

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.519/93

Friday, this the 10th day of June, 1994

C O R A M

HON'BLE MR JUSTICE CHETTUR SANKARAN NAIR, VICE CHAIRMAN

HON'BLE MR PV VENKATAKRISHNAN, ADMINISTRATIVE MEMBER

....

G Appukuttan, Sree Shanmugha Vilasam,
Palachira, Varkala
Assistant Engineer (Retd),
Southern Railway, Palakkad.

....Applicant

By Advocate Shri CP Sudhakara Prasad.

Vs.

1. Union of India represented by
Secretary, Ministry of Railways,
Rail Bhavan, New Delhi.
2. The General Manager,
Southern Railway, Madras.
3. The Chief Personnel Officer,
Southern Railway, Madras.
4. AS Raman, Executive Engineer (Construction),
Southern Railway, Ernakulam.
5. The Review Departmental Promotion Committee
represented by its Convenor,
Chief Personnel Officer,
Southern Railway, Madras.

....Respondents

By Advocate Smt Sumathi Dandapani.

O R D E R

PV VENKATAKRISHNAN, ADMINISTRATIVE MEMBER

Applicant, now retired, is aggrieved by Annexure I order dated 4.3.1993 issued by the General Manager, Southern Railway, in which applicant has been informed that he had not been found suitable by the Review Committee for adhoc promotion to Senior Scale. The same Committee had recommended empanelment of 4th respondent for adhoc promotion to Senior Scale with effect from 29.7.1989.

2. Applicant contends that promotion to a Senior Scale Group B post is based on seniority-cum-suitability and as long as he was not

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found unfit, 4th respondent, who is admittedly junior to him, cannot be promoted. Applicant's contentions that he cannot be found unfit, are based mainly on the ground that no adverse remarks had been communicated to him; therefore, he argues, the Annual Confidential Reports (ACRs) being the basis on which the Review Committee was expected to come to a conclusion, the Committee could not have legitimately found him unsuitable; that he had received a number of merit certificates which are produced as Annexures A8 to A15; and that the Tribunal in an earlier decision in OA 1723/91 had found him suitable for promotion. Applicant also contended that the composition of the Review Committee was improper since the requirement, that the Member belonging to the Scheduled Caste should be a Head of a Department, has not been met.

3. Respondents in their reply statement have stated that the Review Committee had been properly constituted since the order of the Railway Board dated 11.3.87 (Annexure R1) provided as follows:-

"....the Selection Committee will consist of the CPO, the Head of the Department concerned and if either of these members do not belong to the reserved community, the third member should be an officer of SC/ST community who may be either in Senior Administrative Grade/Junior Administrative Grade."

In our view, the Selection Committee was properly constituted. It may also be noted that applicant has not challenged the constitution of the Review Committee at the appropriate time and we cannot, at this stage, entertain this collateral challenge. We, therefore, straightaway dispose of this objection and declare that the DPC has been constituted properly.

4. Respondents further stated that the DPC had gone into the various ACRs of both the applicant and the 4th respondent as directed by the Tribunal in OA 1723/91 and found that the applicant did not fulfil the norms laid down by the Railway Board on 11.2.88 and

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1.3.90. According to these instructions, absence of adverse entries in the ACRs alone should not entitle the applicant for promotion, but he should also secure at least 15 points from the last 5 years' ACRs, the last four ACRs containing at least the rating 'good' and 'fit for promotion'. This, the applicant failed to obtain, whereas the 4th respondent satisfied the criteria. The DPC had also taken note of the various merit certificates, which had been referred to in the order of the Tribunal in OA 1723/91 and had given its comments on each of them.

