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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.NO.91 OF 2011
CUTTACK THIS THE 18th DAY OF JUNE, 2013

Bimash Kumar ^{Panda} ...Applicant

-VERSUS-

Union of India & Ors....Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not ? *yes*
2. Whether it be referred to CAT, PB, or not *yes*

R.C.
(R.C.MISRA)
MEMBER(A)

A.K.
(A.K.PATNAIK)
MEMBER(J)

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CORAM

HON'BLE SHRI A.K.PATNAIK, MEMBER(J)
HON'BLE SHRI R.C.MISRA, MEMBER(A)

Bivash Kumar Panda, aged 47 years, Son of Sri Hemant Kumar Panda, IAS(Retd.), at present working as Principal Scientific Officer & Head, Regional Office, Eastern Region (ER), Ministry of New & Renewable Energy, Govt. of India, At-N/2-176, IRC Village, Nayapalli, Bhubaneswar-751 015

...Applicant

By the Advocate(s)-M/s. B.K.Dash
A.K.Sethi
A.B.Mishra
M.P.Debnath

-VERSUS-

Union of India represented through

1. The Secretary to Govt. of India, Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO Complex, Lodi Road, New Delhi-110 003
2. The Secretary to Govt. of India, Ministry of Personnel, Public Grievances & Grievances, Department of Personnel & Training, North Block, New Delhi-110 001
3. Mr.N.B.Raju, Scientist 'D', Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO COMPLEX, Lodi Road, New Delhi-110 003
4. Dr.G.Prasad, Scientist 'E', Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO COMPLEX, Lodi Road, New Delhi-110 003
5. Mr.Pankaj Saxena, Scientist 'E', Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO COMPLEX, Lodi Road, New Delhi-110 003
6. Mr.I.P.Singh, Scientist 'E', Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO COMPLEX, Lodi Road, New Delhi-110 003

7. Mr.Gangesh Upadhyaya, Scientist 'E', Ministry of New & Renewable Energy, Govt. of India, Block No.14, CGO COMPLEX, Lodi Road, New Delhi-110 003

...Respondents

By the Advocate(s)-Mr.G.Singh

ORDER

HON'BLE SHRI R.C.MISRA, MEMBER(A):

Applicant in this Original Application is working as Principal Scientific Officer in the grade of Scientist 'D' and has approached this Tribunal with a grievance that he has been wrongly denied his promotion to the grade of Scientist-E. His prayer is that he should be granted promotion with retrospective effect in respect of DPC held in the year 2009 by upgrading his Bench Mark in the ACR, by holding a special DPC in that regard.

2. The facts of the case are that the applicant joined as a Direct Recruit Group A Senior Scientific Officer, Grade-II in the year 1990 in the Ministry of New & Renewable Energy (in short MNRE). He got his promotion as Senior Scientific Officer, Grade-I in the year 1995. After a period of nine years from this date of promotion, he got further promotion to the rank of Principal Scientific Officer in Scientist Grade 'D' in the year 2004. He alleges that this promotion took long nine years as against the stipulated period of residency of five years in the earlier grade as per the Flexible Complementing Scheme (in short FCS) Promotion Policy of the year 1986. His case is that he could have been promoted to the grade of Scientist D in the year 2000 only. Even in the years 2001 and 2002, the DPC was not held and only in the year 2004, the DPC was held and he was promoted to the rank of Scientist D. He has made a general allegation in this O.A. that the

MNRE, Govt. of India had adopted a callous attitude because of which he has been denied timely promotions in the past. He has specifically mentioned that the administrative apathy and casual attitude of the Ministry towards conducting regular DPC Meeting at least once in a year as stipulated in the DOP& T guidelines have resulted in a situation where the applicant has suffered stagnation in his career. The New FCS Promotion Policy was circulated vide DOP&T circular dated 9.11.1998 stipulating a lesser residency period for this promotion. If this new policy would have been applied in letter and spirit, immediately after its introduction, the applicant could have been promoted as Scientist-D even in the year 1998. According to FCS Promotion Policy, the promotion of the officer is not based upon the vacancy. It is based upon assessment of performance according to which every officer should get promotion in situ. In the background of this general grievance the applicant has made a specific allegation that in April, 2009, the Screening Committee Meeting was held before the DPC for considering promotion from the level of Principal Scientific Officer (Scantest-D) to the grade of Scientist E. The DPC for this purpose was conducted on 12th May, 2009, but the applicant's name was not cleared by the Screening Committee because of adverse entries in his ACRs and low overall rating. The applicant's batch mate in the same Grade, one Gangesh Upadhayay who has been impleaded as Respondent No.7 to this O.A. was however, cleared by the Screening Committee and was finally promoted as Scientist E. The specific allegation made by the applicant is that before the Screening Committee of April, 2009, he was not communicated with the adverse entries in his ACR and was thus, deprived of the opportunity



