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CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 864 of 2006

with

Original Application Nos. 01/2007 and 03/2007

Thursday, this the 26th day of June, 2008

C O R A M :

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

HON'BLE DR. K S SUGATHAN, ADMINISTRATIVE MEMBER

1. O.A. NO. 864 OF 2006

1. Shiny James, W/o. P.A. James,
Lower Division Clerk, Regional Passport Office,
Cochin : 35, Residing at Quarter No. 3/5,
Passport Office Residential Complex,
Panampilly Nagar, Cochin : 35
2. P.C. Beena, W/o. Leslie Joseph Joshua,
Lower Division Clerk, Regional Passport Office,
Cochin : 35, Residing at Quarter No. II,
Plot No. II, Passport Office Residential Complex,
Perumanoor, Cochin : 35 Applicants

(By Advocate Mr. Shafik M.A.)

v e r s u s

1. Union of India, represented by
Joint Secretary (CPV) &
The Chief Passport Officer, Ministry of
External Affairs, Government of India,
New Delhi
2. The Deputy Secretary (PV),
Ministry of External Affairs,
Government of India, New Delhi
3. The Regional Passport Officer,
Regional Passport Office,
Panampilly Nagar, Cochin - 35

4. The DPC Constituted for Promotion of LDCs as UDCs conducted on 5.10.2006, Represented by its Chairman, Ministry of External Affairs, Government of India, New Delhi ... Respondents.

(By Advocate Mr. Varghese P. Thomas, ACGSC)

2. O.A. NO. 01 OF 2007

S.Jaya,
D/o. E.V. Kannan Nair,
Lower Division Clerk,
Passport Office, Trivandrum
Residing at "Bindu Nivas",
TC 41/206, Manacaud, Trivandrum ... Applicant.

(By Advocate Mr. Shafik M.A.)

v e r s u s

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

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

3. The Passport Officer
Passport Office,
Trivandrum.

4. The DPC Constituted for Promotion of LDCs as UDCs conducted on 5.10.2006, Represented by its Chairman, Ministry of External Affairs, Government of India, New Delhi ... Respondents.

(By Advocate Mr. S. Abhilash, ACGSC)

3. O.A. NO. 03 OF 2007

S. Preetha,
 D/o. G. Thulasidas,
 Lower Division Clerk,
 Passport Office, Trivandrum,
 Residing at "Thulasi Bhavan",
 TC 44/659, Valiathura, Vallakadavu,
 Trivandrum.

... Applicant.

(By Advocate Mr. Shafik M.A.)

v e r s u s

1. Union of India, represented by
 Joint Secretary (CPV) & The
 Chief Passport Officer, Ministry of
 External Affairs, Government of India,
 New Delhi
2. The Deputy Secretary (PV),
 Ministry of External Affairs,
 Government of India, New Delhi
3. The Passport Officer
 Passport Office,
 Trivandrum.
4. The DPC Constituted for Promotion of
 LDCs as UDCs conducted on 5.10.2006,
 Represented by its Chairman,
 Ministry of External Affairs,
 Government of India, New Delhi

... Respondents.

(By Advocate Ms. Mini R. Menon, ACGSC)

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

As the legal issue involved in these three O.As is the same, this common order deals with all the three O.As.

2. Briefly stated, the applicants in all these O.As are working as L.D.Cs in the office of the 3rd respondents and were due for promotion to the post of U.D.C. during 2005-2006. Benchmark prescribed for promotion to the post of U.D.C. is 'Good'. These three applicants were however, superseded vide promotion order dated 9th October 2006 at Annexure A-6 (O.A. No. 864.06). Representation preferred by the applicants did not yield any fruitful result and the respondents have given the reason for non promotion of the applicants that the names of the applicants were duly considered by the D.P.C. held on 05-10-2006 but their names were not recommended for the promotion to the next grade. (Annexure A-1 to A-3 in OA No.864/2006, Annexure A-1 and A-2 in OA No. 1/2007 and Annexure A-1 and A-2 in OA No. 3/07 refer). These order have been under challenge through these O.As.

