CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR

Original Application No.546/2011

Date of decision: 31-10-2012

Reserved on 13.09.2012

CORAM

HON'BLE MR. G. GEORGE PARACKEN, JUDICIAL MEMBER
HON'BLE MR. B.K.SINHA, ADMINISTRATIVE MEMBER

Harish Chandra Singh S/o late Shri Mani Ram Singh, aged about 59 years, R/o IBM Residential Colony Hiran Magri, Sector-11, Udaipur 3, presently working on the post of Sr. Mining Geologists, Indian Bureau of Mines (IBM), 142 'C' Hiran Magri, Sector-11, Udaipur (Raj.).

.....Applicant

(By Advocate Mr. S.K.Malik)

Vs.

1. Union of India through the Secretary Government of India, Ministry of Mines, Shashtri Bhawan, New Delhi.
2. The Controller General Indian Bureau of Mines (IBM), Indira Bhawan, Civil Lines, Nagpur- 440 001.

...Respondents

(By Advocate Mr. Vinit Mathur, ASG and Mr. Ankur Mathur)

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

This OA is directed against impugned Memo No.A.32013(30)/2009 dated 31.3.2010 [A1], Office Order No.51 dated 18.3.2010 [A2] and letter No.31/6/2011-Mines.III dated 14.2.2011 [A3] declining to grant the benefit of 2nd MACP to the applicant.

Relief(s) sought:

(i) ***By an appropriate writ order or direction impugned memo dated 31.3.2010 at Annexures.A1, impugned order dated 18.3.2010 at***

Anexure.A2 and impugned letter dated 14.2.2011 along with proceedings of the departmental screening committee held on 16.2.2010 at Annexure.A3 be declared illegal and be quashed and set aside.

(ii) By an order or direction respondents may be directed to consider the case of Applicant for 2nd MACP w.e.f. 1.9.2008 scheme by convening review DPC and grant the benefit along with all consequential benefits including arrears of pay and allowances with 18% interest per annum.

(iii) By an order or direction un-communicated adverse remarks or below bench mark if any exists the same may be expunged as if they never exists against the applicant.

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

Case of the applicant:

2. The brief facts of the case is that the applicant was initially appointed as Junior Mining Geologist [Group A post] on 31.5.1985 through UPSC. Applicant was promoted as Senior Mining Geologist from 15.8.2002 in scale 10000-15200. The applicant was entitled to be considered for 2nd MACP as per the scheme w.e.f. 1.9.2008 on completion of 20 years service on 31.5.2005. The respondents granted MACP to some of the Group 'A' officers in which the applicant's name was not included [A/2]. Applicant filed a representation against this decision dated 19.3.2010 [A4] to which he was informed that the screening committee had not recommended his case as he had been found unfit. [A1]. The applicant adopted the RTI route for ascertaining the reasons for his omission. He was provided the minutes of meeting of the departmental screening committee held on 16.2.2010. Applicant submits that the department has not taken into consideration the DOPT guidelines dated 10.4.89 prescribed for departmental promotion committee. Para 12.1 of the said guideline prescribes that un-communicated adverse remarks cannot be taken into account while considering the case of MACP. Applicant further submits that he has not been communicated with any adverse remarks in his ACRs. He has alleged that Respondent No.1 has played with his carrier for the reason

that he had earlier deposed for the Government of India before the Hon'ble Court at Jabalpur. 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 ACP. The applicant again submitted another representation on 1.3.2011 to consider his case for MACP w.e.f. 1.9.2008 under the MACP Scheme. He apprehends that he may not be considered in the next DPC which is likely to be held. 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 for the period 2003-04 to 2007-08 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.

Stand of the respondents:

3. The respondents have filed a counter affidavit and contested the prayers in the OA. The respondents have admitted in page 3 of their counter that the ACRs of the applicant did not contain adverse remarks that needed to be communicated and below bench mark grading need not be communicated and further that there is no infirmity in the procedure adopted by the respondents in not communicating the final grading to the applicant. 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. A benchmark of ' Very Good' is required from grade pay Rs. 7600/- and above and the Committee assessed the applicant and four other officers as 'unfit' for upgradation w.e.f. 1.9.2008, scrupulously following the procedure laid down in DOPT OM dated 10.4.1989. 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. The subsequent Screening Committee also found the applicant unfit for grant of MACPs w.e.f. 1.9.2009 and this was communicated to him vide memo dated 7.7.2011. Hence, the respondents submit there is no merit in the OA, and pray for dismissal of the same.

Facts in issue:

4. Having gone through the documents adduced, pleadings in the OA and having heard the learned counsels appearing for the parties, the following facts in issue emerge:

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

5. All others facts being admitted the only issue to be decided is that whether un-communicated remarks can form the basis of an employee being rule not fit for promotion. 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. However, this situation has changed dramatically after the case of ***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. In this case, the appellant was an Executive Engineer in the Border Roads organization, who was considered and found ineligible for the post of Superintending Engineer on completion of the qualifying service of five years in the grade of Executive Engineer on the ground that " the ACRs of the last

five years were not unanimously very good or above". The grievance of the appellant was that he was not communicated the "good" entry for the year 1993-1994. He submitted that had he been communicated that entry he would have had an opportunity of making a representation for upgrading that entry from "good" to "very good", and if that representation was allowed, he would have also become eligible for promotion. The appellant in this case submitted that hereby the rules of natural justice stood violated. 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."***

6. The Hon'ble Apex Court further went ahead to hold that all entries, good or bad, are to be necessarily communicated to an employee under the State or instrumentality of the State and held 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.

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 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."

7. Nearer home, the 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."

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."

8. 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.***
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> ***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:***
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> > ***"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."***
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> ***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.***
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> ***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:***
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> > ***"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."***
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> ***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."

9. In the instant case, the admitted position is that the remarks upon which the Screening Committee in its meeting held on 16.02.2012 had taken the decision to deny MACP to the applicant had not been communicated him earlier. The plea of the respondents on page 3 of the counter is that the ACRs of the applicant did not contain adverse remarks as such were not communicated, does not hold good here in the light of the afore cited judgment of the Hon'ble Apex Court and the different benches of the CAT.

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

10. In view of the above, 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. As such the applicant is entitled to relief as here under:-

(i) the impugned Annexure-A/1 dated 31.03.2010, Annexure-A/2 dated 18.03.2010 and impugned letter dated 14.02.2011 alongwith the proceedings of the departmental screening committee held on 16.02.2010 at Annexure-3 are hereby quashed and set aside as being bad under law.

(ii) The respondents are directed to consider the case of applicant for 2nd MACP w.e.f. 01.09.2008 scheme by convening review DPC to considering granting benefits

with all consequential benefits including arrears of pay and allowances with 9% interest per annum.

(iii) The DPC while considering the case of applicant will treat all adverse remarks or below bench marks, which had not been communicated, expunge as if never existed against the applicant.

(iv) There shall be no order as costs.

11. Accordingly, the OA is allowed as stated above.

[BK Sinha]
Administrative Member

[G. George Paracken]
Judicial Member

pps/rss