

1/8

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR**

Original Application No. 479/2011

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Original Application No.480/2011

Date of decision: 05.11.2012

Reserved on 08.08.2012

CORAM

HON'BLE MR. G. SHANTHAPPA, JUDICIAL MEMBER

HON'BLE MR. B.K.SINHA, ADMINISTRATIVE MEMBER

S.L. Mathur S/o Late Shri M.C. Mathur, aged about 62 years, R/o Vijai Nagar colony behind Khalsa Takies Falna, District Pali (Rajasthan), retired on 30.11.2009 from the post of Sub Post Master, Bali, District Pali (Raj.).

.....Applicant in OA No.479/2011

Mohan Singh Chouhan S/o Late Shri Hem Singh, aged about 63 years, R/o village & post Phulad, District Pali (Rajasthan), retired on 30.09.2008 from the post of Postal Assistant from Head Post Office, Marwar Junction, District Pali (Raj.).

.....Applicant in OA No.480/2011

(By Advocate Mr. S.K.Malik)

Vs.

1. Union of India through the Secretary, Ministry of Communication Dak Bhawan, New Delhi.
2. The Chief Post Master General, Rajasthan Circle, Jaipur (Raj.).
3. The Superintendent of Post Offices, Pali Division, Pali (Raj.).

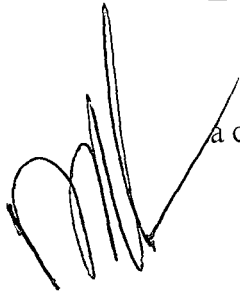
...Respondents

(By Advocate Mr. Ankur Mathur, proxy counsel for Mr. Vinit Mathur, Learned ASG)

ORDER

Per : Hon'ble Mr. BK Sinha, Administrative Member

Since the reliefs claimed in both the cases are similar and both the applicants have a common cause of action, these OAs are disposed of with this common order.



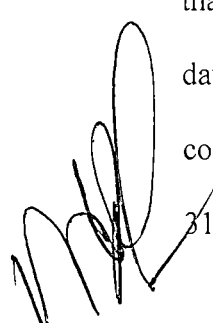
2. These OAs are directed against the order dated 20.4.2010 [A1] and the Minutes of the Screening Committee dated 22.7.2011 [A2] of the 2nd respondent whereby the cases of the applicants have not been considered for 3rd financial up-gradation for the reason of unsatisfactory service record/below Bench Mark.

Relief(s) sought:

- (a) *By an appropriate writ, order or direction impugned orders dated 20.4.2010 at Annexure.A1 and minutes of review screening dated 22.7.2011 communicated through letter dated 6.9.2011 at Annexure.A/2 qua the applicant be declared illegal and be quashed and set aside as if they were never passed against the applicant.*
- (b) *By an order or direction respondents may be directed to consider the case of Applicant for 3rd financial up-gradation under MACP scheme without considering the remarks of unsatisfactory record/below bench mark from due date ie., 2.3.f. 1.9.2008.*
- (c) *By an order or direction respondents may be directed to grant 3rd financial up-gradation under MACP Scheme w.e.f. 1.9.2008 in Pay Band-2 of Rs. 9300-34800 with grade pay of Rs. 4600- and make payment of arrears of pay ad allowances along with interest @ 12% per annum with all consequential benefits. Also issue revised PPO to this effect.*
- (d) *Any other relief which is found just and proper be passed in favour of the applicant in the interest of justice.*

Case of the applicants:

