

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR

Original Application No.08/2013

Jodhpur this the 14th day of February, 2014.

CORAM

**Hon'ble Mr.Justice Kailash Chandra Joshi, Member (J) and
Hon'ble Ms. Meenakshi Hooja, Member (A)**

P.D. Naungia S/o Late Shri Bhura Ramji, aged about 65 years, by caste Jatia (SC), R/o VIII+Po-Auwa, District Pali (Office Address: Retired on 31.10.2008 as PRI (Postal Assistant), Postal Department.

.....Applicant

(Through Advocate Mr. S.P. Singh)

Versus

1. Union of India through the Secretary, Govt. of India, Ministry of Communication, Department of Post, Dak Tar Bhawan, New Delhi
2. The Chief Post Master General, Rajasthan Circle, Jaipur-302 007
3. Assistant Post Master General (S&V) for Chief Post master General, Rajsthan Circle, Jaipur – 302 007
4. Superintendent of Post Offices, Pali Division, Pali - Marwar

(Through Advocate Smt. K. Parveen)

..... Respondents

ORDER (ORAL)

Per Justice Kailash Chandra Joshi, Member (J)

The short facts for deciding this OA as averred by the applicant are that the applicant was appointed on the post of Postal Assistant (PA) from 29.12.1971 and thereafter he rendered unblemished continuous service of 38 years and superannuated on



30.11.2009. The applicant has been granted financial upgradation under Time Bound One Promotion (TBOP) on completion of 16 years on 20.12.1987 and under BCR Scheme on completion of 26 years of service on 01.07.1996. The applicant was granted BCR in the year 1996 and on completion of 30 years of service by virtue of new scheme known as Modified Assured Career Progression (MACP) 3rd financial upgradation w.e.f. 01.09.2008 was due and the junior to the applicant and similar situated person such as TR Chauhan and TK Meena have been promoted but the applicant is deprived of the 3rd financial upgradation stating the reasons below benchmark Annual Confidential Reports (ACRs) and the persons having the same benchmark have been promoted. The respondents did not communicate the below benchmark ACRs and no efforts were made to rectify the defects as well as the ACRs from the year 2006 to 2010 have been intimated in the year 2011 whereas the ACR of every year is required to be communicated, if adverse in the end of the year. The respondents did not issue memo or notice for pointing out the shortcomings on the part of the applicant so that he would have got chance to mend himself. Therefore, by way of this application the applicant has prayed for following relief(s):-

- (a) The impugned order vide Memo No. Staff/10-24/MACP-III/Postal/Jodhpur/2011-12 dated 09.11.2011 (Annex. A/1) 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) By an order or direction respondents may be directed to consider the case of Applicant for 3rd MACP w.e.f. 01.09.2008 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.
- (c) By and order or direction un-communicated adverse remarks or below bench marked if any exists the same be expunged as if they never exists against 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 justice.
 - (e) That the costs of this application may be awarded to the applicant.

2. By way of reply respondents denied the factual aspects on non-communication of the adverse confidential reports to the applicant and averred that on completion of 16 years of regular service the applicant was granted TBOP promotion w.e.f. 20.12.1987 as per the rules of the department and thereafter on completion of 26 years, the applicant was granted BCR promotion w.e.f. 01.07.1996. The applicant superannuated from the service on 31.12.2010, hence applicant was granted two promotions i.e. TBOP and BCR during his service. The MACP scheme was introduced in connection with the financial upgradation of departmental employees vide Directorate, New Delhi letter dated 18.9.2009. According to this scheme MACP-I, MACP-II and MACP-III were to be granted to the employees of the department on completion of 10 years, 20 years and 30 years service and as applicant had completed his 30 years of regular service, his name was also proposed to be considered for grant of MACP-III on 14.01.2002. The name of the applicant was also put before the screening committee alongwith the previous six years ACRs i.e. 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 but he

was not found fit for the financial upgradation due to unsatisfactory service record/below benchmark. The names of all the officials who were not granted MACP-III were communicated alongwith reasons by the respondent No. 3 vide letter dated 20.04.2010. The applicant was also informed vide office endorsement dated 23.04.2010. Thereafter a scrutiny committee was formed on 19.11.2010 for officials who were not found fit for grant of MACP-III on account of below benchmark ACRs. The name of applicant was also included in the list which was put up before the review scrutiny committee consisting of 3 members. The review scrutiny committee reviewed the ACRs of all the officials including the applicant and did not find the applicant fit for upgradation.

After the above said exercise, again the names of such officials were called for reconsideration for grant of MACP-III alongwith service record and ACRs for the years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 and again the screening committee did not find the applicant fit for grant of MACP-III. Therefore, the applicant was not granted MACP-III.

The respondents in reply, replied the plea of the applicant regarding communication of ACRs for the year 2004 to 2010 all together in the year February, 2011 that there are instructions by the Department of Personnel & Training (DoPT) vide OM dated 13.4.2010 that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which

would be reckonable 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 should be given a communication. Thereafter, in continuity of these instructions, scrutiny committees were ordered to be constituted at Divisional level for scrutinizing the confidential reports of postman, Postal Assistants/Sorting Assistants for their preceding 5 years on the basis of the entries made by the reporting officers.

3. Heard. Counsel for the applicant contended that the applicant has been communicated the ACRs for the years 2004 to 2009 by a single communication whereas the rules provide that such ACR should be communicated in the end of the year, before convening the meeting of the committee such ACRs were required to be communicated to the applicant.

4. Per contra learned counsel for the respondents contended that no case is made out in favour of the applicant and after MACP scheme coming into the force, the ACRs for the year 2004 to 2009 were communicated to the applicant.

5. 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:

- (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?

6. The applicant in this application averred that the ACRs for the period from 2004 to 2009 were not communicated to him and these un-communicated ACRs were considered while rejecting the claim for MACP. The respondents in Para 4.3 and 4.4 of the reply averred that ACRs for the year 2004-09 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. Thus it is clear from the pleadings in Para 4.3 and 4.4 that the ACRs for the years 2004 to 2009 were communicated to the applicant after 30th April 2010 and it has never been averred anywhere that Annexure A/2 was issued after considering the representation regarding upgradation of ACR, if any, filed by the applicant. Further it is clear from Annexure A/2 as well as the averment made in Para 4.3 and 4.4 that the ACR for the year 2004 to 2009 remained un-communicated till the year 2011. 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 ***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."

"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."

7. 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 if 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.

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 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."

8. A coordinate bench of this Tribunal at Bombay 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."

9. 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."*

10. In the present case, the admitted position is that the remarks upon which the Review Screening Committee took decision to deny MACP to the applicant were on the basis of the Annual Confidential Reports which had not been communicated 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 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. In such similar/identical cases decided by this Tribunal in OAs No.489/2011 and 180/2012 decided on 11th January, 2013 and 22nd March, 2013 respectively, it has been 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, and we see no reason to differ from the same in this case. 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.

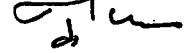
What relief, if any, can be granted to the applicant?

11. In view of the discussion made hereinabove 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/MACP-III/Postal/Jodhpur/2011-12 dated 09.11.2011 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 HOOJA)
ADMINISTRATIVE MEMBER


(JUSTICE K.C. JOSHI)
JUDICIAL MEMBER

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Per
K. Branson
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Shirley
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