5. We called for the relevant ACRs and the minutes of the DPC. The direction in OA 1723/91 is as follows:

"9. On an anxious consideration of the contentions raised by the applicant, we are convinced that injustice has been done to the applicant in holding him unsuitable for promotion by the Committee on the basis of the grading made by the Committee considering the remarks in the ACRs. Since there is no adverse remarks or any other entry which support the view that the applicant is unfit and unsuitable for the job, we are of the view that the decision of the Committee has caused injustice to the applicant particularly in the light of Annexures A10 to A17 produced in this case. So long as the applicant has not been found to be unfit and unsuitable for the work he cannot be denied promotion ignoring his seniority.

10. In the light of the foregoing discussions, we quash Annexures A1 to A3 and direct respondents 1 to 3 to convene a review committee meeting for considering the promotion of the applicant and the 4th respondent as Executive Engineer in the senior scale with effect from 29.7.1989 and take a decision in the light of the observations made in the judgement. In case the applicant is found suitable for promotion, he should be given all consequential benefits notionally till actual promotion...."

[Emphasis supplied]

Respondents had constituted a Review Committee in pursuance of these directions. We notice that the Review Committee had perused the ACRs of the applicant for five years and awarded him 12 points which fell far short of the minimum required by norms referred to earlier, irrespective of the fitness or otherwise of the 4th respondent. Therefore, the DPC found that the applicant did not satisfy the norms prescribed for promotion and he was considered to be unsuitable for

promotion. These findings of the DPC were not based on any of the entries in the ACRs, but were based on the overall and independent assessment by the DPC which also took note of the overall assessment of the reviewing and accepting authorities in the ACRs. We notice that the overall rating of the applicant for the year 1989-90 was only 'average' and that the applicant had a single rating of 'very good' in any of the five years for which the ACRs were considered by the Committee. As already mentioned, the points awarded by the DPC also fell short of the minimum required, even though there was no adverse entry. Therefore, we do not see anything perverse or unreasonable in the conclusion of the DPC that the applicant "has secured not even minimum points and thus not fulfilled the criteria laid down above". The finding of the Committee that the 4th respondent was suitable for promotion, in view of the fact that the 4th respondent had secured three ratings of 'very good' and an overall total points of 16.5 and thereby fully satisfied the norms, cannot also be faulted. It was not by comparison with applicant, that 4th respondent was selected. He was selected in his own right.

6. The main argument of the applicant was that in the absence of any adverse entries in the ACRs, the Committee was not justified in finding him unsuitable for promotion. A similar argument was considered by the Supreme Court in several decisions. In Jayanti Kumar Sinha (JK Sinha) vs. Union of India and others [AIR 1989 SC 72] the Supreme Court stated (page 74):

"Mr Rao had contended that there was no communication of adverse entries. Ordinarily when the entries relate to specific instances leading to adverse entries, the communication thereof is sent to the officer concerned with a view to providing an opportunity for improvement of performance. The entries which we have extracted above are mostly based upon general assessment of the performance....We are satisfied that the review proceedings were in consonance with the guidelines framed by the Government...."

In Shri Baikuntha Nath Das & Anr vs. Chief District Medical Officer,

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Baripada and Anr [JT 1992 (2) SC 1] the Supreme Court stated (page 15):

"...What is normally required to be communicated is adverse remarks - not every remark, comment or observation, made in the confidential rolls. There may be any number of remarks, observations and comments, which do not constitute adverse remarks, but are yet relevant for the purpose of FR 56(j) or a Rule corresponding to it...

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter, of course, attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse....

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference...."

In Parkash Chand Sharma vs. The Oil and Natural Gas Commission and Ors [1970 SLR 116], the Supreme Court observed (page 120):

"It is not suggested that the departmental promotion committee acted mala fide. If the adverse remarks were there in the confidential reports, it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The Committee could not be expected to make investigation about the confidential reports. It appears to us that in this case there was no discrimination, purposeful or otherwise and at the best, the Committee's taking into consideration confidential reports with respect to which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for....."

