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**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JODHPUR BENCH, JODHPUR**

ORIGINAL APPLICATION NO: 207/2004

DATE OF ORDER: 27th Jan. 2006

Heera Bhai Patel : Petitioner(s)

Mr. S.K. Malik & Mr. Dayaram. : Advocate for the Petitioner(s)

VERSUS

Union of India & Ors. : Respondent(s)

Mr. Salil Trivedi : Counsel for the Respondents. 1 to 3

CORAM:
Hon'ble Mr. V.K. Majotra, Vice Chairman
HON'BLE MR. J.K. KAUSHIK, JUDICIAL MEMBER



1. Whether Reporters of local papers may be allowed to see the Judgement? *NO*
2. To be referred to the Reporter or not? *yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *X*
4. Whether it needs to be circulated to other Benches of the Tribunal? *yes*

J K Kaushik
(J K Kaushik)
Judicial Member

V K Majotra
(V.K. Majotra)
Vice Chairman

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**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH; JODHPUR**

Original Application No. 207/2004

Date of decision: 27.01.2006.

CORAM:

HON'BLE MR. V.K. MAJOTRA, VICE CHAIRMAN

HON'BLE MR. J K KAUSHIK, JUDICIAL MEMBER.

Heera Bhai Patel, s/o Shri Prabhu Das Ji Patel, aged about 53 years, r/o qr. No. M. 100, Railway Colony, Rana Pratap Nagar, North Western Railway, Udaipur (Rajasthan), presently working on the post of Chief Pharmacist Gr. II in the Office of the Medical Superintendent, Sub-Divisional Railway Hospital, Rana Pratap Nagar, North western Railway, Udaipur (Rajasthan)

: Applicant.

Rep. By Mr. S.K. Malik & Mr. Daya Ram: Counsel for the applicant.

VERSUS

1. Union of India, through the General Manager, North Western Railway, Jaipur (Rajasthan)
2. Divisional Railway Manager, (E) North Western Railway, Ajmer Division, Ajmer (Rajasthan)
3. Medical Superintendent, Sub Divisional Railway Hospital Rana Pratap Nagar, North Western Railway, Udaipur (Raj)
4. Sh. Subash Kumar Garg, Chief Pharmacist, Gr. II Sub Divisional Railway Hospital, Rana Pratap Nagar, North Western Railway, Udaipur (Rajasthan)

----- Respondents

Mr. Salil Trivedi: Counsel for respondents 1 to 3
None present for respondent No. 4



ORDER

Per Mr. J K Kaushik, Judicial Member.

Shri Heera Bhai Patel has prayed for the following reliefs:

- "(a) By an appropriate order, writ or direction, respondents may be directed to produce the entire service record and ACRs of the applicant for perusal of this Hon'ble Tribunal so that the truth may come out.
- (b) by an appropriate order, writ or direction, impugned orders Nos. CRE/ 246/8/2002 dated 30.04.2004 (Annex. A/1) CRE/ 246/8/2003 dated 30.04.2004 (Annex. A/2) CRE/ 246/8/2002 dated 16.06.2004 (Annex. A/3) CRE/ 246/8/003 dated 16.06.2004 (Annex. A/4) EMD/1026/01(Phar) dated 06.07.2004 (Annex. A/5) EMD/1026/01 (Phar) dated 19. 07.2004 (Annex. A/6) all the Annex. Passed by respondent No. 2 wherein the name of applicant has not been included in the suitability list for promotion, under the restructuring scheme to the post of Chief Pharmacist Gr. I and person

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junior to him has been promoted to the post of Chief Pharmacist Gr. NI may be declared illegal and be quashed and set aside.

(c) By an appropriate order, writ or direction, respondents may be directed to include the name of the applicant in the suitability list for promotion to the post of Chief Pharmacist Gr. I in the pay scale of Rs. 7450-11500 and further promote him on the said post with effect from 01. Nov. 2003 with all consequential benefits.

(d) By an appropriate order, writ or directions adverse remarks communicated to the applicant vide Annex. A/1 & A/2 may be directed to be expunged from the ACR of the applicant for the years ending 31st March 2002 and 31st March 2003.

(e) Any other relief which is found just and proper may be passed in favour of the applicant in the interest of justice by the Tribunal.

2. With the consent of the learned counsel for both the parties, the case was taken up for final disposal at the admission stage, keeping in view the urgency in the matter. We have heard the learned counsel for the contesting parties at a considerable length and perused the pleadings as well as records of this case.



