

V
CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. No. 69 of 2005

Tuesday this the 7th day of November, 2006

CORAM :

**HON'BLE DR. K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE MR.N.RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

P.P. Lonappan,
Assistant Accounts Officer,
Kottayam Central Division,
Central Public Works Department,
Public Library Building, Shastri Road,
Kottayam. : **Applicant**

(By Advocate Mr. TC Govindaswamy)

Versus

1. Union of India represented by the
Secretary to the Government of India,
Ministry of Finance,
Department of Expenditure,
New Delhi.
2. The Controller General of Accounts,
Ministry of Finance,
Department of Expenditure,
New Delhi.
3. The Executive Engineer,
Kottayam Central Division,
Central Public Works Department,
Public Library Building, Shastri Road,
Kottayam.
4. Ms Lilly George,
Pay & Accounts Officer,
Centre for Marine Living Resources and Ecology,
Department of Ocean Development,
Church Land Road, Kochi-16. : **Respondents**

(By Advocate Mr. TPM Ibrahim Khan, SCGSC for R.1 to 3)

The application having been heard on 16.10.2006, the Tribunal on
7.11.2006 day delivered the following :



ORDER**HON'BLE MR.N.RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

The applicant, Shri Lonappan, Assistant Accounts Officer, CPWD, Kottayam is aggrieved by the denial of consideration for promotion to the next higher post of Pay & Accounts Officer in scale Rs.7500-12000.

2. Initially appointed as an Upper Division Clerk on 16.4.1970, the applicant was successively promoted as a Junior Accounts Officer on 9.1.1985 and, as Assistant Accounts Officer on 1.5.1989 in the scale Rs.7450-11500, in the office of the 3rd respondent. His cadre controlling authority is the 2nd respondent, Controller General of Accounts. The next promotion is to the post of Pay & Accounts Officer in scale Rs.7500-12000, to be filled up based on the principle of seniority-cum-fitness. In the All India Gradation list of Accounts Officers, the applicant is at Sl.No.75 and, therefore, he claims eligibility to be considered for promotion, in preference to his juniors. The applicant received a Circular bearing No.Admn./1(1)10/Volunteers/2002-03/1961 dated 26.3.2003 issued by the Dy. Controller of Accounts (Admn) Office of the Principal Chief Controller of Accounts, Central Board of Excise & Customs, New Delhi (A-3). Vide this circular, he was notified as being in a list of AAOs likely to be promoted as P&AO and was required to indicate his choice station on promotion. He gave such option for Kochi. He heard nothing regarding promotion, till he came across a gradation list of Pay & Accounts Officers as on 1.4.2004 (A-4). In that list, the applicant noticed Shri R.S.Suayal and Smt.Usha Khanna, his juniors, (Sl.Nos. 6 and 7 respectively in the enclosed list of Assistant Accounts Officers in Annexure A-3) and many others having been promoted and posted as Pay & Accounts Officers on various dates prior to 1.4.2004.

3. The applicant submitted a detailed representation dated 15.9.2004 (A-5), addressed to the 2nd respondent. Therein, he mentioned about promotion of his juniors over looking his seniority, the reasons therefor, he was unaware of



and ended with a prayer for considering his case for promotion. Annexure A-5 was duly forwarded by the 3rd respondent by a letter bearing No.9(1)/KCD/2004/2112 dated 24.9.2004(A6). He received a copy of the Order No.A-32015/2/04-05/U.D/Admn/18604 dated 14.1.2005 (A-7). Therein, it was said that the promotion case of the applicant to the post of PAO was considered twice for the vacancies of the year 2003-04 and 2004-05 and, on both the occasions, he was found unfit. During the pendency of this O.A., the respondents issued orders dated 16.3.2005(A-8) promoting one Ms.Lilly George, Assistant Accounts Officer, another junior to the applicant as Accounts Officer by A-8.

4. Aggrieved by the impugned orders A-7 and A-8, he has come before this Tribunal, seeking the following reliefs:

- (a) Call for the records leading to the issue of Annexure A-7, Annexure A-8 and quash the same;
- (b) Declare that the non-feasance on the part of the respondents to consider him for promotion as Pay and Accounts Officer in preference to his juniors, referred to in Annexure A-3 and to grant him the consequential benefits thereon, on par with them, is arbitrary, discriminatory, contrary to law and unconstitutional;
- (c) Direct the respondents to consider the applicant for promotion as Pay and Accounts Officer in preference to his juniors and to grant him the consequential benefits of promotion as Pay and Accounts officer, with effect from the date of promotion of the applicant's next junior;
- (d) Direct the respondents to consider the applicant for promotion and posting against one of the vacancies in existence in the office of the Pay & Accounts Officer, Customs/Kochi or in the office of the Pay & Accounts Officer, Central Excise/Trivandrum, as provided in Annexure A-2 policy.

5. His claims for the above reliefs rest on the following grounds:



- a) The promotion post of Pay and Accounts Officer is a non-selection post, to be filled in on the basis of seniority-cum-fitness.
- b) He has not been considered for promotion so far, despite is eligibility and seniority
- c) If he was found unfit for promotion to the higher post as stated in Annexure A-7 in both the years, which is definitely based upon adverse entries in the Confidential Reports, the applicant had never been informed, nor given a reasonable opportunity to make his submissions, as provided for in the rules and instructions on the subject..

6. The respondents resist the claims by stating that,

- a) The contentions of the applicant that he has been denied his right to be considered for promotion as Pay and Accounts Officer, is not correct as he was duly considered for promotion along with other candidates, while preparing the Panel for the years 2003-2004 and again 2004-2005. For both these years, the Departmental Promotion Committee had found the applicant unfit and therefore he has not so far been promoted.
- b) As a matter of fact, his representation was considered and a reply was given to the applicant as per Annexure R-1 letter No.A.32012/2/2004/MF.CGA(A)/Gr.B/1176 dated 19.10.2004 issued by the Accounts Officer.
- c) This Original Application is beyond limitation period prescribed in Section 21 of the Administrative Tribunals Act, as the cause of action had arisen as early as 5.6.2003, the date of promotion of his junior.

7. Heard the counsel and perused the documents.

8. The following issues are framed for consideration



- 1) Was he duly considered for promotion?
- 2) What was the basis for promotion
- 3) If Annual Confidential Reports are the determinants, is he entitled to be warned in advance about crucial entries and,
- 4) Was he so informed about the same?

9. As to the question whether he was duly considered for promotion, the learned counsel for the respondents brought for our perusal, copies of the minutes of the DPC held on 31.3.2003 and 19.4.2004. The first one was to consider the vacancies anticipated during the year upto 28.2.2004 and the second, upto 28.2.2005. The minutes of the first meeting reveal the CR dossiers of the officers under consideration, including those of the applicant, were submitted to the DPC and, after going through the same, the DPC found the applicant unfit among others. The second DPC, likewise, went through the CR dossiers of all the A.A.Os including the applicant, and found him unfit along with others. Based upon these minutes, we find that the case of the applicant was considered twice during 2003 and 2004.

10. Next question is what was the basis for promotion. The applicant maintains that the basis is seniority-cum-fitness. The question now arises as to what constitutes fitness. In the reported case of 1991 Suppl 2 SCC 635, Dharam Vir Singh Tomar v. Administrator, Delhi Administration and others, the Hon. Supreme Court observed as follows:

“..The expression 'fitness' means that there should not be any adverse entry in the character rolls of the concerned person at least for the last three years and no disciplinary proceedings should be pending against him..”

The respondents have no case about the pendency of any disciplinary proceedings. The minutes of the DPC meetings reveal that, in the DPC held on 31.3.2003, no specific reason has been marked as to why the applicant was found unfit along 6 others. However, in the next DPC meeting held on 19.5.2004, the following reasons are given:



"Average grading for 2002-03. The CRs for the period 98-99 to 2001-2002 are also Good. Hence he is declared unfit.

From the remarks made about others, it has to be surmised that the benchmark grading was 'Very Good' and C.Rs were adopted for assessing the fitness. Thus, we find that CRs were taken as the basis for promotion and the benchmark grading was 'Very Good'.

11. Next point to be considered is, if Annual Confidential Reports are the determinants, whether he is entitled to be warned in advance about crucial entries. The respondents have no specific point about the communication aspect of the adverse entries, nor do they assert that such crucial entries were communicated at all. No authorized array of gradings used by the respondents are available as part of material papers, though, from the minutes of the DPC meetings, the following are presumably in use -Below-average, Average, Good, and Very Good. Nothing is known about the official policy of communication of adverse entries. But assuming Very Good entry is the benchmark entry, for the purpose of promotion, what are the must-procedures to be followed, in respect of non-negative but below-the-benchmark grading is the crucial question.

