CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.62/2007

Wednesday, **this the** ....27th..... **day of** .....August, **2008.**

CORAM:

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Dr.K.S.SUGATHAN, ADMINISTRATIVE MEMBER

P.P.Raju,
S/o Purushothaman,
Welder, Integrated Fisheries Project,
Ernakulam, residing at :
Palaparmbil House,
Eroor P.O., Tripunithura, Ernakulam. Applicant

(By Advocate Shri M.R.Hariraj)

Vs.

1. Union of India, represented by the
Secretary to the government of India,
Ministry of Agriculture,
Department of Animal Husbandry and Diarying,
Krishi Bhavan, New Delhi – 110 001.

2. The Director in Charge,
Integrated Fisheries Project,
Kochi-682 016.

3. The Joint Secretary (Fy),
Krishi Bhavan, New Delhi- 110 001. Respondents

(By Advocate Shri Sunil Jose)

The application having been heard on 15.7.2008,
the Tribunal on 27.08.08. delivered the following.

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The applicant has been functioning as Welder in the Respondents' organisation since 24.8.1976. On the introduction of the ACP Scheme his case was to be considered for first and 2nd financial upgradations as on 9.8.1999 and 24.8.2000 respectively. Initially as he was not afforded any such benefits the

applicant moved the Tribunal in O.A. 1047/2001 which was allowed vide Annexure A-3 order dated 20.2.2004. By the said order, the respondents were directed to grant the first financial upgradation with consequential benefits to the applicant from 9.8.1999. At that time the Tribunal referred to a decision reported in 1996 (34) ATC 557, in which average grading of DPC in four out of five ACRs was taken into consideration and DPC assessed the individual as average. The Tribunal however, held that it is sufficient to declare a person unfit even if there is no adverse entries in the ACRs. However, after referring to the above, the Tribunal in the instant case held as under:

> ***"On going through the decision above, we are of the view that the said case will not squarely apply in the present case because in this case, except one entry in the ACR as 'Average' all other entries were 'good' and that 'Average' entry was also not communicated to the applicant. We are also of the view that if the intention of the respondents was to consider the entry of 'Average' as below bench mark, it should have been communicated to the applicant prior to DPC, otherwise 'average' entry cannot be said to be below bench mark. Therefore, such a remark cannot be a reason for denying the ACP benefit to the applicant."***

2. Immediately after the aforesaid order was passed, the applicant was granted first financial upgradation vide Office Order No.36/04 dated 3.6.04. In the said order, apart from the applicant, certain other individuals had also been granted ACP and some of them had been granted the 2nd ACP also.

3. As the applicant was not granted the 2nd ACP, he had filed O.A. No. 542/05 which was disposed of on 21.4.2006 with the following directions.

> ***"7. We find therefore that in view of the above law, it would be not proper to treat the adverse remarks of A-7 and A-9 as the final necessary inputs for determining the eligibility of the applicant for the grant of second ACP. The proper course would have been to dispose of the representations one way or the other as per the extant rules/orders/instructions and only such final disposals should be factored into any decision to decide his eligibility for the said benefit.***

> ***8. Hence we order that A-1 is quashed and direct that any representations made by the applicant against the A-7 and A-9 adverse entries be duly considered by the appropriate authorities concerned within a period of two months from today as per the extant instructions and rules and based upon such disposal, the Screening Committee shall within two months thereafter, duly decide upon the question of granting the applicant the benefits of the second ACP."***

4. The applicant during 2001 was issued with a minor penalty under Rule 16 of CCS(CCA) Rules 1965 vide A-5. This matter is stated to be still hanging fire.

5. The applicant was conveyed an adverse remark for the year 2000-01 vide A-6 order dated 14.6.2001. It was this adverse remark which had been referred to in paragraph 2 of this Tribunal's order in O.A.No.542/05 dated 21.4.2006. And when in pursuance of the order of this Tribunal dated 21.4.06 the respondents considered the representation of the applicant against the adverse remarks and they had rejected his request for expunging the adverse remarks vide A-1 order dated 20.6.2006. Annexure A-8 dated 18.8.2003 is yet another Memo communicating adverse remarks for the year 2002-03.

6. The applicant through this O.A. has sought the following main relief:

> ***"ii. To declare that applicant is entitled to be considered for promotion to second Assured Career Progression Scheme scale in the light of the Annual Confidential Reports up to 1999-2000 and to direct the respondents to consider the applicant to grant of 2nd ACP Scheme placement with effect from 24.8.2000 accordingly with all consequential benefits including arrears of pay and allowances."***

7. The respondents have contested the O.A. According to them the applicant having been imposed penalty of censure effective from 9.11.1999 and he having earned the grading of "average" only for the year 1999-2000, the Screening

Committee did not clear his name for the 2nd ACP as on 24.8.2000. In addition, the applicant has earned the grading of 'Below average' during 2000-01 and consequently when as recently as in July 2006 his case was considered, taking into account his performances from 1995-96 to 2000-2001, his overall grading given by the DPC was only "average" and as such, he has not been given the benefit of 2nd ACP.

8. The applicant has filed his rejoinder stating that his claim for 2nd ACP was with effect from 24.8.2000. Previous five years' ACRs were only required to be considered by the Screening Committee. ACRs for the period from 1995-96 to 1998-99 were considered by the Tribunal and were found not below the bench mark. In 1999-2000 no adverse remark was communicated to the applicant except minor penalty of censure. The currency of penalty was over before the eligibility date for the 2nd ACP. Hence according to the applicant, the Screening Committee has no authority to consider the ACR for the year 2000-01 which is subsequent to the due date of grant of ACP. It has also been contended in the rejoinder that the pendency of disciplinary proceedings initiated in 2001 cannot operate as a bar for promotion. In otherwords, according to the applicant all that was to be seen by the Screening Committee is only the ACRs for 5 years upto 31.3.2000, and penalty of censure cannot have any adverse impact as the currency of the same was over before the due date for consideration of ACP.