3. Skipping up the superfluities, the material facts, necessitating the filing of this O.A, are that the applicant came to be initially appointed to the post of Pharmacist on 01.04.1974. He enjoyed his further promotions to the posts of Senior Pharmacist, Head Pharmacist and finally he got the promotion to the post of Chief Pharmacist Gr. II with effect from 21.09.2001 after facing the requisite selection. The Railway Board have introduced the restructuring Scheme with effect from 01.11.2003 and the applicant's name fell within the zone of consideration for the grant of benefits under the same. Subsequently, he was communicated with certain adverse remarks in his Annual Confidential Reports for the period ending 31.03.2002 and 31.03.2003, respectively, vide impugned orders dated 30.04.2004. He submitted representations against the same specifically indicating that he was never communicated any adverse entry in his ACRs, earlier to the said communications. His both the representations came to be rejected vide impugned orders dated 12.07.2004 (Annex. A/3 and Annex. A/4). This has resulted into

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depriving him the benefits as admissible under the Restructuring scheme. His numbers of juniors have been granted such benefits.

4. The validity of the impugned orders relating to the adverse ACRs have been challenged primarily on the grounds that there is an inordinate delay in communicating the adverse entries, the respondents have not followed the due procedure in regard to writing of the ACRs in as much as during his entire service career he has never been communicated/pointed out any shortcomings and even no notice to that effect has been given to him. As per the rules in force, an employee is required to be given an opportunity to explain his conduct, to say that adverse entries are only uncalled for or silently brood over the matter and on being convinced that his previous conduct justify such entry to improve his performance. Had the shortcomings been pointed out to him, the applicant would have shown improvement by correcting himself. There is no objectivity in recording the adverse remarks. No material what so ever has been disclosed in support of the delay in communicating the adverse remarks in the relevant ACRs.



5. The respondents have contested the case and have resisted the claim of the applicant. One preliminary objection had been taken regarding the maintainability of the O.A. It is stated that two more posts of Chief Pharmacist, one for general and the other for SC community in the scale of Rs. 7450-11500 were available under the restructuring scheme and against the said two additional posts one general candidate had been promoted and against the reserved post the private respondent though he belonged to SC community, could not be promoted since he had not completed two years service in the lower grade. Another post had been given to Shri Sule, a general community candidate. Though Shri Sule is junior to the applicant in the general category, the applicant

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could not be promoted in view of the fact that the applicant was not found suitable. Shri Sule has not been impleaded as a party respondent and therefore the OA is not maintainable. It has been averred that reservation roster is very much applicable to restructuring scheme. The applicant enjoyed his earlier promotions and after 2001, adverse entries were made in his Annual Confidential Reports, which have been communicated to him before considering his case for promotion, as per the Railway Board circular dated 10.06.1993. The representation submitted by the applicant reveals that he did not give any explanation/clarification with regard to the adverse remarks made in his ACRs and the same had been rightly rejected. Hence, no interference is warranted from this Tribunal. The applicant was found not suitable for benefits under the restructuring scheme for the reasons of adverse remarks in the ACRs. The grounds raised in the O.A have been generally denied. The respondent No. 4 has been subsequently promoted under the Restructuring scheme by an order dated 16.06.2005 and the order to this effect was produced by the official respondents at the time of hearing of this case.



6. The learned counsel for the applicant has submitted that the adverse remarks made in the ACRs for the period ending 31.03.2002 and 31.03.2003 have no substance. The applicant was never issued with any warning and none of his shortcomings were even intimated to him during period under report. He was neither subjected to any explanation or any advice what so ever had been tendered on any occasion. He has made us to traverse through the representation made by the applicant and has submitted that there are number of inconsistencies which have been pointed out by the applicant but the respondents have brushed aside the same through a non-speaking order. He has also submitted that no reason for rejection of his representation was forthcoming from the

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material available before this Bench of the Tribunal. He has next contended that as per the statutory rules framed by the Railway Board, adverse entries are required to be communicated within a period of one month from the date of writing of the ACR. In the normal course, ACRs are to be written within one month from 31st March of every year. In this way, the adverse remarks entered in the first ACR for the period ending 31.03.2002 ought to have been communicated to him by 31.05.2002. Similarly, the adverse entries made in the other ACR for the period ending 31.03.2003 ought to have been communicated to him by 31.05.2003. Nevertheless, the respondents department adopted an unusual course and communicated the adverse remarks to the applicant after a long period i.e. after two years in the case for first ACR and after one year in the case of second ACR. This exercise has been done only to deny the due benefits under the restructuring scheme to the applicant. In support of his contentions, he has cited the decision of the co-ordinate bench at Jaipur in case of **A K Yadav Vs. Union of India & Ors** reported in Swamys News- November 2002 page 41 dt. 14.5.2002 and the decisions mentioned therein.