3. The applicant in OA 479/2011 was initially appointed as Postal Assistant w.e.f. 1.4.1969 and applicant in OA 480/2011 w.e.f 3.8.1974. After completion of 16 years of service the applicants were granted TBOP w.e.f. 1.4.86 and August, 1990 respectively. After completion of 26 years service the applicant in OA 479/2011 was granted BCR promotion from 1.7.1995 and applicant in OA 480/2011 in the year 2000. Applicant in OA 479/2011 retired from service on 30.11.2009 as Sub Post Master and applicant in OA 480/2011 retired from service on 30.9.2008 as Postal Assistant. The respondents considered the case of applicants for grant of 3rd financial up-gradation on completion of 30 years regular service along with other employees. However, their case was rejected vide the impugned order dated 20.4.2010 [A1] stating the reason 'unsatisfactory service record/below bench mark'. They have produced Annexure.A3 dated 26.4.2010 to show that some of the employees have been granted financial upgradation w.e.f. from their due date in the grade pay of Rs. 4600/-. The respondents vide letter dated 21.6.2010 communicated the 'average' entries in their CR for the period from 1.4.20004 to 31.3.2009 asking to represent, even though they stood retired from service before



21.6.2010. Yet, the applicants represented against the average entries. Thereafter, the respondents conducted review screening committee on 20.7.2011 [A2] to consider the case of the persons who had not been granted financial upgradation earlier. However, their names were not recommended whereas the name of TR Chouhan, TK Meena, ML Solanki have been recommended even though they had also been given 'average' and their record was unsatisfactory, which amounts to a clear discrimination against the applicants being retired persons. Applicants averred that since they have been granted two promotions one on BCR and another on TBOP and since the scheme of 3rd financial up-gradation introduced after the 6th pay Commission on completion of 30 years of service effective from 1.9.2008, the case of applicants would have been considered as of 1999 and question of considering the CR for the period 1.4.2000 to 31.3.2009 does not arise. The adverse remarks were communicated only after retirement of the applicants which has no sanctity in the eyes of law. They would have no opportunity to bring about improvement in their performance. The respondents have discriminated the serving employees with the retired persons which is clearly arbitrary, discriminatory illegal and unjust and violative of Articles 14 and 16 of the Constitution of India.

Stand of respondents in both cases:

4. The respondents have filed reply statements in both cases and contested the matter. The factual contention of the applicants is not disputed by the respondents. According to the Scheme introduced vide letter dated 18.9.2009, three MACPs were to be granted to the employees on completion of 10, 20 and 30 years. As both applicants had earned their respective two financial up-gradations, their names were proposed for MACP-III on completion of 30 years regular service. Their names were submitted to CO along with special report and ACRs of the previous six years 2003-04, 04-05, 05-06, 06-07, 07-08 and 2008-09 vide Annexure. R.1. The Screening Committee, however, did not find them fit for financial up-gradation due to unsatisfactory service record/below Bench Mark, as the ACRs of the applicants for the previous 5 years were not satisfactory.

The applicants were accordingly intimated vide letter dated 23.4.2010. On their representation, the Screening Committee reviewed their case and again found the applicants not fit for grant of MACP-III which was circulated vide letter dated 2.8.2011. The respondents have further stated that even though the applicants had retired from service, the copies of ACR which contained grading below benchmark were supplied to them with a view to afford them opportunity of making representations. Moreover the benchmark grading 'Good' was not prescribed up to grade pay of Rs. 6600/- till the time of retirement of applicants nor were there any instruction to treat the grading in the ACRs below 'Good' as an adverse entry. Hence, there was no question of communicating the entries relating to 'Average' in the ACRs to the applicants. DoPT's OM dated 13.4.2010 provides that where an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09, which would be reckoned for assessment of his fitness in such future DPCs, contain final grading below the benchmark for his next promotion, then, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation. In view of the above copies of ACRs were given to all the employees including the applicants. Regarding the averment of discrimination, the respondents submit that cases of 12 officials who were in service were considered along with the case of the applicants out of which only three officials were found fit for up-gradation and others were not recommended. The Scrutiny Committee considered the cases of all the officials whose ACRs were below bench mark and found up upgrade the ACRs of Shri TK Meena, Shri T.R.Chouhan and Shri M.L.Solanki on the basis of their performance and since there was no adverse entries in the ACRs of these officials, they were granted the financial up-gradation under MACP-III. However, the grading of the applicants could not be upgraded as a result of the above exercise and it is for this reason that the benefit of MCAP-III could not be granted to the applicants. The action of the respondents is perfectly just and proper and in accordance with the rules and instructions on the subject, the respondents pray for dismissal of the OA.

