

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O A NO.541/2006

TUESDAY THIS THE 28th DAY OF NOVEMBER, 2006

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER**

S.R. Tamata S/o R. R. Lamta
Regional Director
Central Ground Water Board
Kerala Region, Thiruvananthapuram
residing at TC 2513
TKD Road, Marapalam
Pettah, Thiruvananthapuram-4

Applicant

By Mr. Sasidharan Chempazhanthiyil & Vishnu Chempazhanthiyil

Vs.

- 1 Union of India represented by the Secretary
Ministry of Water Resources
Government of India
New Delhi.
- 2 The Chairman
Central Ground Water Board
N.H.-IV, Bhujal Bhavan
Faridabad-121001
- 3 Union Public Service Commission
Represented by its Chairman
New Delhi.
- 4 A.R. Bakshi
Rgional Director
Central Ground Water Board
North East Region, Tarun Nagar
Near Rajiv Bhawan
Guwahati-781005

5 A.D. Joseph
Regional Director (H.P.)
Central Ground Water Board
Bhulal Bhavan, NH-4
Faridabad

6 S.C. Dhiman
Regional Director
Central Ground Water Board
North East Himalaya Region
Shstri Nagar, Jammu-180 004

Respondents.

By Advocate Mr.S. Abhilash ACGSC for R 1-3
By Advocate Mr. TPM Ibrahim Khan, SCGSC

O R D E R

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

This original application is filed against the supercession of the applicant for promotion to the post of Member, Central Ground Water Board, allegedly on the basis of the downgrading of his CR ratings for the year 2003-2004, which were not communicated to the applicant.

2 The facts as submitted are summarized as follows:-

The applicant entered service as a Chemist (Group-A) under the 1st respondent. After being promoted as Senior Chemist, Superintending Chemist, he was promoted as a Regional Director, CGWB, Dehradun vide order dated 1st January, 2003 and while working there, he was transferred to Kerala Region, Trivandrum on 21.8.2003 and is presently working there.

3 The applicant is one of the seniormost Regional Directors under the second respondent from among the 17 Regional Directors in the department. In fact, the applicant is at Sl. No 6 in the seniority

list of Regional Directors at Annexure A-3(2). The next promotion of the applicant is to the cadre of Member, CGWB in the scale of pay of Rs 18400-22400. Recruitment to the cadre of Member, CGWB is by promotion failing which by deputation. The method of filling up is by selection on merit. There were 3 vacancies in the category of Member, Central Ground Water Board. The Departmental Promotion Committee met in July 2006. The applicant's name was not recommended by the DPC whereas three of his juniors namely the respondents 4,5, and 6 were recommended for promotion. The above respondents are junior to the applicant in both the seniority lists at Annexures A-3 and A-4 and also in the Combined civil list of scientist D at Annexure A-6. The DPC considered the confidential reports for the 5 years, 2000-2001, 2001-2002, 20002-2003, 2003-2004, & 2004-2005. The applicant's ACR ratings for the years 2002-2003 and 2004-2005 were 'very good', however the applicant understands that his rating for 2003-2004 was average and that was the sole reason for not recommending the applicant for promotion. The benchmark for promotion is 'very good'. For the year 2003-2004, the applicant's CRs were written in two parts for the periods from January 2003 to September 2003 when he was working as Regional Director at Dehradun and from October 2003 to December 2003 when he was working at Trivandrum. It is for the period January to September 2003 when he was working as Regional Director at Dehradun that he has been graded as average, whereas

for the later period he has been graded as 'very good'. It has been also alleged that the CR for the period, January to October has been written by an officer who had no occasion to supervise the work and conduct of the applicant.

4 It is further submitted that the downgrading of ACR rating for the year 2003-2004 as 'average' has not been communicated to the applicant and as such the DPC should not have taken into consideration the adverse ratings for the year 2003-2004. Under the circumstances, the applicant had filed a representation before the 1st respondent pointing out the above facts. However no action has been forthcoming and the recommendation of the DPC has been placed for cabinet approval and the respondents 4 to 6 are likely to be promoted at any time. Hence this OA.