to defend himself. This was a clear denial of natural justice in his case. Again for the year 2010, the DPC was held on 28.12.2010 for which the screening process to consider the eligibility of officers for promotion has been carried out on 23.12.2010. In this case also, the Screening Committee did not clear his name because of falling short of the required mark of assessment of his service records. The applicant in the meantime represented for reviewing of the ACRs for the years 2004-05, 2005-06 and 2006-07 and the Secretary, Ministry of New & Renewable Energy after considering his representation upgraded the remarks to Good, Very Good, and Good respectively. The subsequent ACRs concerning 2007-08, 2008-09 and 2009-2010 were received by the applicant only on 24.12.2010 at 2.00 PM whereas the Screening was conducted already on 23.12.2010. From the ACRs the applicant could see that his present Reporting Officer, i.e., the incumbent Joint Secretary (Admn.) in the MNRE had given Very Good remarks about the applicant for second half of 2007-08, 2008-09 and 2009-2010. However, the part ACR relating to 1st half of 2007-08 was rated by the previous Reviewing Officer as average without any substantiation of reasons. This part of the ACR for the year 2007-08 was not communicated to the applicant along with ACRs of the years 2004-05, 2005-06 and 2006-07 but was communicated during April, 2010. Because of this non communication the applicant could not make a representation in respect of the part ACR relating to 1st half of 2007-08. This was a denial of natural justice, according to applicant. The applicant has also made an allegation that the earlier Reporting Officer/Reviewing Officer had given the poor rating after one month of his demitting office and therefore, this part of the ACR should



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have been ignored. The first half of the ACR for the year 2007-08 being written by the previous Joint Secretary after more than eight months of his demitting office in the Ministry and two days before retirement cannot be considered as a valid ACR. Therefore, he has pleaded that his over all grading in the ACR for the year 2007-08 should have been Very Good, as per the ACR grading given by the present incumbent, Joint Secretary (Admn.) for the 2nd half of the year 2007-08. Because of the average of both the grades during the year 2007-08, his rating has suffered and therefore, his prayer is that by ignoring ACR for the 1st half of the year 2007-08, only the Very Good remark for the 2nd half should be taken as the final grading for the year 2007-08. Here the applicant has expressed his grievance that at present officers who were junior to him in seniority in the present grade have been considered eligible for promotion whereas he is languishing in his present grade because of injustice done to him by the Ministry. He has cited in this O.A. the judgment of the Hon'ble Supreme Court dated 12.5.2008 in the case of **Dev Dutt vs. Union of India in Civil Appeal No.7631 of 2002.**

Law is well settled that below Bench Mark grading must be communicated to the officer concerned and non -communication of such remarks is violative of Article 14 of the Constitution. In his case, non-communication of below Bench Mark grade for a part of the year 2007-08 is certainly a violation of the principles of natural justice according to law laid down by the Hon'ble Supreme Court of India. This being the crux of the grievance of the applicant in this O.A., he has devoted a considerable part of his O. A. alleging about the apathy of the MNRE as an independent Ministry towards career prospects of its Scientists and how



because of this callous attitude, compared to Group-A Service of other Organizations, his cadre in the Ministry has suffered for a long time for denial of chance for career growth. He has also made several allegations that the FCS has not been properly implemented in the MNRE. In this Original Application, the applicant has alleged that one Mr. Sunil Khatri, Joint Secretary in the Ministry was very hostile towards him and has downgraded his assessment after nine months of his demitting office as Joint Secretary (Admn.). He is not authorized as per the guidelines to write his ACR nine months after demitting his office and therefore, this assessment is liable to be held as non est and invalid as per the rules. The part of the ACR written by Shri Khatri who has already retired, i.e., for April, 2007 to October, 2007 was communicated to the applicant on 22.12.2010 just before the Screening Committee Meeting held on 23.12.2010. On 24.12.2010 immediately after getting the communication, the applicant made a representation to the Secretary, MNRE which is annexed as Annexure-A/8 to the O.A. It appears this representation was not considered by the authorities and Respondent No.1, i.e., Secretary, MNRE brought out an Office Order dated 31.12.2010 appointing three Scientists - D in the Ministry to the grade of Scientist E and among these three Scientists the name of the applicant was not there. Therefore, the final substance of the allegation made by the applicant is that without disposal of his representation dated 24.12.2010, the matter of promotion and appointment to the grade of Scientist E was decided ignoring the merit of the applicant and without following the principles of natural justice.



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3. In the counter affidavit which has been filed by the Respondents in this case, the allegations of the applicant have been denied. It has been specifically stated that FCS is a merit based Promotion Policy followed by the MNRE which has been declared as a Scientific Organization. The ACR entries for the various years in respect of the applicant are based upon his actual performance in respect of the work and not upon any prejudicial consideration. The guidelines with regard to the Screening Committee and DPC have been scrupulously followed in respect of eligible officers including the applicant. It is stated in the counter affidavit also that with regard to the contents of his representation dated 24.12.2010, the letter sent to him by the Ministry on 17.1.2011 earlier, had covered all the points, a fact which the applicant has suppressed from the Tribunal. On the other hand, the adverse entries from the year 2004-05 to 2006-07 have been properly communicated to him and on the basis of his representation the Secretary, MNRE has upgraded his ACR grading for the year 2004-05 from Poor to Good, for the year 2005-06 from Poor to Very Good and for the year 2006-07 from Poor to Good. While the letter sent by the Ministry to the applicant on 17.1.2011 covered all his grievances mentioned in his petition dated 24.12.2010, the petitioner during the pendency of this O.A. made another representation on 14.3.2011, which has already been replied to on 25.4.2011. Therefore, the Respondents have averred that there is no representation with the Ministry from the applicant pending for consideration as of now. One important point made by the Respondents is that under the FCS, in situ promotion does not mean that there will be a promotion irrespective of the performance of the concerned officer.



Promotion under FCS cannot be claimed as a matter of right. In the present case the applicant at different points of time and under different situations has not been able to deliver meticulously as expected of him as a Scientist and hence, he cannot be promoted under FCS. He could not achieve the Bench Mark level of assessment because of his poor performance from year to year. According to Respondents, the applicant has been given all opportunities and the Respondents have completely denied that the principles of natural justice were not followed in his case.

4. A written note of submission was submitted by the learned counsel for the applicant. Having heard the learned counsel for the applicant as well as the Respondents, we have gone through the records as well as the written note of submission.

5. The basic grievance of the applicant in this case is that he has been discriminated against and because of prejudicial consideration his promotional chance has been delayed from time to time. He is covered under the FCS which applies to the Scientific Organizations of the Government of India. As a Scientist and Technocrat he has a right to be considered for his timely promotions under the promotion policy subject of course to the consideration that his performance in his scientific work would measure up to the Bench Mark level as fixed by the authorities. The basic principles of policy of promotion would be to make objective evaluation of the work and performance of the officer and afford to him the due promotional avenues which will further motivate him in his performance. The applicant has made some general allegations of apathy by the Ministry and the concerned authorities with regard to the promotion policy in respect of the Scientific



Officers under the FCS. We are not in a position to make any observation on the general allegations made by the applicant in this O.A. nor we are in a position to comment regarding the allegations of prejudicial treatment to the applicant which are not substantiated on the basis of the materials on record. We, however, have to address ourselves to the specific allegation of the applicant's non promotion from the grade of Scientist D to Scientist E which has been decided in the DPC held on December, 28, 2010 on the basis of which the orders of promotion were brought out on 31.12.2010.


6. It is the admitted fact in this case that the Respondent No.1 in his Office Order dated 15.11.2010 has upgraded the remarks for the years 2004-05, 2005-06 and 2006-07 based upon the applicant's representation. In the rejoinder filed by the applicant at Paragraph-6 a point has been made that the over all rating should have been upgraded to the Bench Mark level as fixed for the Scientist D grade, i.e. 'Very Good' and not anything below that. However, the applicant cannot make such a claim that on the basis of representation the grading in ACR should be brought to a particular level. It is for the concerned authorities to consider his representation on merit and give him relief as due and proper after reconsideration of his performance. A specific direction cannot be issued to the authorities to dispose of the representation in a particular way. Therefore, in this regard, the claim made by the applicant does not have any merit.