72

Facts-in-issue:

5. Having heard Learned Counsels for the parties and having gone through their pleadings, the only issue that emerges for consideration is that whether the remarks which are not communicated will have the effect of denying financial upgradation to the applicants. The admitted position of facts is that the case of the applicant was considered along with others by a DPC constituted for this purpose. The respondents communicated vide their letter dated 21.06.2010, the ACRs for the period from 01.04.2004 to 31.03.2009[A-4]. It appears from the perusal of Annexure-A/4 that the remarks for the period from 01.04.2004 to 31.03.2009 were average. The applicant had retired from service on 30.11.2009 and the remarks were received to him on 21.06.2010 after his retirement. The applicant represented vide his letter dated 03.07.2010 [A-5] wherein he submitted that he had discharged all the duties that had been assigned to him and contributed his level best as SB/RD-KBP/NSC-Media Post-E-Post-Speed Post etc. The applicant has further submitted that the persons named in this representation namely Shri Lumbaram Gehlot and 9 others have been financially upgraded by the same Committee and have not done any such work which would cause financial losses to the department and requested for financial upgradation. In this regard, the respondents have submitted in their counter affidavit that after that the cases of all the officials who were not granted MACP-III were reviewed by the Screening Committee and again the names of such officials were called for vide C.O. letter dated 04.02.2011. A proposal for consideration of MACP-III to such officials were submitted to CO Jaipur letter dated 11.02.2011. The name of the applicants were included in the list at Sl.No.2 along with service records and ACRs of previous five years i.e. 2004-2005, 2005-2006, 2006-2007, 2007-2008 and 2008-2009. This time on review of the case of the applicants, screening committee found the applicants 'not fit' for grant of MACP-III. The information regarding non-grant of MACP-III was circulated vide CO letter dated 02.08.2011. The same was communicated to the applicant vide office endorsement dated 04.08.2011. Hence, all over assessment/



13

services of the applicants were not satisfactory as per the ACRs of the applicants. The screening Committee found the applicants not fit for grant of MACP-III which is just and proper in accordance with the rules of the department. The moot question here is that these remarks were under consideration pertain to the year 2004 onwards while the applicants retired from service 31.11.2009 & 30.9.2008, there is an element of truth in the contention of the respondents that the Annual Confidential Remarks are recorded and communicated so that the assessed Officers may bring about improvement in his conduct. However, if these remarks are bunched up and communicated in one conjunction after the retirement of the officers, they will serve little purpose. There will no improvement in the conduct of the assessed Officers. In this regard the Mumbai bench of CAT has held in the case of *M.K Vincent v. Secretary, Department of Revenue, Ministry of Finance and others*, in OA No.143 of 2009 as under:-

"The foregoing discussion on the facts of the case was warranted in the interest of justice. It is our considered view that otherwise there would have been miscarriage of justice. It cannot be over-emphasized that judicial review sans proper appreciation of facts would be hollow."

*To observe so, the Tribunal relied on the case of *Moni Shankar v. Union of India and others* [2008 (1) SCC (L&S) 819] and *Abhijit Ghosh Dastidar* [2008 (3) SCT 429], wherein it was held that under certain circumstances judicial review of fact is permissible and uncommunicated remarks entered in ACR which affects the promotion chances had to be communicated. In view of what is stated above, it was held:*

"In fact and in law we find that the Applicant has been unjustly denied first financial upgradation by the Screening Committee meeting held on 19.12.2001. We, therefore, direct the respondents to reconsider the applicant's case for granting of first financial upgradation by convening a review Screening Committee, for reviewing the decision of the earlier Screening Committee, dated 19.12.2001 inasmuch as it pertains to Applicant, in the light of the discussion made herein as above. While doing so, the Review Screening Committee is to ignore the ACRs containing below-the benchmark gradings, if such ACRs stand in the way of the applicant being found fit. On being found fit, the applicant is to be granted the first financial upgradation under the ACP scheme with effect from 21.12.2000. Consequently, he shall be entitled to the arrears of higher pay and other emoluments."