5 The applicant has sought the following reliefs:-

1 Call for the records leading to the selection to the post of Member, Central Ground Water Board in the Departmental Promotion Committee meeting held in July2006 and set aside the decision not to recommend the applicant's name for promotion as Member ,Central Ground water Board.

2 Declare that the supercession of the applicant in the matter of promotion to the post of Member, Central Ground Water Board is illegal, arbitrary and direct the respondents 1 to 3 to convene a review DPC to consider the claim of the applicant for promotion as Member, Central Ground Water Board.

3 Direct the respondents 1 to 3 to ignore the CR ratings below the benchmark for promotion which had not been communicated and consider the applicant for promotion to the post of Member, Central Ground Water Board on that basis.

4 Declare that the proceedings of the DPC held in July 2006 for promotion to the post of Member, Central Ground Water board is vitiated as irrelevant factors were taken into account and for non adherence of the procedure prescribed in Annexure AS.

5 Any other further relief or order as this Hon tribunal may deem fit and proper to meet the ends of justice.

6. Award the cost of these proceedings.

6 The following and other legal grounds have been urged by the applicant:

A The procedure adopted by the DPC which met in July2006 for considering promotion to the category of Member CGWB is opposed to the principles laid down in Annexure A5 in as much as it took into account the uncommunicated adverse remarks.

B When an entry in the CR is made below the benchmark of 'very good', the same should have been communicated. If such remarks are not communicated to the person reported upon either to improve the performance or to explain his defence, the same would be a clear violation of the principles of natural justice.

C The CR rating which has been downgraded has not been written by the officer who actually supervised the applicant.

D The applicant is the seniormost eligible person considered by the DPC, as the person at SI No.1 is facing disciplinary proceedings.

7 The respondents 1 & 2 have filed a reply statement in which they have denied the averments of the applicant as totally baseless and without any documentary evidence. According to them, the DPC has been guided by the guidelines circulated by the DOP&T vide their OM NO 22011/5/86/Estt(D) dated 10.4.89 and the instructions in OM No.35034/7/97-Estt(D) dated 08.02.2002. They have denied that three vacancies are in existence in the category of Member. There is only one vacancy at present and another was likely to be

available on 1st February 2007 due to superannuation of the incumbent. It is further submitted that the statement of the applicant regarding downgrading of his CR ratings is not factually correct. According to existing instructions, the overall grading given in the ACR should not be communicated even when the grading given is below the benchmark prescribed for promotion to the next higher grade and only adverse entries in the confidential reports are to be communicated to the government servant.

8 Further, the respondents have discussed the various judgements of the Tribunal and the Hon. Supreme court regarding communication of gradings which are positive but amounts to downgrading when viewed against the benchmark for promotion. The Guwahati Bench of this Tribunal in OA300 of 2002 held that an 'uncommunicated 'Good' entry when the benchmark was 'very good' cannot be taken into account and in this view they agreed with the earlier judgement of the Allahabad bench in 1996. Further in the case of Shri Gowri Shankar Mithal vs Union of India in OA 37/04 the Guwahati Bench interalia held that when a benchmark is fixed in the guidelines for promotion to a higher grade and if the grading given to the officer in the ACR for any year is below the benchmark, the concerned authorities are bound to communicate it to the officer to enable him to file his objection to the above and an uncommunicated grading should have to be ignored. But the Central Administrative Tribunal Mumbai Bench has examined a similar OA 256/2003 filed

iby Sri Pawan Kumar in the light of various judgements of the Hon'ble Supreme Court including the judgement in UP Jal Nigam case and that of the Full Bench of the CAT, Principal Bench in Dr A.K.Dawar's case and dismissed the OA holding that the above facts are not relevant in that case. Another OA 2702/2003 was also dismissed by the Principal Bench on similar lines.

