IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR

Original Application No. 489 of 2011
with MA 194/2011

Dated this the 11th day of January, 2013

CORAM

HON'BLE MR. JUSTICE KAILASH CHANDRA JOSHI, JUDICIAL MEMBER
HON'BLE MS. MEENAKSHI HOOJA, ADMINISTRATIVE MEMBER

Om Prakash Sen S/o Shri Bikkan
Chand Sain, R/o Pushp Bhavan, Bali Road,
Shewari, District Pali, Office address
Mundara Post Office, Dist. Pali,
Employed on the post of Sub Post Master .....Applicant

(By Advocate Mr. S.P.Singh)

Vs.

1. Union of India through Secretary to the
Government of India, Ministry of Communications,
Department of Posts, Dak Tar Bhavan,
New Delhi.

2. The Chief Post Master General,
Rajasthan Circle, Jaipur-302 007.

3. Director O/o Post Master General,
Western Region, Jodhpur.

4. Assistant Director, O/o Post Master General,
Western Region, Jodhpur.

5. Superintendent of Post Offices
Pali Division,District Pali. ....Respondents

(By Advocate Mr. Vineet Mathur, ASGI with Advocate Mr. D.P. Dhaka)

ORDER

Per: Justice Kailash Chandra Joshi

The applicant has filed an MA 194/2011 for condoning the delay in filing the OA stating that since he was suffering from hemiplegia and fell sick and was under treatment, he could not immediately approach the Tribunal and after improving the health condition, he approached the counsel to file the OA. Hence he prays that the delay of 11 days

which was not deliberate be condoned and the OA be decided on merits. Respondents have not filed any reply to the MA nor contested the MA.

2. Since the delay is of 11 days, in order to do substantial justice, the MA is allowed and delay is condoned.

3. This OA is directed against impugned Memo No.STA/WR/43-B/MACP/10 dated 28.10.2010 of the 4th respondent and No.Staff/10-24/MACPs-III/RMS/2010 dated 20.4.2010 of respondent No.2 declining to grant the benefit of 3rd MACP to the applicant.

4. The applicant has sought the following relief(s):

> *(a) The impugned order vide Memo No.Staff/10-24/MACPS-III/RMS/2010 dated 20.4.2010 (Annexure.A2) qua the applicant may kindly be declared illegal unjust and improper and deserves to be quashed and set aside and all consequential benefits may kindly be awarded in favour of the applicant.*
>
> *(b) That the respondent may kindly be directed to grant financial upgradation MACP III to the applicant on completion of 30 years of service.*
>
> *© That the respondent may kindly be directed to expunge average remark and consequential benefits may be granted in favour of the applicant.*
>
> *(d) That any other direction or orders may be passed in favour of the applicant, which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.*
>
> *(d) That the costs of this application may be awarded to the applicant.*

5. The brief facts of the case is that the applicant was appointed on the post of PA on 4.10.1978 and rendered 33 years of service. He was granted financial upgradation as Time Bound One Promotion (TBOP) in the year 1994 on completion of 16 years of service as Postal Assistant and Biennial Cadre Review (BCR) on completion of 26 years of service in the year 2007. But on completion of 30 years of service, the IIIrd financial upgradation (MACP III) was not granted to him for the reason of unsatisfactory service/below bench mark as communicated vide order dated 20.4.2010. Applicant has completed 30 years of service in the year 2008. Even though the remarks of unsatisfactory service record/below bench mark was made to some other officials such as TR Chauhan and TK Meena vide order dated 4.1.2010 they have been granted financial

upgradation (MACP III) vide order dated 4.8.2011. The reporting officer (SPO) vide order dated 31.5.2010 communicated the adverse entry of the year 2006 to 2009 all together vide order dated 31.5.2010, which is against the settled principle of law, whereas the service record is year wise and ought to be communicated yearly giving opportunity to remove the defects if any. The applicant has also stated that he has been neither warned or exhorted during the said period with regard to his aspersion.

