

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NOS.471/2010 & 799/2009

Dated this the 11th day of February, 2011

C O R A M

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

OA 471/10

P. Sudhabai W/o. P. Balakrishnan
U.D.C., Passport Office
Trivandrum. Residing at
'Chittezhath House',
Kadakkavur, Trivandrum

..... Applicant

(By Advocate Mr. Shafik M.A & Mr. R. Sreeraj)

Vs

1 Union of India represented by
Joint Secretary (CPV) & The
Chief Passport Officer,
Ministry of External Affairs
Government of India, New Delhi

2 The Under Secretary (PV)
Ministry of External Affairs
Government of India, New Delhi

3 The Passport Officer
Passport Office, Trivandrum. Respondents

(By Advocate Mr. Sunil Jacob Jose, SCGSC).

OA 799/09

P. Sudhabai W/o. P. Balakrishnan
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4 The DPC constituted for promotion
of UDCs as Assisted Conducted on
31.10.2008, represented by its
Chairman, Ministry of External Affairs
Government of India, New Delhi

..... Respondents

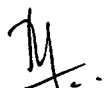
(By Advocate Mr. Sunil Jacob Jose, SCGSC).

These Applications having been heard on 1.2.2011, the Tribunal delivered the following:

ORDER

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

As the issues raised in these two Applications filed by the very same applicant are interlinked, they were heard together and are being disposed of by this common order.



O.A.799/09

2 In this Application the applicant is aggrieved by the refusal of the respondents to include her in Annexure A-5 panel for promotion as Assistant based on the DPC held on 31.10.2008.

3 The applicant is presently working as UDC under the 3rd respondent. She joined service as LDC on daily wages having been sponsored by the Employment Exchange, Chennai w.e.f. 1.6.1985. She is at present working as UDC in the Passport office Trivandrum. She is fairly senior UDC having clean records without any adverse entries. The grievance of the applicant is that despite this, she was not included in the panel published. Aggrieved, she submitted representations. The respondents replied that she is graded as "Average for 3 years as such she is not recommended as the DPC has graded her as "Unfit" and that 3rd ACP is also denied to her on that ground. Apprehending foul play and error in the conduct of DPC she has filed this O.A for a declaration that she is entitled to be included at the appropriate place in A-5 panel for promotion as Assistant as per the DPC meeting held on 31.10.2008 and to promote her as Assistant with effect from the date on which her junior is promoted with all attendant benefits.

4 The respondents filed reply statement rebutting the averments in the O.A. They stated that the applicant was considered by the DPC for promotion and that she was found "Unfit ". As regards the allegation of the applicant that the remarks in ACRs were not communicated, it is submitted that only adverse entries are to be communicated and not the grading, as per the then existing instructions and that the new

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guidelines of DOPT dated 14.5.2009 which was already produced by the applicant as Annexure A-11 have only prospective application.

5 The applicant filed rejoinder stating that a minor penalty imposed on 29.12.2004 cannot be a bar for promotion on 31.10.2008. She denied that the Bench mark of "Good" is applicable for upgradation under the MACP scheme. The applicant also relied on a catena of decisions of the Apex Court and contended that any remarks which has the effect of impairing promotional prospects of an individual should be communicated and if not communicated the uncommunicated remarks cannot be taken into accounts by the DPC.

6 The respondents filed additional reply statement reiterating the statement in the reply.

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7 In this Application the applicant, is challenging Annexure A-1 order dated 24.5.2010 transferring her to Malappuram. In the year 1988 she was transferred to Kochi and on 6.4.1990 she was transferred back to Trivandrum RPO. In 1999 she was promoted as UDC and is presently working as UDC. Her name figures at Sl. No. 65 in the seniority list of UDCs published by the 1st respondent as on 1.1.2008 She was due for promotion as Assistant in the lyear 2008 when her juniors were promoted but she was not promoted . She has challenged her non promotion in O.A. 799/2009 which is still pending. According to the transfer policy, transfer of LDCs and UDCs shall be avoided except in case of bifurcation or in case of redistribution of posts. The movement is also based on longest stay in a station. According to the applicant

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there are a number of officials like Sri Umadevi, Smt. Hemalatha, A Brinda, , Unnikrishna Kurup who are junior to the applicant but promoted as Assistant in 2008 who have completed more than 20/25 years of service in the same office, and still continuing in the same office. The applicant who was discriminated in promotion has now been transferred to Malappuram. She has submitted detailed representation detailing her personal problems to the 2nd respondent. Apprehending immediate relief she has filed this O.A., challenging Annexure A-1 order as illegal, arbitrary and violative of the instructions, principle of natural justice, she has already been denied promotion and the denial of promotion is pending before the Tribunal in O.A. 799/2009 and the transfer is against the transfer policy of the department as it is on the basis of station seniority only, considering her difficulties the 3rd respondent has recommended her retention at Trivandrum and that most of the employees who were issued orders of transfer have been retained on consideration of their representations.

