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CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD BENCH
ALLAHABAD

O.A./T.A. /CCA No. 830 of 2008

Date of decision _____

Onkar Nath Tripathi _____ Applicant(s)

Shri M. K. Upadhyay _____ Counsel for the applicant(s)

Versus.

Union Of India & Ors _____ Respondents(S)

Shri Ajay Singh _____ Counsels for the respondent(s)

CORAM

HON'BLE DR. K.B.S. RAJAN, MEMBER (J)

HON'BLE MS. JAYATI CHANDRA, Member (A)

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? ✓
3. Whether their Lordship wish to see the fair copy of the judgment?
4. Whether to be circulated to all Benches?


SIGNATURE

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[RESERVED]

**CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD BENCH
ALLAHABAD**

(THIS THE 04th DAY OF Oct. 2012)

Present

HON'BLE DR. K.B.S. RAJAN, MEMBER (J)

HON'BLE MS. JAYATI CHANDRA, MEMBER (A)

ORIGINAL APPLICATION NO. 830 OF 2008

(U/S 19, Administrative Tribunal Act, 1985)

Onkar Nath Tripathi, S/o Late Shri Brij Lal Prasad Tripathi, R/o H.
No.28-B/118-B, Rama Nand Nagar, Allahpur, District Allahabad.

.....Applicant

V E R S U S

1. Union of India through the Secretary (POSTS) Department of Posts, India, Ministry of Communication, Dak Bhawan, Sansad Marg, New Delhi.
2. Chief Post Master General, U.P. Circle, Hazratganj, Lucknow.
3. Director Postal Services (HQ) O/o CPMG, U.P., Lucknow.
4. Senior Superintendent of Post Offices, Allahabad Division, Allahabad.

.....Respondents

Advocates for the applicants:- **Shri M. K. Upadhyay.**

Advocate for the Respondents:- **Shri Ajay Singh.**

ORDER

DELIVERED BY:-

(HON'BLE DR. K.B.S. RAJAN MEMBER-J)

The applicant in this case, has challenged following orders:-

- (a). Annexure A-1 order dated 02-06-2005 granting notional promotion/actual promotion against the upgraded posts from LSG (Norm Based) to HSG (Norm based) cadre whose names are furnished in

Part A, wherein the name of the applicant did not figure.

(b). Annexure A-2 order dated 06-06-2005 granting promotion from HSG - II (Norm based) cadre to HSG I cadre in the pay scale of Rs 6500- 10500 to the officials mentioned in the list appended to the order, in which also, the name of the applicant did not figure in.

(c). Annexure A-3 order dated 26-10-2006 by the appellate authority i.e. the Chief Postmaster General, UP Circle ^{who} had rejected the appeal of the applicant against his non promotion stating that the applicant was adjudged for notional promotion to the grade of HSG II/HSG I.

2. The application has been accompanied with a Misc. Application for condonation of delay, which had been allowed, vide order dated 08-07-2009.

3. The facts of the case, with terse sufficiency are hereunder:-

(a) The applicant joined the respondent's office as Postal Assistant in 1965. He came on transfer under rule 38 to Allahabad Division and joined the unit on 23-08-1967. He was granted the first financial up-gradation, on completion of 16 years of service, in the LSG grade w.e.f. 30-11-1983 in the then pay scale of Rs 4500 - 7000/-. Again, he was afforded the 2nd financial upgradation under the BCR scheme in the scale of Rs 5000 - 8000 w.e.f. 01-07-1992.

(b). While the above HSG Gr. II is based on completion of certain prescribed years of service, for filling up HSG II post (norm based), 2/3rd number of vacancies are on the basis of seniority cum fitness, while the remaining one-third is by way of limited competitive examination. To fill up 11 vacancies of HSG I Cadre, the Directorate advised all Circle Heads to fill up the Norm based vacant post of HSG notionally in terms of pre-existing recruitment rules from the year when filling up of norm based posts were not carried out, vide Annexure A- 4. The said order reads *inter alia* as under:-

"The Department of personnel and training advised that norm based LSG/HSG II posts may be filled up notionally in terms of the relevant Recruitment Rules from the year when the norm based promotions have not been carried out and promotions to the upgraded posts in HSG I could be made in accordance with the Recruitment Rules from amongst these formally appointed in HSG II with the requisite 3 years actual/notional service in the grade as the case may be.

It has been decided to implement the advice of the Department of Personnel and training...."

(c). Accordingly, DPC was convened to consider all the eligible candidates for promotion against the vacant norm based LSG posts and the applicant was included in the list of such promotees, vide Annexure A-5. He was so appointed with retrospective effect from 01-01-1987. For further promotion to the HSG II (Norm based), on the basis of seniority cum fitness

DPC was held in 2005 but the applicant was not promoted. Consequently, his name did not figure in the list of candidates promoted from HSG II to HSG I (norm based). According to the applicant, though he was not communicated any adverse remarks nor had there been any currency of penalty at the time of consideration for promotion, he was not selected. Thus, he had preferred Annexure A-6 representation dated 16-09-2005. It was this representation that had been rejected by Annexure A-3 order dated 02-11-2006 (which is one of the impugned orders).

(d). The applicant has also made, as a passing reference that in 2004 he was asked to convey his willingness to be posted on *ad hoc* basis to the post of HSG I, vide Annexure A-7. However, it was declined by him due to his ill health.

(e). The applicant has further stated that for promotion to the post of HSG II, records from 2000-01 for five years were to be scrutinized and minor penalty of withholding of increments for a few months has no adverse effect and does not put any bar to the promotion. Never was he communicated any adverse remarks of his ACR.

(f). The applicant superannuated w.e.f. 30-09-2006.

4. The applicant has prayed for the following reliefs:-

"(i). to issue an order, rule or direction quashing and setting aside the impugned order dated 02.06.2005 and 06.06.2005 (Annexure A-1 & A-2) pertaining to the applicant by which the applicant

has been arbitrarily and illegally adjudged unfit for promotion to HSG-II and HSG I respectively.

(ii). to issue an order, rule or direction quashing the impugned appellate order dated 19.09.2006 (Annexure A-3) passed by the respondents no.2 and communicated vide letter dated 26.10.2006.

(iii). to issue an order in the nature of mandamus to consider the case of promotion of the applicant for the regular promotion to the cadre of HSG II and HSG I on the basis of ACRs ignoring the adverse entry if any not communicated to the applicant, because the minor penalties of the withholding of increment do not stand as bar for promotion to the next higher cadre of HSG II and HSG I, as no penalty was current on the date of the consideration of case of applicant by the DPC.

(iv). to issue an order, rule or direction commanding the respondent to promote the applicant notionally in HSG II and thereafter in HSG I on regular basis from the date on which his immediate juniors have been promoted to the aforesaid cadre and grade.

(v). to issue an order, rule or direction to fix the pay as admissible under the rules in the cadre and grade of HSG I from the date of the promotion and order for payment of difference of pay, retrial benefits and refix pension on the basis of pay of HSG I.

(vi). to issue an order, rule or direction which this Hon'ble Tribunal may deem fit in the circumstances of the case.

(vii). to award the cost of the application in favour of the applicant."

5. Respondents have contested the OA. The main plank of their contention is that the applicant was adjudged as unfit for norm based promotion to the grade of HSG II. DPC is the authority competent to adjudge the service records of officials and the decision of the CPMG is final.

6. Counsel for the applicant has invited our reference to paragraph 16 of the original application wherein he has averred that no adverse remarks were communicated to him and further no penalty was imposed. For the same, respondents, in their reply have offered no comments.

7. Initially, the counsel for the respondents was not available and the case of the applicant was heard and order reserved. However, later on, the counsel for the respondents made available the records for perusal of the Tribunal.

8. Arguments were heard and records perused. The applicant has been granted 'average' for the years 2000 -2001. On 20-02-2002, he was visited with a minor penalty of withholding of annual increment for a period of two months. His grading for 2002-03 was reported 'good' and so is the report for 2003-04. The DPC has considered the applicant as unfit on the basis of the assessment it has made and thus as per the respondents the applicant has no case.

9. The question is as to whether the grading of average, which is less than the Bench mark for promotion to the post of HSG II (Norm based) and HSG Gr. I (Norm based) should have been communicated and on failure of such communication, should the particular report be ignored while considering the case for promotion. Answer to this question is available in the decision of the Apex Court in the case of **Dev Dutt vs Union of India, (2008) 8 SCC 725** wherein the question related to the grading of 'good' for the year 1993 - 94 not having been communicated, while the benchmark was 'very good'. The Apex Court after full discussion in that case held as under:-

16. *In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. "poor" entry) need to be communicated and not "fair", "average" or "good" entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. 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 of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.*

17. *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*

v. *Union of India*³ that arbitrariness violates Article 14 of the Constitution.

18. 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.

10. The above decision was referred to in a subsequent case as well in the case of **Abhijit Ghosh Dastidar vs Union of India (2009) 16 SCC 146**, wherein, the period related to 1998 – 99. In that case, the appellant therein stood retired at the time when the case was decided. The Apex Court has, in that case, following the decision in the case of Dev dutt (supra) held as under:-

8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion, admittedly the entry of "good" was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the annual confidential report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the abovereferred decision (Dev Dutt case¹, SCC p. 738, para 41) relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

9. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28-8-2000. Therefore, the appellant also be deemed to have been given promotion from 28-8-2000.

10. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for

the period for which he had not worked in the Higher Administrative Grade Group A, but his retrospective promotion from 28-8-2000 shall be considered for the benefit of refixation of his pension and other retiral benefits as per rules.

11. Telescoping the above law into the facts of the case, if the case is analyzed, admittedly, the grading of the applicant has been below the bench mark and these had not been communicated. The applicant retired in September, 2006. As such, decision of the Apex Court in the case of Dastidar (*supra*) would apply.

12. Yet another aspect to be kept in mind is that the applicant was awarded penalty of withholding of increment for two months in the year 2002. The sting of the same cannot be extended till the date of consideration as the rules relating to the effect of minor penalty on promotion reads *inter alia* as under:-

"Promotion of persons undergoing a penalty

The undersigned is directed to refer to DoP&T O.M. No.21/5/70-Estt. (A), dated 15-5-1971 (reiterated vide O.M. No.22011/2/78-Estt. (A), dated 16-2-1979) and to say that in terms of the provisions of these Office Memoranda, a Government servant, on whom a minor penalty of withholding of increment, etc. has been imposed should be considered for promotion by the Departmental Promotion Committee which meets after the imposition of the said penalty and after due consideration of full facts leading to imposition of the penalty. If he is still considered fit for promotion, the promotion may be given effect after the expiry of the currency of the penalty. It has however, been separately clarified vide Office Memorandum No.22011/2/92-Estt. (D), dated 30-11-1995 that in such cases, the seniority would be fixed according to the position of the officer in the panel on the basis of which he is promoted on expiry of the period of currency of the penalty.

2. Doubts have been expressed regarding the pay fixation and date of commencement of the eligibility service in such cases. It is clarified that since the promotion is to take effect only from a date subsequent to the expiry of the

currency of the penalty, the officer would be entitled to pay fixation in the promotional grade with effect from the date of actual promotion only. Even if a person junior to him in the panel is promoted earlier, it will have no bearing on the pay to be allowed on promotion to the officer on whom a penalty was imposed, and there shall be no stepping up of his pay.

3. Similarly, as the officer undergoing penalty is not to be promoted during the currency of the penalty, the eligibility service in the promotional grade for further promotion shall commence only from the date of actual promotion and in no case, it may be related, even notionally, to the date of promotion of the junior in the panel."

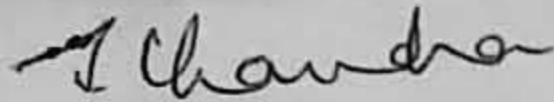
13. Following the decision in the case of Dastidar supra, and keeping in view the above rule, it has to be held that the respondents shall consider the case of the applicant for grant of notional promotion to the grade of HSG - II and HSG I, without taking into account those un-communicated reports which carry below benchmark grading and if otherwise found suitable, afford the promotion purely on notional basis without any benefit of actual pay fixation.

14. In view of the above, the OA is allowed to the extent as under:-

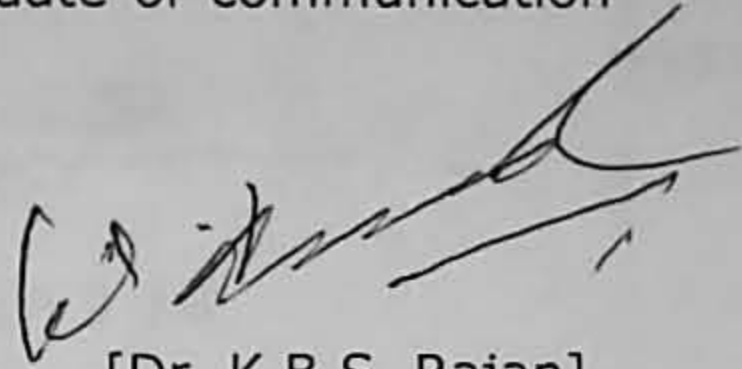
(a) The Respondents shall consider the case of the applicant for promotion to the grade of HSG II and if through, to the grade of HSG I on the basis of those ACRs ignoring those un-communicated ACRs which carry grading less than the Benchmark and without considering the fact of minor penalty awarded to the applicant in 2002 and grant the promotion, if otherwise found fit on notional basis without any

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benefit of actual pay and allowances. The pay fixed on the higher post shall be taken into account for working out the terminal benefits and the pension and difference arising out of the same shall be paid to the applicant. This order shall be complied with, within a period of six months from the date of communication of this order. No costs.



[Jayati Chandra]
Member-A



[Dr. K.B.S. Rajan]
Member-J

/Dev/