9 In the case of UP Jal Nigam and others Vs Prabhat Chandra Jain (1996 (2) SCC363), the Hon'ble Supreme Court observed that 'the gradation falling from 'Very Good' to 'Good' may not be ordinarily an adverse entry, that can be perilously adverse when the benchmark is being put as 'Very Good.' However, the Hon'ble Supreme Court has declared in its judgement dated 22.11.2005 in Union of India and another Vs Major Bahadur Singh (Civil appeal no 4482 of 2003) that the judgement of the court dated 31.1.96 in U.P Jal Nigam and others in SLP (Civil) no 16988/95 has no universal application and the judgement itself shows that it was intended to be meant only for the employees of UP Jal Nigam. As such, the respondents have averred that the applicant cannot claim the benefit of that judgement.

10 Further it has been submitted that the applicant has chosen to approach the Tribunal when his A-7 representation is still pending and hence the OA is premature and his grievances that he was also superceded for promotion in the Regional Director cadre are imaginary, as then also the DPCs had not found him FIT and

disciplinary proceedings were still pending against him when the DPCs met. They have also controverted the contention of the applicant that his grading for the year 2003-04 is 'Average' and stated that had there been any adverse entry that would have been communicated. The DPC file has been produced for perusal of the court.

11 Respondent No.3 viz. the UPSC has also filed a separate statement in which they have explained in detail the constitutional mandate of the Commission under Article 320 and the instructions of the Government of India regarding the criteria for merit promotion and the guidelines for DPCs contained in Department of Personnel & Training OM No 22011/5/86-Estt-D dated 10.4.1989 as amended from time to time. With regard to the specific averments of the applicant, the Commission has put forth the following contentions:

a} For promotion to the grade of Member, Central Ground Water Board, Ministry of Water Resources, only those candidates who are overall assessed as 'Very good' by the DPC would be fit for promotion and those who did not make it to the assessment of 'Very Good' would be unfit.

b} That the Commission in exercise of their constitutional functions decided that an officer attaining at least four benchmark gradings of 'Very Good' out of the 5 ACRs should be assessed as fit or promotion and that this decision would be applicable to all DPCs pertaining to the vacancy year 2003-04 and subsequent years.

c} That the DPC for promotion to the grade of Member, Central Ground Water Board in the pay scale of Rs 18400-22400/- was held on 23rd June, 2006 which considered 9 officers for 3 vacancies for the year 2006-07. The DPC recommended a panel of four officers (including 01 officer in the extended

panel) for the year 2006-07.

d} That the applicant Sri S.R.Tamta was considered by the aforesaid DPC held on 23rd June 2006 for promotion at SI No,2 of the eligibility list of the year 2006-07. On the basis of his service records with particular reference to the performance reflected in various attributes of his ACRs of last five years he was assessed as 'unfit" and as such was not recommended for promotion by the DPC. Some officers junior to him were assessed as 'FIT' for promotion and they superceded the applicant.

e}The DPC was held strictly in accordance with the Recruitment Rules and instructions /guidelines relevant to the said DPC.

12 Further the UPSC has submitted that according to the extant instructions issued by the DOPT, the assessment below benchmark by the Reporting or Reviewing officer is not an adverse entry and the DPC is not required to take cognizance of such an entry. Further the DPC is not guided by the overall grading in the CRs of the officer but makes its own independent assessment on the basis of the various attributes in the CRs and such an assessment made by the DPC is not open to scrutiny in view of the number of judgements of the Hon Supreme court. noted under:

1. Nutan Arvind Vs UOI& Another (1996 2 SCC 488)
2. UPSC Vs H.L.Dev& others (AIR 1988 SC 1069)
3. Dalpate Abasaheb Solanke Vs B.S.Mahajan (AIR 1990 SC 434)
4. Anil Katiyar vs UOI&Others (1997 1 SCC 280)

13 In the light of the above detailed averments the UPSC have submitted that they have meticulously followed the relevant

instructions of the DOP&T and there was no miscarriage of justice.

14 We have heard Sri Sasidharan Chempazhanthiyil for the applicant and the Learned SCGSC for the respondents. The arguments were mainly based on the pleadings and on the basis of the records.