7. A specific allegation has been made by the applicant that a particular Joint Secretary has made poor assessment of his ACR for the first part of the year 2007-08 after the nine months of his demitting office as Joint Secretary



(Admn.) in the Ministry, as by that time, according to extant instructions, he had forfeited his right to record any remark in respect of his ACR. This remark was communicated to him on 22.12.2010 which was received by him on 24.12.2010. By that time, the Screening Committee Meeting was held already on 23.12.2010. His representation to Respondent No.1 made on 24.12.2010 was not disposed of and the orders of promotion were finalized on 31. 12.2010 ignoring his case. In the counter affidavit the Respondents have replied that the contents of the petition dated 24.12.2010 were considered and replied to on 17.1.2011. The applicant made another representation on 14.3.2011 which has been replied to on 25.4.2011. These facts, it is alleged by the Respondents have been suppressed by the applicant before the Tribunal and therefore, it is the claim of the Respondents that there is no representation pending for disposal with the Respondents. On a perusal of the letter dated 17.1.2011 addressed by the Ministry to the applicant, it is found that among other things, it has been mentioned that even in case the first part of his ACR for 2007-08 would have been taken as Very Good as argued in the representation, the total mark would have been 73.3% as against the minimum of 75% required. On a perusal of the reply of the Ministry given to the applicant vide letter dated 25.4.2011 the various points with regard to DPC and FCS as urged by the applicant have been answered. It has been explained how the applicant could not meet the minimum criteria for consideration for promotion from Scientist D to Scientist E even inspite of the fact that the Secretary, MNRE has upgraded his ACR s for the year 2004-05, 2005-06 and 2006-07. However, in the representation dated 24.12.2010 the applicant had made specific allegations regarding the remarks recorded for the first half of the year 2007-08 by the then Joint Secretary (Admn.) which he has pleaded to be non est, since it was




recorded by the concerned Joint Secretary "after more than one year ^{of his departure} and after his retirement from service". This part of the allegation needs to be specifically looked into by the Respondent No.1 even though the letters sent by the Ministry to the applicant as pointed out earlier have covered in detail the other issues regarding the DPC and the FCS for promotion. 

8. Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India & Ors. In Civil Appeal No.7631 of 2002 have observed as follows:

"Thus, it is not only when there is a Bench Mark 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"

9. Therefore, the law is well settled that in the matters of promotion an employee must get adequate opportunities to defend himself against an entry which is considered below bench mark even if it is not an adverse entry. In the said judgment, the Hon'ble Supreme Court has observed that "one may not have the right to promotion but one has the right to be considered for promotion". In case of the present applicant, he has approached this Tribunal with various points of grievance about his service career some of which are general in nature. But some of the allegations are specific and here, there is an opportunity for the concerned authorities to look into his genuine grievance, which should be quickly done in order to remove the impression of the applicant that injustice and prejudice have been caused to his career growth and while his contemporaries and juniors have got the right opportunities of promotion, his case was ignored because of some prejudice. However, performance being




an extremely important criterion in matters of promotion, this is something which is to be adjudged by the concerned authorities as per the laid down objective criteria. This Tribunal cannot give any specific direction as to the upgradation of the remarks in the ACR nor is it in a position to direct the Respondents to give promotion to the applicant. All that can be done is only to direct the Respondents to look into those points of grievances which have been specifically made and which are still pending with the authorities. ~~10.2~~

10. In pursuance of this discussion, therefore, we direct the Respondent No.1 to specifically consider the representation of the applicant made on 24.12.2010 which is annexed as Annexure-A/8 to this O.A. and look into each and every point of his grievance and dispose of the same by a detailed speaking order within a period of 60 days from the date of communication of this order. As a result of the disposal of this representation if the applicant is found to be meeting the required Bench Mark criteria for promotion to the grade of Scientist-E, he may be so considered by convening a review DPC within a further period of sixty days from the date of communication of the decision by Res.No.1 on the representation of the applicant, as directed above.

With the above observation and direction, this O.A. is disposed of.
Parties to bear their respective costs.


(R.C.MISRA)
MEMBER(A)


(A.K.PATNAIK)
MEMBER(J)