3. Respondents have contested the O.A. According to them, the Benchmark for selection to the post of UDC is 'good' and graded accordingly as 'Fit' or 'Unfit'. Only 'Fit' cases are considered for promotion in DPC. An average report cannot be equated with 'Good' as per guidelines issued by the Department of Personnel and Training, vide order dated 8-02-2002 at Annexure R-1.

4. In the rejoinder, the applicant in each of the O.A. contended that the applicants have not been communicated with any adverse entries in their A.C.Rs and un-communicated remarks in the ACR cannot form the basis for the DPC to fix 'unfit benchmark' for the officials. The DPC has not been

conferred with any unbridled powers to mark a candidate as unfit based on the grading in A.C.Rs.

5. In their additional reply, the respondents have reiterated their stand as in the reply and further contended that the contentions raised in the rejoinder are against the guidelines of the D.P.C. published on 8-02-2002.

6. Counsel for the applicant submitted that ACR is not meant to punish any individual and the purpose of communication of adverse remarks in the ACR is only to enable the individual concerned to improve himself. As such any remarks or grading which comes in the way of the individual's promotion should be treated as adverse remarks and hence should be communicated. Otherwise, the purpose of communication would not be served. And, uncommunicated remarks should not be taken into account by the DPC. For example, when the grading 'good' is the benchmark for promotion from LDC to UDC, in the event of awarding of the grading 'average' to a candidate would mean that there is down grading. If so, the same should be communicated. And, if not communicated, the same should not be taken into account by the D.P.C. In this regard the counsel for the applicant relied upon the decision of the Full Bench (five Member Bench) of the Principal Bench in O.A. No. 24/2007 decided on 7th May, 2008, wherein the Tribunal has held as under:-

"32. in view of our reasoning recorded earlier, we are of the opinion that the recording officer/reviewing officer who are presumed to be aware of the Benchmark as laid down by the relevant orders, are also obliged to communicate the presence of the 'Good' entry, as and when they are recorded, to the knowledge of the concerned officer, for him

to avail steps to resort to appropriate measures. This position could be envisaged as a fall out of the Supreme Court's decision in U.P. Jal Nigam as well as S.K. Goel.

33. In view of the practice, which was being followed over a considerable period of time, we can visualize that there would have been innumerable number of cases where persons similarly situated like the applicant herein might have had set backs in their career. Nevertheless, we do not think, it will be appropriate to give a license to set at naught all such promotions, although the exposition of law as presently given by us normally would have conferred a cause of action for them in principle. We hold that the order in this OA is to have only a restricted operation. Past cases where decisions have been taken by the DPC and supersession brought about, are not to be permitted to be reopened. But where such decisions have already been subjected to challenge before the Tribunal or where the decision of the DPC had been arrived at only on or after 07.05.2007, such restrictions may not be applicable. We are constrained to observe as above as unrestricted license for litigation is intended to be conferred upon consequent to our orders.

25. Having regard to the above, the decision of the Ahmedabad Bench in *Union of India & Ors. vs. A.P. Srivastava*, (SCA No. 8339/2007) has meticulously dealt with the above aspect. With the new promotion guidelines introduced on 8.2.2002 and the Union of India has done away with zone of consideration for promotion, the decision that whosoever meets the benchmark shall be declared fit and promoted. Moreover, Union Public Service Commission's own policy decision laying down that achieving four benchmarks out of available ACRs is binding on them. The downgrading of the ACRs is certainly adverse to the applicant, which should have communicated in law as per the instructions.

35. Resultantly, we approve the view taken by the Ahmedabad Bench in OA 673/2004 holding that downgrading from 'Very Good' to 'Good' and similar downgrading does amount to making of an adverse entry. Mandatorily these are required to be communicated to the persons who stand to be effected thereby. The reference is answered as above.

36. The office is directed to place the matter before appropriate Division Bench for examining the other issues that have been highlighted."