12. A plethora of decisions are available on this issue. In (1996) 33 ATC 802, it was observed that "...we are inclined to agree that a 'good' or 'Average' grading in the ACR, though not per se adverse would assume the character of adverse remarks in the context of the requirement of 'Very good' benchmark to qualify for empanelment for promotion"

13. In 1998(2) SLJ(CAT) 334, the issue was the question of promotion of the applicant therein to the post of Deputy Commissioner. She was given an overall grading of 'Good' as against the benchmark of 'Very Good'. The Bench decided to allow the application by directing the applicant to file representation against the 'Good' entries.



14. In 2001(2) SLJ(CAT) 9, the applicant therein was not selected as his ACR for some period was 'Good' or 'Satisfactory' which were not communicated. The learned Bench had observed,

"An entry like 'Poor', "Below Average', "not Satisfactory' are per se adverse. But there may be an entry like 'Satisfactory' or 'Good' but the Bench Mark may be 'Very Good'. In such a case, a grading which is less than the prescribed Bench Mark may amount to an adverse entry, since it will definitely affect the promotional prospects of an officer. The question is, whether such an entry though not per se adverse but which is below the Bench Mark, should be communicated to an officer or not, and if not communicated, what is the consequence?

"6. The learned counsel for the applicant placed reliance on three recent judgments of a Division Bench of this Tribunal dated 7.1.2000 in O.A.Nos.117/99, 120/99 and 172/99 where the Division Bench has referred to number of authorities on the point, and, in particular, to following decisions:

- (i) Udal Krishna v. Union of India (1996) 33 ATC 802=1996(1) SLJ 464 (CAT),*
- (ii) G.Chenkamalam v. Union of India (1998) 37 ATC 354=1998(2) SLJ 334 (CAT).*
- (iii) Jugal Krishnan Goyal v. Union of India, O.A.No.29/1989 decided on 17.5.989 unreported judgment of Jabalpur.*
- (iv) Bhaktadas Roy v. Union of India, O.A.No.125/92 of Mumbai Bench decided on 18.2.1993,*
- (v) Girija Shankar Misra v. Union of India (1996) 34 ATC 43.*

and came to the conclusion that any entry, which may not be per se adverse, but still if it is below the prescribed Bench Mark, then it amount to adverse entry and cannot be acted upon, unless it is communicated to the officer concerned. The Division Bench has referred to four five earlier judgments of different Benches of the Tribunal and also to the judgment of the Apex Court in case of U.P. Jal Nigam & others v. Prabhat Chandra Jain & others reported in JT 1996 (1) SC 641 and came to the conclusion that any grading or any entry which is below the Bench Mark, must be communicated or otherwise it



should not be acted upon."

"7. We must bear in mind that the rules do not provide for communication of grading below the Bench Mark unless it is an adverse grading like 'Poor', 'Not satisfactory' etc. A positive grading like 'Satisfactory', 'Good' etc. is not necessarily adverse and therefore, under the rules, they need not be communicated. But there is consistent judicial review, as could be seen from some of the judgments referred to earlier, that if a grading is below the Bench Mark, then it will adversely affect the promotional prospects of an officer and therefore, it should be communicated to him. If there is violation of rules like not communicating adverse remarks, as provided in the rules, then one can straightaway proceed by ignoring the uncommunicated adverse remarks. But here there was a positive grading and therefore, it need not be communicated as per rules, but it requires to be communicated as per judicial decisions if the grading is less than the Bench Mark grading. Every officer may not be aware of the judicial decisions to apply his mind and to communicate the positive grading, though less than the Bench Mark grading, to the concerned officer. There is no violation of any rule here if a positive grading less than the Bench Mark grading is not communicated to the officer. But it is a case of necessity as per the judicial decisions. Since many officers or most of the officers may not be aware of the judicial decisions and there is no circular by the Government to this effect and therefore amendment to the confidential service rules to communicate lower grading than the Bench Mark grading, we cannot straight away ignore the lower positive grading and then consider whether the officer has been rightly superseded or not."

"We are fortified in our view by two decisions on this point.

