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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No. 291 of 2008

Cuttack, this the 05th day of March, 2011

Keshabananda Dwibedy Applicant

-v-

Union of India & Others Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not? *Yes*
2. Whether it be circulated to Principal Bench, Central Administrative Tribunal or not? *Yes*

A.K.
(A.K.PATNAIK)
Member(Judl)

C.R.
(C. R. MOHAPATRA)
Member (Admn.)

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A No. 291 of 2008

Cuttack, this the 05~~th~~ day of April, 2011

CORAM:

THE HON'BLE MR.C.R.MOHAPATRA, MEMBER (A)
A N D
THE HON'BLE MR.A.K.PATNAIK, MEMBER (J)

Keshabananda Dwibedi, aged about 46 years, Son of Benudhar Dwibedi, permanent resident of Plot No. 689/5, Nayapalli, PO. Bhubaneswar-751 006 and at present working as Stenographer, Grade III in the Office of the Additional Commissioner of Income Tax, Range-II, Ayakar Bhawan, Rajaswa Vihar, PO. Bhubaneswar-751 007, Dist. Khurda.

.....Applicant

By legal practitioner: M/s. M/s R.B.Mohapatra,
N.R.Routray,
D.K.Mohanty,
Counsel

-Versus-

1. Union of India represented by the Chief Commissioner of Income Tax, Ayakar Bhawan, Rajaswa Vihar, PO. Bhubaneswar-751 007, Dist.Khurda.
2. Additional Commissioner of Income Tax (Hqrs.) (Admn.), Office of the Chief Commissioner of Income Tax, Ayakar Bhawan, Rajaswa Vihar, PO. Bhubaneswar-751 007, Dist. Khurda.
3. Additional Commissioner of Income Tax, Range-II, Ayakar Bhawan, Rajaswa Vihar, PO. Bhubaneswar-751 007, Dist.Khurda.
4. Chittaranjan Patra, Income Tax Inspector, Office of the Assistant Commissioner of Income Tax, Berhampur, At/Po. Berhampur, Dist. Ganjam.
5. S.K.Mishra, Income Tax Inspector, Office of the ITO, Puri, At/Po/Dist. Puri.

....Respondents

By legal practitioner: Mr.R.C.Swain, ASC



ORDER

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MR.C.R.MOHAPATRA, MEMBER(A):

The Applicant was working as a Stenographer Gr.III in the Office of the Additional Commissioner of Income Tax, Range-II, Ayakar Bhawan, Rajaswa Vihar, Po-Bhubaneswar, Dist. Khurda at the time when this OA was filed. Meanwhile, during the pendency of this OA, on the recommendation of the DPC, he has been promoted to the post of Stenographer Gr. II [vide order under Annexure-A/10 dated 28th August, 2003].

Aggrieved by his non-promotion to the grade of Stenographer Gr. II when his juniors namely Respondent No.4 vide order dated 12th December, 1996 (Annexure-A/3) and Respondent No.5 vide order dated 17th July, 1997 (Annexure-A/5), were promoted, he preferred appeal on 23.07.1997 and having got no response on the said appeal, he approached this Tribunal earlier in Original Application No.767 of 1997 with prayer to direct the Respondent-Department to promote him to Stenographer Gr.II with effect from the date when his juniors were promoted and grant him all consequential service & financial benefits retrospectively. The Respondents, had filed their counter admitting the stand that present Respondents 4&5 are juniors in the grade of Stenographer Gr. III to the Applicant. But they have

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denied the allegation of the Applicant regarding non-consideration of his case for promotion to the said grade while considering the case of his juniors [Respondent Nos.4&5 in the present OA]. It was stated by the Respondents that the case of Applicant was considered by the DPC held in the year 1997 but it did not recommend the case of Applicant for promotion to Stenographer Gr. II because of the adverse remarks in his CCR/ACR for the year 1995-96. It was further stated that the said adverse entries/remarks were communicated to the applicant, in response to which he submitted representation. The representation was duly considered by the competent authority [Commissioner of Income Tax, Bhubaneswar] and the reason of rejection was also communicated to the Applicant in letter dated 30th August, 1996. The representation submitted by the Applicant against his supersession, was considered by the competent authority but as the name of the applicant was not recommended by the DPC for his promotion the same was rejected and intimated to the applicant. After having heard the rival submission of the parties, this Tribunal disposed of the OA No. 767 of 1997 on 30th April, 2008. Relevant portion of the order reads as under:

“4. Heard the rival submission of the parties and perused the documents placed on record. From the submissions made by the parties as also from the

record, this Tribunal is now required to decide as to whether there was proper consideration of the case of all eligible employees, including Applicant and Respondents 3 and 4 for promotion to Stenographer Grade II in accordance with the existing Rules/instructions governing the field and as to whether denial of promotion on the face of the promotion of his junior namely Respondents 3 and 4 on the basis of the adverse ACR for the year 1995-1996 was justified.

5. Before coming to the issues involved in this case, it is relevant to state that it is not the function of the Court to hear appeals over the decisions of the selection committee/DPC nor do they have any power to substitute its own finding in place of the findings/assessment reached by the duly constituted DPC based on the service record. The decision of the DPC can be interfered with only on limited grounds such as illegality, impropriety, patent material irregularity in the constitution of the DPC or its procedure vitiating the selection or proved mala fides.

6. Similarly, it is trite law that unless the representation against the adverse entry is communicated and considered and disposed of it is not just and fair to act upon those adverse entries vide *Brij Mohan Singh Chopra v State of Punjab*, AIR 1987 SC 948. An un-communicated adverse report should not be acted upon to deny benefits to a Government servant when such benefits are extended to his juniors vide *Vijay Kumar v State of Maharashtra*, AIR 1988 SC 2060. Equally it is well settled law that when representation against adverse remarks is pending such adverse remarks cannot be taken into consideration for withholding of promotion vide *State of M.P. v. Bani Singh*, AIR 1990 SC 1308.

7. It appears from the record, undisputedly, both Respondent Nos. 3 & 4 are junior to Applicant in the grade of Stenographer Gr. III. It is also revealed from the record that supersession of Applicant, in promotion to Stenographer Gr. II by the Respondents 3 & 4 was on the basis of the recommendations of the DPC held during 1996 & 1997 respectively. It is also revealed from the record that the reason of non-

recommendation by the DPCs for promotion of Applicant to the Stenographer Gr. II was for the adverse entries in his ACR for the year 1995-1996. Though there is no whisper in the Original Application as to the date of communication of such adverse remarks in the ACR of the year 1995-96 to the Applicant and date of submission of representation as against such adverse remarks by the Applicant, yet from some of the communication placed on record, it is revealed that the Applicant submitted his representation as against such adverse ACR on 03.06.1996 and the said representation of applicant was rejected and communicated to him on 30th August, 1996. Under the circumstances, since the adverse ACR of the year 1995-96 is the reason of non-recommendation of the case of the Applicant, date of holding the DPC during 1996 is crucial for effective adjudication of the present dispute; the same is lacking in the pleadings of the parties.

Government of India Department of Personnel and Training OM No. 22011/9/98-Estt.(D) dated 16th June, 2000 deals with regard to the relevant year up-to which the ACRs are to be considered. Relevant portion of the above instruction provides as under:

" * * * *

2. In regard to operation of the Model Calendar for DPCs, a doubt has raised by certain quarters as to the question of the relevant year upto which ACRs are required to be considered by the DPCs. In this connection it is once again clarified that only such ACRs should be considered which became available during the year immediately preceding the vacancy/panel years even if DPCs are held later than the schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of the date of convening DPC. (Emphasis supplied)

3. Ministries/Departments are requested to give wide circulation to these clarifications for general guidance in the matter and also to ensure

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strict adherence to the time-schedule prescribed as per the Model Calendar for DPCs."

Paragraph 6.2.1 of the Government of India, Department of Personnel and Training OM No.35035/7/97-Estt.(D) dated 16th February, 2005 deals with regard to Evaluation of Confidential Reports. Relevant portion of the aforesaid OM provides as under:

"(b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for five preceding years irrespective of the qualifying service prescribed in the Service/Recruitment Rules. The preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T OM No. 22011/9/98-Estt.(D) dated 8.9.98, which prescribe the Model Calendar for DPC read with OM of even number, dated 16.6.2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year).

Besides the above the OM dated 10.03.1989 issued by the Ministry of Personnel, Public Grievances and Pension laid down the procedure of selection. It authorized the DPC to decide its own method and procedure for objective assessment of the suitability of candidates. It excluded interviews, unless specifically provided for in the relevant Recruitment Rules and directed that confidential reports were to be the basic inputs for assessment. The OM required the DPC to follow the procedure laid down therein to ensure that the evaluation of the CRs was fair, just and non-discriminatory. Taking into consideration the above instructions of the Government of India, the Hon'ble Supreme Court in the case of **Union of India and Others v A.K.Narula**, AIR 2007 SC 2296 have held as under:

"The guidelines give a certain amount of play in the joints to the DPC by providing that it need not be guided by the overall grading recorded in the CRs, but may make its own assessment on the basis of entries

in the CRs. The DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms. It is only when the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness, the selection calls for interference. Where the DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by the DPC, the Court will not interfere. In the absence of any allegation of *mala fide* or bias against the DPC and in the absence of any arbitrariness in which assessment has been made, the High Court was not justified in directing that the benefit of upgrading be given to respondent and was done in the case of other officer whose confidential reports observed upgrading."

8. As the pleadings are silent with regard to dates of DPC, communication of adverse remarks, number and year of vacancies, different grading given by the DPC both of the years 1996 & 1997, the Respondent-Department was directed to produce the DPC proceedings for the perusal of this Tribunal. But in spite of repeated opportunities, the Respondents have shown their inability to produce the records. In the absence of records, we are handicapped to know the assessment made by the DPC of the Applicant, with the adverse entries, vis-à-vis the Respondents 3 & 4. **In view of the above and in view of the fact that since non-recommendation of the case of the Applicant by the DPC held during 1996-1997 was due to the adverse remarks of 1995-96, which was not in accordance with the DOP&T instructions quoted above, it is held that there has been gross miscarriage of justice to the Applicant. Therefore, the Respondents are hereby directed to convene the review DPC and re-consider the case of the Applicant for promotion to Stenographer Gr.II. In the event of his being found fit, he should be notionally promoted from the date his juniors were promoted to the said grade. All these exercises shall be completed**

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 within a period of three months from the date of receipt of this order.

9 . In the result, this OA stands allowed. No costs."

[emphasis supplied]

2. In compliance of the order of the above direction of this Tribunal in earlier OA Respondent- Department, in Annexure-A/14 dated 10/16th July, 2008 informed the Applicant as under:

"On the above subject, I am directed to inform that a Review Departmental Promotion Committee for the Recruitment Year, 1996-97 was held on 20.6.2008 to consider your case for promotion from Stenographer Gr.III to Stenographer Gr.II for the said Recruitment Year by adopting the **same standards, yardsticks and norms** as with the other selected persons. In the said DPC, the Committee found you 'Unfit' for promotion to Stenographer Gr.II."

3. Being aggrieved by the order under Annexure-A/14 dated 10/16-07-2008, the Applicant approached this Tribunal in this second round of litigation with prayer to quash the order under Annexure-A/14 dated 10/16th July, 2008 and consequently direct the Respondents to promote him to Stenographer Gr.II from the date his juniors were promoted with all consequential service and financial benefits notionally.

4. As in the other case [OA No. 767 of 1997] Respondents, in their counter, have resisted the prayer of the Applicant. The Respondents mainly object to the stand of the applicant is that the promotion to the post of Stenographer Grade II is subject to the

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DPC finding him 'fit'. As the applicant was found 'unfit' by the DPC due to the adverse entries in his ACR for the year 1995-96 his case was considered along with others but he was not promoted. In compliance of the order of this Tribunal, Review DPC convened and considered the case of the Applicant but could not find him suitable for promotion from the date when his juniors were promoted. Accordingly, Respondents have prayed for dismissal of this OA.

5. Despite notice having been served on the Respondents 4&5, neither they appeared through any Counsel nor filed their counter even after adequate opportunity was granted to them.

6. However, at this stage we may record that pursuant to the direction of this Tribunal, the Respondents have produced the minutes of the DPC held on 06-12-1996 and the Review DPC held on 20-06-2008 in compliance of the order of this Tribunal. Having heard the arguments put forward by the respective parties with reference to the pleadings, perused the materials placed on record including the minutes of the DPC and that of the review DPC conducted in compliance of the earlier order of this Tribunal dated 30th April, 2008 in OA No. 767 of 1997. The dispute in this OA, relates to whether there has been miscarriage of justice caused to the applicant in the decision making process of the matter in other



words, whether the DPC convened on 06-12-1996 considered the case of the applicant at all if so, the reason of finding the applicant unfit by the DPC and that whether the consideration given by the Review DPC, according to the Respondents, which met on 20-06-2008, was in accordance with Rules and the order of this Tribunal dated 30th April, 2008 in OA No. 767 of 1997.

7. For one reason or the other, the Respondents had shown their inability to produce the minutes of the original DPC held on 06-12-1999. Therefore, this Tribunal while drawing adverse inference for their non-production of the minutes of the DPC, this Tribunal in order dated 30th April, 2008 directed the Respondent-Department to convene the Review DPC and reconsider the case of the Applicant in accordance with the DOP&T instruction (mentioned in the order) for promotion to Stenographer Gr.II. It was also directed that in the event of his being found fit; he should be notionally promoted from the date when his immediate junior was promoted to the said grade. Respondent-Department communicated to the applicant in Annexure-A/14 that Review DPC was convened on 30.6.2008 and considered his case for promotion to Stenographer Gr. II for the R.Y. 1996-97 by adopting the same standards, yardsticks and norms as with the other selected persons. In the said DPC, the

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Committee found him 'Unfit' for promotion to Stenographer Gr.II. Admittedly, the DPC was convened on 06-12-1996 for filling up of, among other categories of posts, the post of Stenographer Gr.II of the RY 1996-97. For this purpose, the DPC took into consideration the ACRs of all eligible Stenographer Gr.III for the years 1991-92, 1992-93, 1993-94, 1994-95, and 1995-96. As it appears from the minutes of the DPC, the supersession of the applicant was for the 'inadequate' grading in the ACR of the applicant of the year 1995-96 against which he made representation but his representation was rejected and communicated to him prior to convening the DPC. But according to the DPC guidelines issued by the Government of India Department of Personnel and Training, New Delhi based on which the case of the applicant was to be reconsidered in compliance with the earlier order of this Tribunal clearly provides that **"only such ACRs should be considered which became available during the year immediately preceding the vacancy/panel years even if DPCs are held later than the schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of the date of convening DPC. (Emphasis supplied).** Since the vacancy was of the RY 1996-97, the DPC ought to have considered the ACRs of all eligible

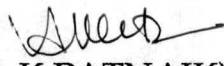
Stenographer Gr. II upto the year 1994-95 and certainly not beyond that. Review DPC convened in pursuance of the direction of this Tribunal also failed to notice this aspect of the matter and rejected the claim of the applicant without due application of mind. Hence it can safely be held that the consideration and recommendation made by the DPC held on 6.12.2006 being contrary to the instructions, stated above, is non-est in the eye of law being void *ab initio* and consequently, promotion if any to the grade of Stenographer Gr.II based on such recommendation stands terminated.


8. Though the 'inadequate' remark recorded in the ACR of the applicant for the year 1995-96 has not been questioned in this OA, yet this Tribunal cannot close its eyes and further consider it just to record that according to various instructions issued by the Government relating to 'grading' to be awarded in the ACRs of an employee, the grading/remark "**inadequate**" as has been recorded in the ACR of the applicant, does not find place in any of the instructions. Be that as it may, we express no opinion on the same in view of the categorical finding i.e. holding the DPC's recommendation as non-est. Since the original DPC held on 06-12-1996 and promotion allowed based on the recommendation of the said DPC is held non-sustainable, consequently, the Review

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DPC held on 20-06-2008 and order issued under Annexure-A/14 are hereby quashed. As a result, the Respondent-Department are directed to convene DPC and consider all eligible Stenographer Gr.III for promotion against the vacancies of the RY 1996-97 to Stenographer Grade II, by taking into consideration the ACRs/CCRs upto to the year in accordance with the DOP&T instruction stated above and take further action in accordance with the recommendation of the said DPC. The entire exercise shall be considered within a period of 90(ninety) days from the date of receipt of copy of this order.

9. In the result, this OA stands allowed to the extent stated above. There shall be no order as to costs.


(A.K.PATNAIK)
Member (Judl.)


(C.R.MOHAPATRA)
Member (Admn.)