8 The 3rd respondent filed reply statement on behalf of the respondents. At the outset, they stated that transfer is an incidence of service and that Courts would not interfere unless there is violation of some rule which prohibits transfer or there is a genuine case of malafides. They stated that the transfer order is a transfer simpliciter, in public interest considering the administrative need of the Department at the Malappuram office and that there is no discrimination in the case of the applicant. They stated that the applicant is the seniormost UDC in Trivandrum office having continuous stay of 20 years. As regards her promotion to the post of Assistant, they submitted that the performance report comes up at the time of consideration for promotion

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and that the ACR of the applicant is below the bench mark of "Good". Therefore, she was not found fit for promotion. They stated that the applicant though came to the office on 2.6.2010 refused to accept the relieving order therefore the respondents have no other option but to send the relieving order by speed post to the residential address of the applicant. They stated that the substitute of the applicant Juni Susan Abraham joined duty on 4.6.2010.

9 I have heard learned counsel for the parties and perused the documents.

10 The main grouse of the applicant is that the grading which is below the bench mark of "Good" was not communicated to her hence, it cannot be taken into consideration by the DPC and that once she is promoted, she could not be transferred as she would not be the seniormost Assistant and in that case she would not be the longest stayee in the station liable for transfer and that all UDCs on promotion as Assistants were retained in the same office.

11 The contention of the respondents on the other hand, is that the applicant was considered for promotion but the DPC has found her unfit for promotion based on the ACRs which are only "Average" she did not earn the benchmark of "Good". They further contended that among the UDCs, the applicant is the seniormost and longest stayee at the station therefore, she is liable to be transferred.

12 As regards functioning of the DPC, the instructions of the Government of India, Department of Personnel & Training OM dated 8th

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February, 2002 lays down the procedure to be observed by the DPC. The relevant portion is extracted below:

3.2 Benchmark for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed benchmark and accordingly grade the officers as fit or unfit only. Only those who are graded fit (i.e who meet the prescribed bench mark) by the DPC shall be included and arranged in the select panel in order of inter se seniority in the feeder grade. Those officers who are graded unfit (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded fit(in terms of the prescribed benchmark)by the DPC.

13 The benchmark fixed for Assistant is "Good" . The applicant have "Average" grading for the years 2002-03, 2004-05, 2005-06 and 2006-07. Therefore, the DPC had taken into account the ACRs for the period 2002-03 to 2006-07 to consider the promotions. She had obtained only one "Good" grading for the year 2003-04. Accordingly, the DPC has marked her "Unfit" for promotion, her juniors who were found "Fit" were promoted superseding the applicant. As regards the allegation of the applicant that the remarks in the ACRs were not communicated it is found that only adverse entries and not grading are usually communicated as per the instructions of DOPT. I notice that the very same issue was considered by the Tribunal in the common order in O.A. 864/2006, 1/2007 and 3/2007 and the Tribunal allowed the O.As. The relevant portion is extracted below:

"9. Arguments were heard and documents, including the ACRs and DPC Proceedings perused. The DPC took into account the ACRs for the years 2000 - 2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005. The grading awarded in each of the above year to each of the applicants is as under:-

Applicant	2000-01	2001-02	2002-03	2003-04	2004-05
S. Preetha	Very Good	Good	Average	Good	Average
Shini James	Very Good	Average	Average	Good	Good
S. Jaya	Good	Good	Average	Good	Average
P.C.Beena	Very Good	Average	Average	Good	Good