The first case is one which is already referred to above, namely *G.Chenkamalam v. Union of India (supra)*, where a Division Bench of the Bangalore Bench of this Tribunal in an identical situation directed the competent authority to convey the lower grading than the Bench Mark grading to the officer concerned and if he makes a representation, then it should be considered and if in the result of the representation there is a change in the grading for better, then Review DPC must be held to consider the case of the officer for promotion.

"Similarly, in the other case referred to above, namely *Udai Krishna v. Union of India (supra)*, a Division Bench of the Allahabad Bench of this Tribunal has taken an identical view that the positive grading of



'Good' which is less than the Bench Mark in the year 1989-90, should be communicated to the officer and on the representation of the officer, if there is a change in the grading, then a Review DPC should be held to consider his case for promotion. We feel that in the present case also we should adopt the same procedure, since the concerned officer may not be aware of the judicial decisions that a positive grading should also be communicated to the officer if it is below the bench Mark grading."

15. These decisions of the Coordinate Benches have unequivocally stated the position that, any grading below benchmark grading, though not adverse per se, has the attributes of an adverse entry and should be treated as such.

16. This Tribunal had occasion to decide on an almost identical cases, of late ie., OA 896/2003. Therein again, the issues raised were about what constitutes an adverse entry and the need to communicate the positive but below benchmark assessment to the applicant. On this issue, this Bench had observed as follows:

"In Brij Mohan Singh Chopra v. State of Punjab [(1987) 2 SCC 188] it has been laid down "There is no doubt that whenever an adverse entry is awarded to government servant it must be communicated to him. The object and purpose underlying the communication is to afford an opportunity to the employee to improve his work and conduct and to make representation to the authority concerned against those entries. If such a representation is made it is imperative that the authority should consider the representation with a view to determine as to whether the contents of the adverse entries are justified or not. Making of a representation is a valuable right to a government employee and if the representation is not considered, it is bound to affect him in his service career, as in government service grant of increment, promotion and ultimately premature retirement all depend on the scrutiny of the service records..."

In Gurdial Singh Fiji v. State of Punjab [(1979) 2 SCC 368] – it has been laid down "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 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. Unfortunately, for some reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the government has not been able to consider his explanation and decide whether the report was justified." and in *Amar Kant Choudhary v. State of Bihar* [(1984) 1 SCC 694] – it has been laid down "...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 improve his work and conduct or to explain the circumstances leading to the report. Unless the representation against the adverse entry is considered and disposed of it is not just and fair to act upon those adverse entries. These decisions lay down the principle that unless an adverse report is communicated and representation, if any, made by the employee is considered, it cannot be acted upon to deny promotion. We are of the opinion that the same consideration must apply to a case where the adverse entries are taken into account in retiring an employee prematurely from service..."*

We therefore find that the gradings of Average and Good which the applicant had earned during check period relating to the period of promotions mentioned above are to be treated as adverse and they should not be acted upon without giving an opportunity of communication etc as contemplated under the rules concerned

17. Final question to be considered is whether he was so informed about the same. It is no one's case that he was informed about his gradings during the relevant period.

18. We find therefore that,

- (i) the case of the applicant was considered twice during 2003 and 2004,
- (ii) CRs were taken as the basis for promotion and the benchmark



grading was 'Very Good'.

(iii) the gradings of Average and Good which the applicant had earned during check period relating to the period of promotions mentioned above are to be treated as adverse and they should not be acted upon without giving an opportunity of communication etc as contemplated under the rules concerned, and that

(iv) he was not informed about his gradings during the relevant period.

19. Based on the above finding, we partially allow this O.A and quash the impugned order A-7. There shall be a direction to the respondents concerned that they shall communicate all the entries below the benchmark grading for the check period for promotions considered in the DPC meeting held on 31.3.2003 and 19.5.2004, within a period of two months from the date of receipt of a copy of this order. In respect of each one of them, the applicant shall submit his representations within one month of receipt of the ACRs. Such representations shall be duly considered and decision taken by the appropriate authorities within one month of receipt of such representations in the light of the prevailing rules, regulations, instructions and orders. Within three months of such decision having been made, an ad hoc DPC should be held to consider the case of the applicant and final decision taken without causing any prejudice to the persons already promoted. If the applicant is promoted as a result of decisions taken in pursuance of the above exercise, he shall be duly entitled to all consequential benefits.

20. No costs.

Dated, the 7th November, 2006.



N.RAMAKRISHNAN
ADMINISTRATIVE MEMBER



Dr. K.B.S.RAJAN
JUDICIAL MEMBER