6. The applicant represented for review of the recommendation of the screening committee citing judgments of the Hon'ble Supreme Court and the Central Administrative Tribunals that un-communicated remarks in the ACR of an employee should not be taken to decide his/her fitness for grant of MACP. The applicant again submitted further representations on 20.10.2010 and 26.9.2011 to consider his case for MACP under the MACP Scheme, but no reply has been received. Applicant also submits that he is a disabled with 40% but with zeal and enthusiasm he has not compromised to the work despite of a disabled person which is evident from the service record as competent authority always marked physically fit. The respondents have not complied with Para 2 of DOPT Memo No.13015/3/2002 dated 9.1.2004 wherein it is stated that the employee shall not be deprived promotion on reason of being disabled person. Hence, he filed this OA for the aforesaid reliefs on the ground that failure of respondents to communicate any remarks even after several requests of applicant show that there is nothing against the applicant to deprive the benefit and the action of respondents is clearly arbitrary, unjust, illegal and contrary to law. It also violates Articles 14 and 16 of the Constitution of India.

7. The respondents have filed a counter affidavit and contested the prayers in the OA. The respondents have stated that since the applicant had earned two financial upgradations, his name was proposed for the consideration of MACP III as he has completed his 30 years regular service on 16.10.2008. His name was forwarded to C.O. Jaipur with special report and ACRs of the previous six years from 2003 to 2009. His name was considered by the Screening Committee and found not fit for the financial

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upgradation under MACP III due to unsatisfactory service record/below bench mark, as the ACRs of the official of previous five years were not satisfactory. This was informed to the applicant vide office endorsement dated 23.4.2010. The review Screening Committee reviewed the ACRs of all the officials which were below bench marks and found that the applicant was not fit for consideration. The name of the applicant was again included in the list at S.No.17 and sent with the ACRs of previous five years ie., 2004 to 2009 and service record. This time also the Screening Committee did not find the official fit for grant of MACP.III. This was circulated vide CO dated 2.8.2011 and communicated to applicant vide endorsement dated 4.8.2011. They have further stated that they have clearly followed the DOPT guidelines dated 10.4.1989 which says that the DPC enjoys full discretion to devise their own methods and procedure for objective assessment of the suitability of the candidates who are to be considered; the DPC should not be guided merely by the overall grading that may be recorded in the ACR but should make its own assessment on the basis of entries in the ACRs; that in assessing the suitability the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of the general service record of the officer and the fact of the imposition of the penalty, he should be considered suitable for promotion. The instruction regarding communication of below benchmark gradings issued by DOPT is in respect of promotion only and has no bearing in upgradation under MACPs. They have further stated that the representations of the applicant have been duly considered by the respondents. Hence, the respondents submit there is no merit in the OA, and pray for dismissal of the same.

8. Having gone through the documents adduced as well as the reply filed by the department and having heard the learned counsels appearing for the parties, the following issues emerge for consideration:

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(i) Whether un-communicated remarks, even if they are adverse, can form the basis of an employee being declared unfit for MACP or any ancillary benefits?

(ii) What relief, if any, can be granted to the applicant?

Whether un-communicated remarks, even if they are adverse, can form the basis of an employee being declared unfit for MACP or any ancillary benefits?

9. The applicant in this application averred that the ACRs for the period from 2006 to 2009 were not communicated to him and these un-communicated ACRs were considered while rejecting the claim for MACP. The respondents in Para 4.4 and 4.5 of the reply averred that ACRs for the year 2006-09 were below bench mark and the same were communicated to the applicant as per instructions contained in the Directorate, New Delhi dated 13.4.2010 and 4.6.2009 (A7). Thus it is clear from the pleadings in Para 4.4 and 4.5 that the ACRs for the years 2006 to 2009 were communicated to the applicant after 30th April 2010 and it has never been averred anywhere that Annexure.A2 was issued after considering the representation regarding upgradation of ACR, if any, filed by the applicant. Further it is clear from Annexure.A2 as well as the averment made in Para 4.4. that the ACR for the year 2006 to 2009 remained un-communicated till the year 2010. In view of the above pleadings made in the application as well as the reply, the issue to be decided is whether un-communicated remarks can form the basis of an employee being ruled not fit for MACP. Here, it is also an admitted position that hitherto the practice had been that only adverse remarks were getting communicated to the employee giving him a chance to represent against the same. The remarks which did not fall within the adverse category were not being communicated, with the result that in any selective process, these remarks could become the basis for a person getting eliminated. Hence, a practice grew up where instead of recording adverse entries the officers found it convenient to record colourless or insipid entries like 'average', 'good' etc. so that it has its desired results of denying promotion to the employee assessed while not requiring them to justify their remarks. This situation has changed dramatically after the case of

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Dev Dutt v. Union of India & Ors., reported in (2008) 8 SCC 725 in Civil Appeal No.7631 of 2002, decided on May 12, 2008, a landmark decision on the subject. The Hon'ble Supreme Court has held in this case as under:

> ***"9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.***
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> ***10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, and the decision relied upon by the learned counsel for the respondent are distinguishable."***

10. The Hon'ble Apex Court further held that all entries, good or bad, are to be necessarily communicated to an employee under the State or instrumentality of the State as under:

> ***"13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even it there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.***
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> ***14. In most services there is a gradation of entries, which is usually as follows:***
>
> ***(i) Outstanding***
> ***(ii) Very good***
> ***(iii) Good***
> ***(iv) Average***
> ***(v) Fair***
> ***(vi) Poor***
>
> ***A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.***
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> ***15. If we hold that only "poor" entry is to be communicated, the consequences may be that persons getting "fair", "average", "good" or "very good" entries will not be able to represent for its upgradation, and this may***

subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the office memorandum dated 10/11.09.1987, 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 ay 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."

11. A coordinate bench of this Tribunal at Mumbai in the case of **M.K Vincent v. Secretary, Department of Revenue, Ministry of Finance and others**, *in* OA No.143 of 2009 has held 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."***
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> ***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:***
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> ***"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."***
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> ***The OA is allowed as above."***

12. 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***

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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 bythe 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 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. Uniono f 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."*

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13. In the present case, the admitted position is that the remarks upon which the Review Screening Committee in its meeting held on 22.7.2011 took decision to deny MACP to the applicant were on the basis of the Annual Confidential Reports which had not been communized to him earlier. The plea of the respondents in Para 4.4 and 4.5 is that the ACRs of the applicant were communicated to him as per letter dated 13.4.2010 and 4.6.20009 (A7) but this plea averred in the counter does not hold good here in the light of the judgment of the Hon'ble Apex Court and orders of the different benches of the CAT. Accordingly it is held that un-communicated remarks in the ACRs even if they are adverse cannot form the basis of an employee being declared unfit for granting MACP or any ancillary benefits.

What relief, if any, can be granted to the applicant?

14. In view of the discussion made herein above while considering the point No.1 we are firmly of the opinion that the respondent organization has relied upon un-communicated remarks below the benchmark to deny MACP to the applicant, which is bad in law and also against the settled proposition of law. Accordingly O.A is allowed and applicant is entitled to relief as hereunder:-

(i) The impugned order No.Staff/10-24/MACPs-III/RMS/2010 dated 20.4.2010 qua applicant is hereby quashed and set aside as being bad in law.

(ii) The respondents are directed to consider the case of applicant for 3rd MACP on completion of 30 years of service by convening a review Screening Committee.

(iii) The Screening Committee while reviewing the case of the applicant is to ignore those uncommunicated ACRs containing below bench marks grading if such ACRs stand in the way of the applicant being found fit and to give all consequential benefits as per rules.

(iv) There shall be no order as costs.

Meenakshi

[Meenakshi Hooja]
Administrative Member

[Justice K.C. Joshi]
Judicial Member

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