9. Counsel for the applicant invited the attention of the Tribunal to para 7 of A-3. He has further submitted that ***censure cannot be a bar for consideration of promotion.***

10 Counsel for the respondents submitted that, though the applicant could

have the ACP as of 9.8.1999 in view of the fact that he had four 'good' and one 'average' only, in the subsequent year his having secured only average for 1999-2000, his overall grading by the DPC was (taking into account the performance from 1995-96 to 1999-2000) average, since there were two 'average' gradings out of five. In addition, the applicant was awarded penalty of censure, the currency of which remained till July 2000.

11. Arguments were heard and documents perused. In so far as the impact of penalty of censure is concerned, though the Apex Court has held that awarding of censure is a blameworthy factor , (Union of India Vs. A.N.Mohanan) 2007 (5) SCC 425, no bar was imposed for consideration for promotion after the order of censure was passed. In that case penalty of censure was awarded on 13.9.2001 while promotion was given on w.e.f. 26.11.2001. The applicant claimed his promotion from 1.11.1999, which was allowed by the Tribunal and upheld by the Hon'ble High Court of Kerala, but was reversed by the Apex Court and the promotion granted with effect from 26.11.2001 was held to be correct. Telescoping the above decision into the facts of this case, it will be seen that the applicant's entitlement to 2nd ACP was w.e.f. 24.8.2000 and the penalty of censure was imposed on 9.11.1999. Even if the sting of censure could be extended for six months, the same too was over much prior to 24.8.2000. As such, there was no embargo to consider the case of the applicant for 2nd ACP, even though penalty of censure was imposed.

12. This now takes us to the next question viz., whether the respondents are right in treating the overall grading of the Screening Committee as 'average.' The applicant contended that since he was granted the Ist ACP with effect from 9.8.99 all that has to be seen is whether the subsequent year's ACRs contained

"good/average" grading. In view of the fact of non-communication of any adverse remarks for the 1999-2000, even if it was "average" the respondents cannot consider that grading as one that would disable the applicant to derive the benefit of 2nd ACP. The screening Committee appears to have taken into account the ACRs for the period from 1995-1996 upto 1990-2000. As these contained over all grading of "good" for three years and "average" for two years the grading was arrived at only as average. A comparison of this grading by the Screening Committee with that of the earlier Committee which considered grant of Ist ACP, would go to show that whereas upto 1998-99 the applicant was able to get the grading of "good" whereby only 98-99 he was awarded Ist ACP, ***his not getting the 2nd ACP benefit was on account of his being graded as average.*** In other words, it is the latest ACR (1999-2000) that has resulted in bringing down his grading from "good" to "average". But the 'average' remarks have not been communicated to the applicant. The Apex Court in the case of Dev Dutt vs Union of India, CA No. 7631 of 2002 decided on May 12, 2008, has held as under:-

> "5. The stand of the respondent was that according to para 6.3(ii) of the guidelines for promotion of departmental candidates which was issued by the Government of India, Ministry of Public Grievances and Pension, vide Office Memorandum dated 10.04.1989, for promotion to all posts which are in the pay scale of Rs. 3700-5000/- and above, the bench mark grade should be 'very good' for the last five years before the D.P.C. In other words, only those candidates who had 'very good' entries in their Annual Confidential Reports (ACRs) for the last five years would be considered for promotion.
>
> The post of Superintending Engineer carries the pay scale of Rs. 3700-5000 and since the appellant did not have 'very good' entry but only 'good' entry for the year 1993-94, he was not considered for promotion to the post of Superintending Engineer,
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> 6. The grievance of the appellant was that he was not communicated the 'good' entry for the year 1993-94. He submitted that had he been communicated that entry he would have had an opportunity of making a representation for upgrading that entry from 'good' to 'very good', and if that representation was allowed he would have also become eligible for promotion. Hence, he submits that the rules of natural justice have been violated.

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10. In the present case, the bench mark (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 as an adverse effect on his chances.

11. 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 1993-94 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 decisions relied upon by the learned counsel for the respondents are distinguishable.

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17. In our opinion of 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 get some other benefit.

18. For example, if the bench mark 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 may 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 for some other extraneous consideration."

13. As such, since the grading of average was not communicated to the applicant, any adverse impact on account of that grading has to be ignored. Subsequent communication of adverse remarks pertaining to subsequent years,in any event, cannot be taken into account.

14. In view of the above, the applicant has made out a case and his ACR upto 1999-2000 should be viewed as if they contained no adverse remarks and also they are of the grade of bench mark only consequent to which the applicant should be made through for grant of 2nd ACP.

15. The O.A. is thus allowed. Orders whereby the respondents have denied 2nd ACP benefit are held to be quashed. Though the applicant has impugned A-6 and A-8 orders as these are not directly related to the relief that sought for, no orders are passed in respect of these impugned orders.

16. Respondents are directed to consider the case of the applicant for 2nd ACP on the above lines and grant him the same with effect from 24.8.2000. Needless to mention that the applicant would be entitled to arrears of pay and allowances arising out of such benefits. The above drill be performed within three months from the date of communication of this order. No order as to costs.

Dated the .....27th.....August, 2008.

Dr.K.S.SUGATHAN
ADMINISTRATIVE MEMBER

Dr.K.B.S.RAJAN
JUDICIAL MEMBER

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