7. Per contra, the learned counsel for the respondents has reiterated the defence version of the respondents as noticed above. He has contended that the Railway Board have taken a conscious decision to deal with the matters where the adverse entries have not been communicated to an employee whose case come up for consideration for promotion. The respondents have strictly followed the same and therefore no fault can be fastened with their action. His attention was invited to the very adverse entries as well as to the effect of inordinate delay in communicating the adverse entries to the applicant. However, the issue was sidetracked and no direct answer was forthcoming.

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Nothing was said regarding the procedure adopted for writing of the ACRs or on the effect of delay in communicating the adverse entries.

8. We have considered the rival contentions put forth on behalf of both the contesting parties. As far as the factual aspect of this case is concerned, it is a fact that the applicant was not issued with any written warning or suggestion indicating the shortcoming of the applicant during the period under report by his controlling authority and question of giving any opportunity to submit explanation did not arise. There is not even a word for explaining the reasons for inordinate delay in communicating the adverse entries to the applicant. In such situation, the impugned adverse entries cannot be sustained in the eye of law and we would do well to reproduce the following observations of the Apex court in case of **State of U.P. VS Yamuna Shanker Misra & Anr. (1997) 4 SCC 7** (last but two para)



"It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51A (j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon the facts or circumstances. Though sometimes, it may not be part of record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite given giving such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself necessarily, the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standards of excellence in services constantly rises to higher levels and it becomes successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

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9. As regards the shield of Railway Board RBE No.92/93 (Annexure R-3), heavily relied upon by the respondents, is concerned, the same is not meant for removal of basic defect in very writing of the ACR or the rules relating to the communication. In the instant case, the very ACRs had not been written in accordance with the procedure established by law. It is also amazing to note that the Railway Board have been pleased to provide a very inconsistent situation despite the fact that it is the general law of the land that if any adverse remark has not been communicated or one has not been given opportunity to represent against such remark, the same cannot be used against such employee. In any case, in the instant matter the adverse remarks have not been written as per the rules in force and the same are required to be treated as non-existence in the eyes of law. Therefore, the aforesaid Railway Board Circular would also be of no consequence. We may, however, observe that once a particular mode of doing a thing has been prescribed, such thing has to be done as per such mode or not at all done and other modes of doing are necessarily forbidden. Once a specific procedure has been laid down for writing as well as for communicating the adverse remarks, there could be hardly any necessity for giving any clarification in case of non-adherence of such procedure. It is unnecessary to refer to the long line of decisions commencing from **Taylor v. Taylor**, (1875) 1 Ch. D. 426; **Nazir Ahmed v. Emperor**, AIR 1936 PC 253 and **Ramachandra Keshar Adke v. Gavind Joti Chavare**, AIR 1975 SC 915, laying down hitherto uncontroverted legal principle that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. The rule adopted in **Taylor v. Taylor** is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other




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manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

10. The very objective of communicating the adverse entries gets frustrated in case there is an inordinate delay in communicating them. We are little dismayed with the aforesaid clarification that the adverse entries may be communicated at the time of consideration of one's case for promotion, if not communicated earlier. The result would be absurd in case one comes within consideration zone for promotion at a distant time, say after ten years; obviously, the same would be a futile exercise. After all, one is expected to mend his ways, which could be not possible after a long period. In this view of matter, we are unable to approve the action of the respondents.

11. The upshot of the aforesaid discussion leads us to an irresistible conclusion that this OA merits acceptance and the same stands allowed in part. The impugned orders dated 30.04.2004 (Annex. A/1), 30.04.2004 (Annex. A/2), 16.06.2004 (Annex. A/3) and 16.06.2004 (Annex. A/4) are hereby quashed and set aside. The said adverse remarks shall be considered as non-est for all purposes. The applicant shall be entitled for all consequential benefits including re-consideration of grant of benefits under restructuring scheme, within a period of three months from date of receipt of a copy of this order.


(J K Kaushik)
Judicial Member


(V K Majotra)
Vice Chairman.
27.1.06

Section officer (Record)

R/C
on 1/6/2006
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