15 The main contention of the applicant is that the procedure adopted by the DPC is opposed to the principles laid down in Annexure A-5 guidelines on which aspect the challenge is twofold: firstly on the ground that reliance has been placed on uncommunicated adverse remarks and extraneous parameters written by incompetent authorities and that the downgrading of the ACR for a part of the year was by an officer who was not competent to write his CR. Since the challenge in the OA is against the non-observance of procedures as prescribed in DOP&T OM No.35034/7/97-Estt-D dated 8-02.2002 (Annexure A-5), let us first examine the contents of this OM which contains the Revised Guidelines on the procedures to be observed by DPCs in regard to the Selection mode of promotion. The relevant portions read as under:-

Para 3.1 Mode of Promotion

In the case of selection (merit) promotion, the hitherto existing distinction in the nomenclature (selection by merit and selection -cum-seniority) is dispensed with and the mode of promotion in all such cases is rechristened as selection only. The element of selectivity (higher or lower) shall be determined with reference to the relevant benchmark (very good or good) prescribed for promotion.

3.2 Bench mark 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. those who meet the prescribed benchmark) by the DPC shall be included and arranged in the select panel in order of their inter se seniority in the feeder grade. Those officers who are graded unfit (in terms of the prescribed benchmark) by the DPC shall 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.

3.21 Although among those who meet the prescribed benchmark, inter-se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/service rules, including the conditions that one should be the holder of the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post.

3.3 Promotion to the revised pay scale (grade) of Rs 12000-16500 and above

(i) The mode of promotion, as indicated in paragraph 3.1 above shall be selection

(ii) The benchmark for promotion, as it is now, shall continue to be 'very good'. This will ensure element of higher selectivity in comparison to selection promotions to the grades lower than the aforesaid level where the benchmark as indicated in the following paragraphs, shall be 'good' only.

(iii) The DPC shall for promotions to said pay scale (grade) above, grade officers as fit or unfit only with reference to the benchmark of 'Very Good'. Only those who are graded as 'fit' shall be included in the select panel prepared by the DPC in order of their inter-se seniority in the feeder grade. Thus, as already explained in paragraph 3.2 above, there shall be no supersession in promotion among those who are found 'fit' by the DPC in terms of the aforesaid prescribed benchmark of 'Very Good'.

16 The major change incorporated in these revised guidelines which modified the earlier Instructions contained in the OM dated 25.5.98 is that there shall be no supersession in promotion among those who are found 'fit' by the DPC in terms of the prescribed benchmark. The following contentions of the applicant have to be therefore evaluated against this background. The contentions of the applicant can be summarised as under:-

(1) that the applicant is one of the seniormost Regional Directors in the Central Ground Water Board, which is the feeder grade for promotion to the post of Member, Central Ground Water Board.

(2) that in the matter of promotion by selection method, contained in the instructions of the Govt. of India OM No 35034/1/1997-Estt-D dated 08.02.2002, prescribed the procedure to be observed by the DPC.

(3) that he was considered for promotion as Member, Central Ground Water Board, but the DPC which met in July, 2006, did not recommend him for promotion whereas his juniors namely the respondents No. 4, 5, and 6 were recommended for promotion.

(4) that the reason for his supersession is the downgrading of the CR ratings of the applicant for the year 2003-04. He also submitted that since the grading in this ACR is 'Average', he could not make up to the benchmark of 'Very Good' as fixed by the DPC for promotion. Thus, it was on the basis of the ACR grading for the year 2003-04 that the applicant was sought to be superceded.

(5) that this downgrading of CR rating has not been communicated to the applicant. He therefore contended that when a benchmark is fixed and notified, any gradation below the said benchmark has to be treated as adverse and is to be

communicated. The applicant has also stated that he had been discharging his duties to the utmost satisfaction of his superiors and accomplished all the tasks entrusted to him.

17 With reference to these pleas, the UPSC has averred that it is evident from the above OM dated 8.2.2002 that for promotion to the grade of Member, Central Ground Water Board in the Ministry of Water Resources, only those candidates who are overall assessed as 'Very Good' by the DPC would be 'fit for promotion' and those who do not make it to the assessment of 'Very Good' would be 'unfit'. A DPC for promotion to the grade of Member, CGWB in the pay scale of Rs 18400-22400 was held on 23rd June 2006 which considered nine officers (05 in the primary clause + 04 in failing which clause) for 03 vacancies for the year 2006-07. The DPC recommended a panel of four officers (including 01 officer in the extended panel) for the year 2006-07. The applicant was considered at SI No .02 of the eligibility list of the year 2006-07. On the basis of his service records with particular reference to performance reflected in various attributes of his ACRs of last five years, he was assessed as 'unfit' and as such, was not recommended for promotion by the DPC. Some officers junior to him were assessed as 'fit' for promotion and they superseded the applicant.

18 Here we may pause for a moment before going into the merits of the selection conducted by the DPC, to point out that the

respondents have repeatedly averred, relying on the case of the Anil Katiyar vs UOI & Other (1997 (1) SCC 280), wherein the Hon'ble Supreme court held that "Having regard to the limited scope of judicial review of the merits of a selection made for appointment to a service of a civil post, the Tribunal has rightly proceeded on the basis that it is not expected to play the role of an appellate authority or an umpire in the acts and proceedings of the DPC and that it could not sit in judgement over the selection made by the DPC unless the selection is assailed as being vitiated by malafides or on the ground of its being arbitrary. It is not the case of the applicant that the selection by the DPC was vitiated by malafides." We are very well conscious of this legal position that the independent assessments of DPCs cannot be gone into by the Courts/Tribunals sitting in judgement as an appellate authority. But when, as in this case, a specific allegation about consideration of uncommunicated remarks in the ACR of a particular year has been made alleging arbitrariness, surely the Tribunal would be right in undertaking an exercise to verify the truth in order to see whether there is any substance in the allegations, particularly so when the whole case of the applicant rests on that sole ground.

19 In this view of things we summoned the original record of the DPC and the following are our observations in respect of the ACRs of the officer considered for the five years viz 2000-01, 2001-02, 20002-03, 2003-04 and 2004-05.

2000-01 written in two parts

For the period 1.4.2000 to 9.7.2000

Reporting Authority	<u>General remarks</u> 'hardworking, knowledgeable'	<u>Grading</u> 'Very Good'
Reviewing authority	Agreed with the above	'Very Good'

For the period 10.7.2000 to 31.3.2001

Reporting Authority	Hardworking, sincere	'Very Good'
Reviewing authority	Agreed except remarks against col11 of Part III 'Good'	

2001-02

Reporting authority	Knowledgeable with proper Interest and enthusiasm to Carry out the duties	'Very Good'
Reviewing authority	Agreed	'Very good'

2002-03 in two parts For the period 1.4.2002-16.1.03

Reporting authority		'Very good'
Reviewing authority	Agreed with the above	Very good

17.01.03 to 31.03 .03

Less than 3 months, no reporting required

2003 to 2004 For the period 1.4.2003 to 31.3.2004

Reporting authority		' Good'
Reviewing authority	Agreed with the above	

2004-05

Reporting authority		'Good'
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Reviewing authority	very experienced ,hardworking Expert in groundwater chemistry Considering his work in the tsunami affected belt grading has to be very good	'Very good'
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Briefly summarized the assessment picture would be as under:

<u>Year</u>	<u>Grading</u>
2000-01 Part I	'very good'
Part II	'very good (modified as 'good')
2001-02	'very good'
2002-03	'very good'
2003-04	'good'
2004-05	Very Good '(as modified by Reviewing authority)

20 From the above it is evident that the contentions of the applicant with regard to the ACR of 2003-04 are not factually correct as it has not been written in two parts nor is there any variation in the gradings by the Reporting officer and the Reviewing officer. However the contentions of the applicant appear to hold good for the ACR for the year 2000-01. Since the applicant is not privy to his CRs, this could be a genuine mistake in not mentioning the year correctly. The ACR for the year 2000-01 has been written in two parts, in the first part the applicant has been rated as 'very good' by both the officers, whereas in the second part, the Reporting officer continued to have the same opinion about the applicant, but the Reviewing officer has while broadly agreeing with the assessment, expressed his disagreement over one parameter in the ACR at Column 11 regarding the capacity of the applicant to coordinate the activities of the persons working with him and on that count modified the grading to 'good' which is below the benchmark. Hence viewed in the total perspective of the remarks in that there is a disagreement with the assessment of the Reporting authority on a particular parameter, and it has also resulted in revision of the grading in

our view, it should have been communicated to the applicant as it was a reflection on his capacity for coordination which could have been remedied by the applicant or he could have raised a defence against the opinion of the Reviewing officer. Even, the entry in the year 2003-04 and the grading amounted to a fall below the benchmark from the previous year and was required to be communicated as per the various judgements of this Tribunal in OA 2607/2002 (T.K.Aryavir vs UOI 2003 1 ATJ 130) Principal Bench decisions in (OA 1016/2001), decision in OA filed by R.K.Anand and in the case of B.L.Srivastava upheld by the Delhi High court in CWP 715/2001 with the observations that the law is well settled that any downgrading which will affect the promotional prospects of the employee has to be communicated to him so that he can make an effective representation and take recourse to an appropriate remedy.

21 The Hon Supreme Court in the celebrated case of UP Jal Nigam & Others Vs Prabhat Chandra Jain & Ors. (1996) 2 SCC 363) has held as under :

'The Nigam has Rules whereunder an adverse entry is required to be communicated to the employee concerned , but not downgrading of an 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 that is required by the authority recording confidentials in the situation is to record reasons for such downgrading in 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 the annual confidential reports would 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 that the service record of the first respondent.. No reason for the change is mentioned . The downgrading 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.'

22 We are aware that the above judgement has been subjected to various interpretations and several judgements including the Full Bench order of this Tribunal in OA 559/2001 in Manikchand Vs Union of India have distinguished the ratio of the judgement on facts which were clearly distinguishable. Some such cases mentioned by the respondents in their reply are :

- i)Dr A.K.Dawar Vs Union of India
- ii)Union of India Vs M.S.Preet in CWP 13024 /2002, High Court of Punjab & Haryana
- iii)OA 831/2002 (Chandigarh Bench)
- iv)OA 2967/2002 Tarun Kumar Vs Union of India,(Principal Bench)
- v)OA No. 256/2003, Pawan Kumar Vs Union of India,(Mumbai Bench.)

23 A careful reading of the above judgements would reveal the fact that none of these cases were on all fours with the facts of the case in UP Jal Nigam and these judgements did not overturn the

underlying principle which the Apex Court laid down that an employee was entitled to be told that there was a fall in his performance which is likely to affect his promotional chances and thus give him an opportunity to correct himself. For example if we take the case of Sri A.K.Dawar, the Full Bench observed that "if there is no downgrading of the concerned person in the ACR, in that event the grading need not be communicated". In the Mumbai Bench case, it was observed that "since there has been no downgrading of remarks in any particular year, it is distinguishable from the facts of the case cited by the Learned counsel for the applicant." In Manik Chand's case, the question considered was whether gradings below bench mark should be mandatorily communicated? While holding that it may not be necessary it was observed "There is no quarrel for communication of those gradings/remarks which have been down-graded or where there is a steep fall as has been held in UP Jal Nigam (supra) and Gurdian Singh Fiji (supra)". In our view these judgments do not detract from the intrinsic merit of the ratio of the order in UPJAL NIGAM case. It has been further brought to our notice that the Supreme court themselves have observed that the judgement in UP Jal Nigam case has no universal application in its judgement in UOI vs Major Bahadur Singh and the Department of Personnel & Training in OM No 21011/1/2006-Estt-A dated 28th March 2006 has issued instructions to all departments that cases taking shelter under the UP Jal Nigam judgement should be properly

defended keeping in view the declaration of the Supreme court in this regard. But a reading of the judgement would make it abundantly clear that no observations against the ratio of the judgement in UP JAL Nigam have been made and only a caution has been sounded that "courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed as one additional or different fact may make a world of difference between conclusions in two cases" These observations cannot be interpreted to mean that the ratio of the judgement in UP Jal Nigam is fallacious or suffers from any infirmity and cannot be made applicable in any other case. Such a view is totally distorted.

24 We are therefore of the considered view that the principle propounded by the Apex court order in UP Jal Nigam is a salutary one and upholds the highest values of transparency and equity which should govern the actions of the government particularly in the selections to the higher posts in Govt service and any trace of arbitrariness and discrimination should not be allowed to creep in into these procedures at any stage as that would seriously undermine the credibility of the system and affect the morale of Government servants. This direction of the Supreme court is also in tune with the latest developments in opening up the procedures of the Govt to public scrutiny and a decision it is understood has already been taken to open up the confidential reports to the officers so that it can

be used as a tool for reform and not retaliation. In fact the directions of the apex court are directed to the administrative authorities whose function it is to communicate the adverse observations to the employee and it is not a task to be left for the DPCs to implement. The DPCs are only creatures of the Govt and are guided by the instructions/ guidelines issued by the Govt and only ensure that they are observed. We would therefore like to observe that the Department of Personnel & Training which is the ncdal Department in this regard should seriously rethink on this matter and bring about suitable changes in the guidelines/Instructions regarding communication of adverse remarks in the ACRS in the light of the Judgement in UP JAI Nigam case and bringing about consequential changes in the guidelines for the DPCs. This would smoothen the working of the DPCs also and reduce the burden on them and the courts . This gray area in the matter of communication of adverse remarks is resulting in a maze of conflicting judgements and from that point of view also a policy decision is required to be taken by the Govt most expeditiously in the light of the law laid down by the Apex Court.

25 While it is admitted that there are conflicting judgements of different benches on this issue, it is seen that the majority of judgements are in favour of the ratio of the Supreme court judgement that the employee has a right to be communicated of any fall his CR ratings below the benchmark for promotion and failure to do so would

amount to denial of natural justice. The minority judgements are distinguishable on facts as already discussed. The respondents have pointed out that the Union of India has filed SLPs in the Supreme Court against the orders in R.K.Anand's case and the judgements of the Lucknow, Allahabad And Jabalpur benches have been appealed against in the respective High Courts. Be that as it may, it is crystal clear that the majority view of all the coordinate benches including the Principal Bench is overwhelmingly in favour of communication of such gradings affecting the employees adversely. We are therefore in respectful agreement with the view that whether it is an adverse remark or adverse grading , it is the adverse aspect which should determine whether it should be communicated and an invidious distinction cannot be made on the basis of phraseology.

26 Now let us look at the factual circumstances in this Application in relation to the facts of the UP Jal Nigam case. The minutes of the DPC held on 23rd June in respect of the applicant has been perused. Paras 3 to 6 of the minutes of the DPC are relevant to assess the process followed by the Committee to arrive at their finding.

The Departmental Promotion Committee were informed of the following provisions contained in the DPC guidelines circulated by the Department of Personnel&Training vide their OM No 22011/5/86-Estt-D dated 10.04.89:-

6.1.2 -The DPCS enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them.'

6.1.3 While merit has to be recognized and rewarded, advancement in an officer's career should not be regarded as a matter of course, but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the ACRS and based on strict and rigorous selection process.'

6.2.1.(e)- the DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be in consistent with the grading given under various parameters or attributes.'

The Committee was also informed that in accordance with the instructions contained in para 6.3.1 of the DOP&T OM dated 10.4.89 read with subsequent OM NO 22011/5/91- Estt-D dated 27.3.97 and OM No 35034/7/97-Estt-D dated 8.2.2002., the benchmark for promotion in the present case is 'very good'.

Attention of the Committee were also invited to the instructions contained in DOPT OM No 35034/7.97- Estt-D dated 8.2.2002, which interalia provides 'that 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' by the DPC shall be included and arranged in the select panel in order of their seniority in the feeder grade, Those officers who are graded as 'unfit' (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel. Thus, there shall be no supercession in promotion among those who are graded 'fit'(in terms of the prescribed benchmark) by the DPC.

The Committee were apprised that taking into account the instructions/guidelines, issued by the DOP&T, as detailed above, the Commission in exercise of their constitutional functions, as envisaged in Article 320 of the Constitution took a conscious decision that an officer attaining atleast 4 benchmark gradings out of the 5 ACRs, as prescribed by the Govt. of India in DOP&T OM No 22011/9/98-Estt-D dated 8.9.98 read with subsequent OM of even No dated 16.6.2000 should be assessed as 'fit' for promotion and that this decision should be applicable to all DPCs pertaining to the vacancy year 2003-04 and subsequent years.