The OA is allowed as above."

6. Likewise the Principal Bench of this Tribunal in the case of *Smt. Ved M. Rao and Anr. Vs. Union of India and ors.* in OA NO.2601/2004 with OA No.2818/2004, has held as under:-

9. *It was not in dispute that the downgraded ACRs which were below the benchmark had not been communicated.*

10. *At this stage, we deem it necessary to mention the decision of the Supreme Court in the case of *Nutan Arvind (SMT.) v. Union of India and Another*, (1996) 2 SCC 488. It had dealt with this question and concluded that when a high-level Committee had considered the respective merits of the candidates and assessed the gradings there is little scope for judicial interference/ review. The findings read:*

6. *When a high-level committee had considered the respective merits of the candidate, assessed the grading and considered their cases for promotion, this Court cannot sit over the assessment made by the DPC as an appellate authority. The DPC would come to its own conclusion on the basis of review by an officer and whether he is or is not competent to write the*

confidentials is for them to decide and call for report from the proper officer, It has done that exercise and found the appellant not fit for promotion. Thus we do not find any manifest error of law for interference."

To the same effect is the decision of the Supreme Court in the case of Union Public Service Commission v. H.L. Dev and Ors., AIR 1998 SCC 1069. It was held that it is exclusively the function of the Selection Committee to categorize and make assessment of the concerned officers. It is not the function of the Court/ Tribunal to hear the matter as if it is an appeal against the same. To that extent, there is no dispute at either end.

11. However, as already referred to above, the benchmark was 'Very Good'. We know that in the case of U.P. Jal Nigam & Others v. Prabhat Chandra Jain and Ors., JT 1996 (1) SC 641, the Supreme Court held:

"3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of any entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would not be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case, we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

12. The Full Bench of the Delhi High Court in the case of J.S. Garg v. Union of India & Others, 2002 (65) Delhi reported judgments 607 (FB) had also gone into the same controversy and while relying upon the decision in the case of U.P. Jal Nigam (supra), it was held that in case of downgrading of the Annual Confidential Reports, they must be communicated. Otherwise they have to be ignored.

13. In the present case before us, as already referred to above, the uncommunicated remarks, which were below the benchmark, have been considered. In terms of the decisions referred to above which bind this Tribunal, the same could not have been so considered. Necessarily, it had to be ignored. That has not been done in the present cases."

7. In the instant case also, we find that the ratio decided by the CAT in its Principal Bench and in its Mumbai Bench in the case of *M.K. Vincent* (supra) and *Smt. Ved M. Rao and Anr.* (supra), would also hold good to the instant case. These remarks stand un-communicated ab initio. It was within the knowledge of the respondents that what the normal benchmark of financial upgradation is. Hence, the remarks should have been communicated in good time so that the applicants could improve their conduct and earn better remarks in the future, having not done that communicating bunch of remarks for 5 years after his retirement is only an act of proforma compliance. Hence the ratio laid down in above two cases is fully attracted.

8. Under the circumstances discussed above, we find that the treatment meted to the applicants is not just for reasons stated above. We, therefore, direct the respondents to

consider the case of the applicants for granting of 3rd MACP by convening a Review Screening Committee for reviewing the decision of the earlier committee dated 22.07.2011 [A/2] in the light of the discussion above. It is further directed that the Review Screening Committee will ignore ACRs in the case containing the below benchmark grading, if such ACRs stands in the way of the applicants being found fit. The upgradation will take effect from the date it is due.

9. With the above observations and directions, the OA is allowed with no order as to costs.

[BK Sirha]
Administrative Member

pps/rss

G. Shanthappa
Judicial Member