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10. The above would show that the graph of assessment has been fluctuating and in zig-zag motion. The sting of below benchmark grading would continue for five years. As for example, all the applicants have the grading of Average for the year 2002 - 2003 the adverse effect of which would prevail till 2006-2007. Again, Applicant in OA No. 1 of 2007 and 3 of 2007 have the below Bench mark grading for the year 2004-2005, the adverse effect of which would extend till 2009-2010.
11. Admittedly, the applicants have not been communicated with the average grading, which is below the prescribed Benchmark. The question is what is the impact of the same.
12. In *State of Haryana v. P.C. Wadhwa, (1987) 2 SCC 602*, the Apex Court has held as under:-
14. *The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career.*
13. Again, in *Swatantar Singh v. State of Haryana, (1997) 4 SCC 14*, it has been held -
- "It is true that in view of the settled legal position, the object of writing the confidential reports or character roll of a government servant and communication of the adverse remarks is to afford an opportunity to the officer concerned to make amends to his remissness; to reform himself; to mend his conduct and to be disciplined, to do hard work, to bring home the lapse in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant reflecting as accurately as possible his sagging inefficiency and incompetency. The defects and deficiencies brought home to the officer, are means to the end of correcting himself and to show improvement towards excellence."*
14. Thus, from the above decisions of the apex Court, it is evident that the precise purpose of communication of adverse remarks is that it acts as a curve corrector, so that the employee could reform himself and improve in order to ensure that the career prospects are not hampered. It is not meant to penalize the individual.
15. Now, what is the consequence of non-communication of those remarks which ought to have been communicated? Answer to this question is available in the decision of the Apex Court in *Union Public Service Commission v. Hiranyalal Dev, (1988) 2 SCC 242*, wherein the Apex Court has held, *"It cannot be gainsaid that the Selection Committee could not have taken into consideration the adverse remarks entered in the records which had not been communicated to Respondent I"*. The Apex Court has in the case of *Prabodh Sagar v. Punjab SEB, (2000) 5 SCC 630*, opined, *"The challenge, however, is based on two principle counts — on the first it is the issue of mala fides and on the second it is the un-communicated adverse reports: undoubtedly both these counts are rather serious in nature and success in regard to any one of the counts would entitle the appellant herein to appropriate relief."*
16. The above decisions of the Apex Court as well as the Full Bench of the Tribunal, when read concurrently, would mean that any remark which has the effect of impairing the promotional prospects of an individual should be communicated and if not communicated, the un-communicated remark cannot be taken into account by the D.P.C.
17. Thus, following the decision of the Full Bench cited above, it could be safely stated that in view of the fact that the applicants have not been communicated the

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adverse remarks, such grading ought not have influenced the DPC in their recommendation.

18. Now, what should be the remedy? The only course left is that the DPC should consider afresh the case of the four applicants, without taking into account the uncommunicated remarks and if otherwise found fit, the applicants should be recommended for promotion and the respondents may act on the basis of the same. Of course, in the event of promotion being made, the applicants shall be entitled only to notional fixation of pay, actual being available only from the date they hold the higher responsibilities. For, denial of promotion by the respondents in these cases was not deliberate but by an erroneous interpretation of the rules on the subject as to which entries are to be necessarily communicated.

19. In view of the above, the OAs are allowed to the extent that the impugned orders in all the O.As (Annexure A-1 to A-3 in OA No.864/2006, Annexure A-1 and A-2 in OA No. 1/2007 and Annexure A-1 and A-2 in OA No. 3/07 whereby it was informed that the DPC did not consider the applicants fit for promotion) are hereby quashed and set aside. Respondents are directed to hold a review DPC in respect of the applicants which would consider the case of the applicants, without taking into account the uncommunicated grading below the benchmark and if otherwise found fit for promotion, the applicants shall be accordingly promoted to the post of U.D.C. However, it is made clear that such promotion shall be on notional basis, and would count for seniority and fixation of notional pay, and actual pay would be available only from the date the applicants ensoulder higher responsibilities.

20. This order shall be complied with, within a period of three months from the date of communication of this order."

The case of the applicant is exactly identical to the above cases.

14 Accordingly, I follow the order of this Tribunal in the orders extracted above and allow O.A. 799/2009. The respondents are directed to hold review DPC in respect of the applicant without taking into account the uncommunicated grading below the benchmark and if otherwise found fit for promotion she shall be accordingly promoted to the post of Assistant on notional basis and seniority and actual pay would be available only from the date the applicant shoulder higher responsibilities.

15 In view of the decision above, I am of the opinion that the end of justice will be met if the transfer of the applicant is kept in abeyance till her promotion to the post of Assistant is reviewed as directed.

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16 In the result, O.A. 799/09 is allowed following the orders of the Tribunal in the cases cited supra and O.A. 471/2010 is closed with the direction that the transfer order shall be kept in abeyance till the direction in O.A. 799/09 is completed. No costs.

Dated 11th February, 2011


(K. NOORJEHAN)

ADMINISTRATIVE MEMBER

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