27. The above narration of the minutes of the committee would go to show that the DPC had scrupulously followed the procedures as prescribed in the master guidelines and Annexure A5 with the modifications as detailed in the subsequent instructions with reference to the zone of candidates, fixing of bench mark etc. but it is not clear whether they have taken into account the gradings in the ACRs ^{or given} ~~given~~ have independent gradings as enjoined in the instructions. Hence we have taken the ACR ratings as the basis for our conclusion. The UPSC in their reply have highlighted their decision as contained in para 6 above regarding the criterion adopted by them of at least four out of five gradings fulfilling the benchmark for being assessed as 'fit'. The applicant in this case has atleast clearly three 'Very good' gradings and for one year 2003-04 his grading is 'good'. The grading of the first part of the year 2000-01 is 'very good' and the grading for the second part is 'Very Good' by the reporting authority but modified as 'Good' by the Reviewing authority. There is no indication whether the committee has considered this as 'good' only. Presumably it is so, as we cannot find any other reason for assessing the applicant as 'unfit'. There are no adverse or other unsatisfactory entries in his ACRs for the five years against the various parameters against which he has been assessed by the superior officers. We have looked at the instruction s regarding CRs written in parts. It is seen that Para6..2.1 of the OM dated 10.04.89 prescribes that "if more than one CR is written for the

particular year all the CRs for the relevant year shall be considered together. Sub para(f) of the above also states thus:

"If the reviewing authority or the accepting authority as the case may be has overruled the Reporting officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purpose of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment conspicuously after due application of mind. If the remarks of the Reporting authority, reviewing authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC."

28 From the minutes as well as the averments of the UPSC, it is noticed that the applicant was assessed "as unfit" on the basis of his service records with particular reference to performance reflected in various attributes of his ACRs of last five years.

29 There is no indication from the minutes whether the DPC had given any independent gradings to the officer in the light of the guidelines and even if it has been done, it does not form part of the record produced before us. It is interesting to note that both parts for the year 2000-01 are written by the same officers and the very same officers wrote the next report for 2001-02 and found the applicant 'very good'. Hence looking at the totality of the report for the year 2000-01, it should have been 'very good' only. But due to the non communicated disagreement expressed by the Reviewing officer and the consequential downgrading to Good by the Reviewing officer, the DPC appears to have considered it as below

the benchmark. Viewed in that context, the disagreement with reference to the Attribute relating to 'coordination noted by the Reviewing officer which apparently was the reason for his downgrading of the rating given by the Reporting Officer from "very good" to 'good' should have been treated as adverse and communicated to the applicant. In fact even without the support of the law as laid down in UP Jal Nigam, it can be stated that this adverse observation by the Reviewing Officer against the attribute in column 11 of the ACR amounted to an adverse remark which should have been communicated to the applicant. Since this was not done, it has caused substantial prejudice to the applicant resulting in his losing the race for promotion for want of one 'very good' grading. Though the same officer had changed his opinion in the next year's report, the damage had already been done. We are of the view that this downgrading effected by the Reviewing authority reflects the 'sting of aduerseness' as referred to by the apex court in UP Jal Nigam case and was indeed "perilously adverse" so as to damage the applicant's chances of promotion. Hence the reliance placed by the DPC on this part of the record has caused serious prejudice to the applicant and we are of the view that it is a fit case to be referred to the DPC for review ignoring the remarks of the Reviewing Authority downgrading the grading to 'Good'.

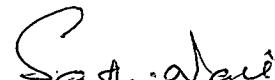
30 In the result, we declare that the case of the applicant for promotion to the post of Member, Central Ground Water Board has

to be reconsidered in the light of our observations above and accordingly direct the respondents to convene a review DPC to consider the claim of the applicant, ignoring the rating below the benchmark for promotion and the disagreement recorded as reason thereof by the Reviewing authority in Part II of the ACR of the applicant for the Year 2000-01 which had not been communicated to him. This exercise shall be completed within a period of three months from the date of receipt of this order.

Dated 28.11.2006.



GEORGE PARACKEN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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