7. From the above observations, it is seen that even the DPC considering the adverse entries in the ACRs which have not been communicated to the officer, is not fatal to the findings of the DPC. However, there was no such adverse entry in this case. Applicant places strong reliance on the observations in Gurdial Singh Fijji vs. State of Punjab and others [AIR 1979 SC 1622], in which the Supreme Court stated:

"17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to

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improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified....

18.That an officer was 'not found suitable' is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give anything approaching the judgment of a Court, but it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List...."

8. In this case, we have perused the ACRs and we did not come across any adverse remarks and, therefore, the questions of they having been or not having been communicated to the applicant or of reliance being placed on adverse remarks in deciding his suitability for promotion, do not arise. Moreover, in this case, we see that the DPC has recorded detailed reasons, gone through various records such as merit certificates produced by the applicant, ACRs and the norms prescribed for suitability and after a detailed analysis awarding various points for ACRs of the applicant, they have come to a considered conclusion that the applicant was not suitable for promotion. To the facts of this case, therefore, the decision in AIR 1979 SC 1622 extracted above, would not apply.

9. Respondents have referred to the decision in State Bank of India and others vs. Mohd Mynuddin [AIR 1987 SC 1889]. That case related to appointments made by selection. The present case is promotion by seniority-cum-suitability. However, deciding on suitability is certainly based on evaluation of merit and the observations of the Supreme Court would have relevance in this case. The Supreme Court stated (Page 1891):

"....It is not sufficient that in his confidential reports it is recorded that his services are 'satisfactory'. An officer may be capable of discharging the duties of the post held by him satisfactorily but he may not be fit for the higher post.....If promotion has been denied arbitrarily or without any reason ordinarily the Court can issue a direction to the management to consider

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the case of the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity to the management to consider the question of promotion. There is good reason for taking this view. The Court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher post which is to be filled up by selection. The duties of such posts may need skills of different kinds--scientific, technical, financial, industrial, commercial, administrative, educational etc. The methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become now-a-days very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a committee consisting of persons who have the knowledge of the requirements of a given post to be nominated by the employer..."

10. Applicant mainly contended that in the absence of any adverse remarks communicated to him, the DPC could not have any material on which he could have been found unsuitable for promotion. We have already noted above, that the ACRs of the applicant contained the general grading 'average'. This is not a remark which would be communicated to the applicant as an adverse remark. But, certainly, it would have great weight in any consideration of the suitability of the applicant for promotion, especially when the promotion is on seniority-cum-suitability basis. Mere absence of any adverse remarks in the ACR is not an indicator of the required degree of efficiency or suitability of the applicant to hold a higher post by promotion. The findings of the DPC are, therefore, not vitiated by any infirmity and we cannot interfere with the conclusions arrived at by the review DPC.

11. Learned counsel for applicant also very strongly urged that action of the respondents in denying promotion to the applicant was as a result of a strong bias against applicant since he had approached the High Court of Kerala for certain reliefs against the respondents and had succeeded consistently, while the respondents have gone up to the Supreme Court in appeal and failed. We have to reject this contention out of hand as we notice that the 4th respondent, whose

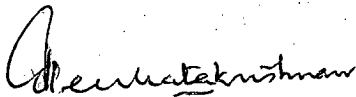
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promotion is being challenged, was also a party along with the applicant in the same proceedings before the High Court and it is difficult to believe that respondents would have a bias against the applicant alone and not against the 4th respondent.

12. In the result, the application is dismissed. However, it appears that the applicant was promoted from a subsequent date as a result of certain interim orders issued by this Tribunal. Such promotion would, no doubt, have been subject to the final outcome of the OA. Considering all the circumstances of the case and the fact that the applicant has in the meanwhile, retired from service, we direct that respondents shall not cancel any promotion that has already been given to the applicant as a result of the findings in this order.

13. There is no order as to costs.

Dated the 10th June, 1994.



PV VENKATAKRISHNAN
ADMINISTRATIVE MEMBER



CHETTUR SANKARAN NAIR (J)
VICE CHAIRMAN