND ESIC HOSPITAL & ODC (E.Z)
 DIAMOND HARBOUR ROAD, JOKA KOLKATA, 700 104
 (A statutory body under the Ministry of Labour & Employment, 15
 Government of India)
 AN ISO 9001:2008 CERTIFIED ORGANIZATION
 FAX: 24672795, Phone : 2467 1764/6280/1322

No. 412-A-11/20/MACP/2014-Estt.

Dated: 17/08/2020

To

Sh./Smt. Soma Datta
 ANM, Staff No. 432 (H),
 ESIC Hospital & ODC (EZ), Joka.

Sub: Not granting of MACP - reg.

Please refer to your application on the above matter.

In this connection it is informed that your case for granting of MACP has been placed before the Screening Committee constituted by the AC & RD, Regional Office, ESIC Kolkata. The Committee has not recommended your name/case for grant of MACP to you due to not fulfill the bench mark criteria of APAR grading for MACP as prescribed in the Govt. of India, Ministry of Personnel, Public Grievances and Pensions, DoPT, Office Memorandum No. 35034/3/2015-Estt. (D) dated 22.10.2019.

This issues with the approval of the Medical Superintendent.

Yours faithfully,

Sd/-
 (Samiran Das)
 Asstt. Director (Admn)" int

As the applicant's claim to MACP benefits was reportedly denied to her on the ground of non-fulfilment of APAR gradings required for MACP, the applicant obtained some of the APARs to discover as under:-

Year of Assessment	Overall numerical grading and grading obtained by the applicant
2013-2014	Good (5.1)
2016-2017	Very Good (6.5)
2017-2018	Good (5.5)
2018-2019	Very Good (6.5)

After having been informed of her APAR gradings, the applicant thereafter represented to the respondent No. 6 stating that as the APARs

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were not communicated to her on time, she had missed the opportunity to seek an upgradation at the appropriate period of time, and, would accordingly, request the authorities to consider her financial upgradation under MACP without any reference to her below bench mark APARs.

Ld. Counsel for the applicant would also cite decisions of the Hon'ble High Court at Calcutta in **WPCT No. 398 of 2012** and orders of this Tribunal in **O.A. No. 170/00727/2016** and **O.A. No. 350/01875/2016** in support.

4. In **Dr. Ganeshlal Mishra v. State of Orissa, 1977 (2) SLR 473**, the Hon'ble Court held:

".....There is no force in the contention of the petitioner that uncommunicated, adverse entries are not open to consideration. That question was examined at length by a full bench of this court in the case of **S.S.S. Venkatrao v. State of Orissa and others, ILR 1974 Cuttack 227** relying on the authority of two decisions of the Supreme Court in the cases of **Prakash Chand Sharma v. The Oil and Natural Gas Commission and others, 1970 SLR 116** and **R.L. Butail v. Union of India and others, 1970 SLR 926**, this court held that adverse entries can be acted upon even if not communicated unless mala fide on the part of the authority is established."

In (1992) 2 SCC 299, **Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another**, the Hon'ble Apex Court ruled as under:

"...If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority."

Thereafter, in **Dev Dutt v. Union of India & ors. 2008 (2) SCC (L&S) 771**, the Hon'ble Apex Court has held as below:-

"In the present case, the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'Very Good' entry for the last five years. Thus, in this situation the 'good' entry, in fact, is an adverse entry because it eliminates the

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candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances."

The Hon'ble Apex Court went on to remark further as follows:

"For example, if the benchmark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy or his superior, or because of caste or communal prejudice, or for some other extraneous consideration."

In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future. (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India (supra)* that arbitrariness violates Article 14 of the Constitution.

Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."

Hence, it is now a settled principle of law that APARs, adverse or otherwise, are to be mandatorily communicated to the employee in compliance of the ratio in *Dev Dutt (supra)*.

The Hon'ble Apex Court, however, has cautioned on the extent of judicial review in *Bharat Ram Meena v. Rajasthan High Court, (1997) 3 SCC 233* and *State of MP v. Shri Srikant Chaphekar, 1992 (5) SLR 635 (SC)* as under:-

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" A direct review of an adverse remark may not be entertained since in most cases the aggrieved employee would have a right of making a representation to a higher authority. Moreover, if factual elements forming the basis of the adverse remark are in dispute it would be proper for the Court not to enter the arena of appreciation of evidence and it would be right in declining to enter into the controversy. Nor is it proper for a Tribunal to assess the sufficiency of the adverse remarks for the action proposed to be taken by the authorities."

Even in *Dev Dutt (supra)* the Hon'ble Court disposed of the matter

by directing as follows:-

"48. We, therefore, direct that the 'good' entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make their representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment."

5. The respondents, having failed to communicate the APARs in due time, the applicant was deprived of a legitimate opportunity to prefer her request for upgradation. Further, based on such non-communicated APAR gradings, the authorities have also rejected her claim of MACP.

6. Accordingly, this O.A. is disposed of with the following directions:-

- (i) The concerned respondent authority shall convey all the APARs which were taken into consideration while considering the applicant's eligibility for MACP within a period of two weeks from the date of receipt of a copy of this order.
- (ii) Once so received, if she so desires, the applicant will be at liberty to prefer a comprehensive representation to the competent respondent authority praying for upgradation of her APAR gradings.

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(iii) Once such comprehensive representation is received, the competent respondent authority shall apply his mind and arrive at his decision to reflect the result of objective assessment, fairness and justice so as to determine the objectivity (which are real criteria of APAR entries), in accordance grades to the applicant.

The competent authority shall thereafter convey his reasoned decision to the applicant within a period of 6 weeks from receipt of such representation.

(iv) in the event, the applicant's APAR/APARs which stand in the way of her upgradation under MACP, stands upgraded, the authorities will take steps to reconsider the applicant for grant of MACP benefits in accordance with law within a further period of 8 weeks thereafter and grant consequential benefits as per her entitlement.

The communication of the respondent authorities dated 17.8.2020 rejecting the prayer for grant of MACP at Annexure "A-2" to the O.A. is accordingly quashed and set aside.

7. With these directions, the O.A. is disposed of. No costs.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

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