7. In addition, the counsel relied upon the decision in OA No. 636/07 of the Principal Bench and OA 910/06 of this Bench decided on 01-11-2006.

8. Counsel for the respondents has made available the original records containing the ACR dossiers of the applicants and the DPC Proceedings for our perusal.

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

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

10. The above would show that the graph of assessment has been fluctuating and in zig-zag motion. The sting of below benchmark grading would continue for five years. As for example, all the applicants have the grading of Average for the year 2002 – 2003 the adverse effect of which would prevail till 2006-2007. Again, Applicant in OA No. 1 of 2007 and 3 of 2007 have the below Bench mark grading for the year 2004-2005, the adverse effect of which would extend till 2009-2010.

11. Admittedly, the applicants have not been communicated with the average grading, which is below the prescribed Benchmark. The question is what is the impact of the same.

12. In *State of Haryana v. P.C. Wadhwa*, (1987) 2 SCC 602, the Apex Court has held as under:-

14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career.

13. Again, in *Swatanter Singh v. State of Haryana*, (1997) 4 SCC 14, it has been held –

"It is true that in view of the settled legal position, the object of writing the confidential reports or character roll of a government servant and communication of the adverse remarks is to afford an opportunity to the officer concerned to make amends to his remissness; to reform himself; to mend his conduct and to be disciplined, to do hard work, to bring home the lapse in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant reflecting as accurately as possible his sagging inefficiency and incompetency. The defects and deficiencies brought home to the officer, are means to the end of correcting himself and to show improvement towards excellence."

14. Thus, from the above decisions of the apex Court, it is evident that the precise purpose of communication of adverse remarks is that it acts as a

curve corrector, so that the employee could reform himself and improve in order to ensure that the career prospects are not hampered. It is not meant to penalize the individual.

15. Now, what is the consequence of non-communication of those remarks which ought to have been communicated? Answer to this question is available in the decision of the Apex Court in *Union Public Service Commission v. Hiranyalal Dev*, (1988) 2 SCC 242, wherein the Apex Court has held, "It cannot be gainsaid that the Selection Committee could not have taken into consideration the adverse remarks entered in the records which had not been communicated to Respondent 1". The Apex Court has in the case of *Prabodh Sagar v. Punjab SEB*, (2000) 5 SCC 630, opined, "The challenge, however, is based on two principle counts — on the first it is the issue of *mala fides* and on the second it is the un-communicated adverse reports: undoubtedly both these counts are rather serious in nature and success in regard to any one of the counts would entitle the appellant herein to appropriate relief."

16. The above decisions of the Apex Court as well as the Full Bench of the Tribunal, when read concurrently, would mean that any remark which has the effect of impairing the promotional prospects of an individual should be communicated and if not communicated, the un-communicated remark cannot be taken into account by the D.P.C.

17. Thus, following the decision of the Full Bench cited above, it could be safely stated that in view of the fact that the applicants have not been communicated the adverse remarks, such grading ought not have influenced the DPC in their recommendation.

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

19. In view of the above, the QAs are allowed to the extent that the impugned orders in all the O.As (Annexure A-1 to A-3 in OA No.864/2006, Annexure A-1 and A-2 in OA No. 1/2007 and Annexure A-1 and A-2 in OA No. 3/07 whereby it was informed that the DPC did not consider the applicants fit for promotion) are hereby quashed and set aside. Respondents are directed to hold a review DPC in respect of the applicants which would consider the case of the applicants, without taking into account the un-communicated grading below the benchmark and if otherwise found fit for promotion, the applicants shall be accordingly promoted to the post of U.D.C.

However, it is made clear that such promotion shall be on notional basis, and would count for seniority and fixation of notional pay, and actual pay would be available only from the date the applicants enshoulder higher responsibilities.

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

21. No costs.

(Dated, the 26th June, 2008)

(Dr. K/S SUGATHAN)
ADMINISTRATIVE MEMBER

(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVR.