

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 135 of 2010

TUESDAY, this the *14th* day of December, 2010.

CORAM:

**HON'BLE Mr. JUSTICE P.R. RAMAN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

T.N. Subramanian,
S/o. Late T.S. Narayanan,
Statistical Assistant,
Coconut Development Board,
Kera Bhavan, S.R.V.H.S Road,
Ernakulam South, Cochin – 16
Residing at 11/275, Old Bus Stand,
Opposite Village Office, Main Road,
Thripunithura – 682 301.

... Applicant

(By Advocate Mr. M. Paul Varghese)

Versus

1. Statistical Officer, Coconut Development Board,
Kera Bhavan, S.R.V.H.S Road,
Ernakulam South, Cochin – 682 016.
2. Secretary, Coconut Development Board,
Kera Bhavan, S.R.V.H.S. Road,
Ernakulam South, Cochin – 682 016.
3. Chief Coconut Development Officer,
Coconut Development Board,
Kera Bhavan, S.R.V.H.S Road,
Ernakulam South, Cochin – 682 016.
4. The Chairman, Coconut Development Board,
Kera Bhavan, S.R.V.H.S Road,
Ernakulam South, Cochin – 682 016.
5. Union of India, represented by its Secretary,
Ministry of Agriculture, New Delhi.



6. Shri Thomas Mathew M.,
Chief Coconut Development Officer,
Coconut Development Board, Kera Bhavan,
S.R.V.H.S Road, Ernakulam South,
Cochin – 682 016. ... Respondents

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

The application having been heard on 02.12.2010, the Tribunal on 14.12.10 delivered the following:

ORDER

HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER

This O.A. has been filed by the applicant for the following reliefs :

- (i) Call for the records leading to Annexures A3 and A5 and set aside the same, in as far as it make the applicant unfit for promotion to the post of Statistical Investigator.
- (ii) Set aside Annexure A6 notification to the extent to which it call for the applications to the post of Statistical Investigator on direct recruitment basis.
- (iii) Issue appropriate directions or orders, to the respondents 1 to 5 to hold the DPC again and promote the applicant to the post of Statistical Investigator.
- (iv) Grant such other reliefs which this Hon'ble Tribunal may deem fit and proper to grant, in the facts and circumstances of the case.
- (v) Award the costs of this proceedings.

2. The applicant who joined the Coconut Development Board on 24.09.1990 is now working as Statistical Assistant. He is a graduate in commerce with economics and business statistics. He also possesses post graduate diplomas in computer application and in marketing management. He is the only qualified candidate for consideration for



promotion to the post of Statistical Investigator. In the Departmental Promotion Committee (DPC) meeting held on 05.10.2009, the DPC found him unfit for promotion to the said post on the ground that overall grading obtained during one of the 5 years is 'average' whereas the bench mark fixed is 'good' for the preceding 5 years. Hence the O.A.

3. The applicant contends that the ACR of the applicant at Annexure A-3 for the year 2008-09, the decision of the DPC at Annexure A-5 holding him unfit for promotion to the post of Statistical Investigator and the consequential notification at Annexure A-6 calling for applications to the post of Statistical Investigator under direct recruitment are illegal, arbitrary and unreasonable. The applicant being the only candidate eligible to be considered for promotion to the said post as per the recruitment rules, is entitled for promotion, there being no legally sustainable adverse remarks against him. The 1st and 3rd respondents have made adverse entries in Annexure A-3 APAR with malafide intention to prevent the applicant from getting the promotion. The adverse entries in the APAR should not have been considered by the DPC as the same was not intimated to the applicant before the meeting of the DPC. As per the O.M. dated 16.02.2009 at Annexure A-7, the reports by the reporting / reviewing officers are not sustainable. Even if they are sustainable, when the assessments for the preceding 4 years are 'good' and 'very good', he should not have been made unfit for promotion. The attribute of willingness to take higher responsibility adversely commented upon in A-3 APAR should not have been taken into consideration without taking into account the reports of the previous



years in the very same respect. Direct recruitment to the post of Statistical Investigator can be resorted to only when the recruitment by way of promotion fails, and when the applicant is entitled to promotion resorting to direct recruitment is unwarranted. The applicant has no other chance of getting any promotion. His legitimate right and expectation for promotion and fundamental rights guaranteed under Article 16(1) of the Constitution are being infringed by the impugned orders of the respondents.

4. The respondents contested the O.A. In the reply statement filed by them, it was submitted that on examination of the ACRs for the last 5 years of the applicant, the DPC observed that the overall grading during one of the years is 'average' whereas the bench mark fixed is 'good' for promotion. Since the willingness to undertake greater responsibility was 'average' in four ACRs, review of the last ACR alone was not sufficient to consider him for promotion, it was decided to fill the vacancy through direct recruitment. Since 'average' was not considered as an adverse remark, it was not communicated to the applicant earlier. The applicant was provided with a copy of APAR for 2008-09. His reply against the adverse remark has been examined and his representation was not accepted.

5. In the rejoinder, the applicant submitted that the DPC had considered the ACRs of the applicant for the last 5 years which were not communicated to him. Annexure A3 Office Memorandum dated 16.11.2009 was issued after the DPC. The contention that the adverse



remark in the ACR in question was not communicated as the 'average' was not considered as adverse, has no basis in the light of the decision of Hon'ble Supreme Court in *Devdutt vs. Union of India and Others*, (2008) 8 SCC 725. When the overall assessment is 'good' and 'very good', the other parameters and the grading should not have been taken into consideration. In Annexure A-3 ACR for the year 2008-09 at Part IV, column 2, the reviewing officer has agreed with the report of the reporting officer, but in column 5, it was recorded as 'average', while the overall assessment by the reporting officer was 'good'. If there is any delay at the level of reporting and reviewing officers, the consequence listed in O.M. dated 16.02.2009 at Annexure A-7 should follow.

6. In the additional reply statement, the respondents submitted that the 4 prior ACRs which were not supposed to be disclosed considering the direction 2(v) of the O.M. dated 14.05.2009 wherein it was specified that the new system shall be made applicable prospectively only with effect from the reporting period 2008-09. Even though the self appraisal of the applicant was received late after the prescribed date of 15.04.2009 and going by the schedule, there would not be any ACR to be reported upon.

7. We have heard Mr. M. Paul Varghese, learned counsel for the applicant and Mr. Sunil Jacob Jose, SCGSC, learned counsel for the respondents and carefully perused the records.

8. The undisputed fact is that the applicant is the only eligible



candidate in accordance with the recruitment rules for consideration for promotion to the post of Statistical Investigator in the Coconut Development Board. The issue is whether the applicant has been given fair consideration by the respondents based on his ACRs, relevant instructions and the law laid down by the Hon'ble Supreme Court in this regard. The applicant has been found unfit by the DPC which met on 05.10.2009. The proceedings of the said DPC meeting is reproduced as under:

"Proceedings of the Departmental Promotion Committee (Group 'B') meeting held at 12.00 noon on 5.10.2009 at Headquarters of the Coconut Development Board, Kochi to consider promotion to the post of Statistical Investigator in the pay band of Rs. 9300-34800 with GP 4200 (Pre-revised scale Rs. 5500-175-9000) in the Coconut Development Board."

A meeting of the Departmental Promotion Committee (Group 'B') was held at 12.00 noon on 5.10.2009 in the headquarters of the Coconut Development Board to consider promotion to the post of Statistical Investigator in the pay band of Rs. 9300-34800 with GP Rs. 4200 (Pre-revised scale Rs. 5500-175-9000).

The following members of the Departmental Promotion Committee were present in the meeting.

- 1 Smt Minnie Mathew I.A.S
Chairman, Coconut Development Board : Chairman
- 2 Shri M. Thomas Mathew
Chief Coconut Development Officer
Coconut Development Board, Kochi : Member
- 3 Shri A.N. Muraleedharan Achari
Secretary, Coconut Development Board,
Kochi : Member
- 4 Shri Khokan Debnath,
Deputy Director, Directorate of
Cashewnut Development, Kochi : Member
representing DAC



- 5 Smt K.V. Sumana,
Administrative Officer,
Coir Board, Kochi : Member representing
SC/ST Community

The Committee noted the contradictory entries in the Recruitment Regulations for the post of Statistical Investigator. However, the committee proceeded to examine the suitability of the candidate based on the legal opinion received in the matter.

As per guidelines the benchmark prescribed for considering candidates for promotion to 'PB 3' Group post is 'Good'. Those who are graded as fit by the DPC is to be included in the select panel in the order of their *inter se* seniority in the feeder grade subject to availability of vacancies.

The committee assessed the suitability of the only candidate viz. Shri T.N. Subramanian, Statistical Assistant who possessed the required qualifications and experience for promotion to the post of Statistical Investigator as per Coconut Development Board Recruitment Rules. The Committee examined the ACRs of Shri T.N. Subramanian, Statistical Assistant for the last five years and observed that the overall grading obtained during one of the years is 'Average' whereas the benchmark fixed is 'Good' for the preceding five years. It was also observed that the grading received by Shri T.N. Subramanian against the parameter "Willingness to undertake greater responsibility" (Sl.No.20 of the ACR) is 'Average' in four ACRs. The grading obtained under other parameters in the ACRs for three years is only 'Fair'.

The committee after careful consideration of the ACRs of Shri T.N. Subramanian for the last five years and also taking into consideration the benchmark fixed for promotion to 'PB 3' Group post, found Shri T.N. Subramanian, Statistical Assistant as 'unfit' for promotion to the post of Statistical Investigator. The Committee, therefore, did not recommend Shri T.N. Subramanian, Statistical Assistant in the select panel to the post of Statistical Investigator.

Sd/- Sd/-
(M. Thomas Mathew) (A.N. Muraleedharan Achari)

Sd/- Sd/- Sd/-
(Khokan Debnath) (K.V. Sumana) (Minnie Mathew)



Assessment of Confidential Reports (DPC on th October 2009)

Sl. No.	Name & Designation	Assessment Year and Assessment Report of Controlling Officer					Fair/Unfit
		2004-05	2005-06	2006-07	2007-08	2008-09	
1	Shri T.N. Subramanian	Very good	Good	Good	Very good	Average	Unfit

Sd/-
(M. Thomas Mathew)

Sd/-
(A.N. Muraleedharan Achari)

Sd/-
(Khokan Debnath)

Sd/-
(K.V. Sumana)

Sd/-
(Minnie Mathew) "

9. According to the DPC, the applicant is not meeting the bench mark of 'good' for the preceding 5 years. During one of the years, he was assessed as 'average'. The year he has given 'average' grading is 2008-09 when the Annual Performance Appraisal Reports (APARs) was introduced in place of ACR for the first time. The DPC also observed that the applicant's grading rated against the parameter "willingness to undertake greater responsibility" is 'average' in four ACRs. The grading obtained under some other parameters in the ACRs for three years is only 'fair'. Based on the above, the Committee had not recommended the applicant for promotion to the post of Statistical Investigator. A perusal of the APAR for 2008-09 reveals that the self appraisal part was written by the applicant on 05.05.2009. The assessment of the reporting officer was made on 30.09.2009. The remarks of the reviewing officer also were made on 30.09.2009. The meeting of the DPC took place on 05.10.2009. The APAR for the year 2008-09 with the remarks of the



reporting/reviewing officers was forwarded to the applicant only on 16.11.2009, i.e. 11 days after the DPC met. The assessment by the DPC of the APAR 2008-09 is flawed to the extent it considered adverse remarks which were not communicated to the applicant. It also failed to note that after agreeing with the reports of the reporting officer in Part IV, column 2, which included the overall assessment of the reporting officer as 'good', the reviewing officer rated the overall assessment of performance and qualities of the applicant as 'average' in column 5. The reviewing officer has contradicted himself. In agreeing with the overall assessment as 'good' reported by the reporting officer and then down grading it to the 'average' without any explanation is not correct. If he had any disagreement with the overall assessment of 'good' or any other remarks of the reporting officer in Part-III, he should have indicated the extent of his disagreement or added anything specific with regard to the work and conduct of the official over and above the remarks of the reporting officer against column 2 of Part IV.

10. The respondents are apparently right in pointing out that the APAR system had prospective application only with effect from the reporting period, i.e. in the instant case 2008-09, and accordingly they were not bound to communicate the remarks which were considered 'not adverse' to the applicant for the period prior to 2008-09. But the fact remains that they had not considered it necessary to communicate the APAR for the year 2008-09 with the remarks of the reporting/reviewing officers, some of which were adverse to the applicant, before holding the DPC. By sending APAR together with the remarks which were adverse to the



career and promotion prospects of the applicant after the DPC met, was merely complying with an empty formality disregarding the spirit of the APAR.

11. The O.M. dated 16.02.2009, at Annexure A-7 deals with timely preparation and proper maintenance of ACR. The paras 2 and 3 of the said O.M. which are relevant to the case on hand, are reproduced below :

"2. As cases continue to occur where confirmation, regular promotion, appointment to sensitive posts, etc., could not be considered in time because of non-availability of ACRs for the relevant period, the matter of timely completion of ACRs was further reviewed in this Department and it has been found necessary to prescribe a time limit after which the Reporting/ Reviewing Officer shall forfeit his right to record the ACR. It has been decided that while the time-limits prescribed in the aforesaid O.M. Dated 23.9.1985 should be adhered to as far as possible. In case the ACR is not initiated by the Reporting Officer for any reason beyond 30th June of the year in which the financial year ended, he shall forfeit his right to enter any remarks in the ACR of the officer to be reported upon and he shall submit all ACRs held by him for reporting to the Reviewing Officer on the next working day. Similarly, the Reviewing Officer shall also forfeit his right to enter any remarks in the ACR beyond 31st August of the year in which the financial year ended. The Section entrusted with maintaining the ACRs shall, while forwarding the ACRs for self-appraisal with copy to the Reporting/Reviewing Officers, also annex the schedule of dates as enclosed herewith. It shall also bring to the notice of the Secretary concerned in the case of Ministry / Department and the Head of the organization in the case of attached and subordinate offices, the names of those Group A and B Reporting Officers and Group A Reviewing Officers in the month of October after receiving the completed CRs who have failed to initiate / review the ACRs even by 30th June or 31st August as the case may be. The Secretary in the Department/Head of the organization in the case of attached/subordinate offices may direct to call for the explanation of the concerned officers for not having performed the



public duty of writing the ACRs within the due date and in the absence of proper justification direct that a written warning for delay in completing the ACR be placed in the ACR folder of the defaulting officer concerned.

3. In case the remarks of the Reporting Officer or Reviewing Officer as the case may be have not been entered in the ACR due to the concerned officer forfeiting his right to make any entry as per the provision in para 2 above, a certificate to this effect shall be added in his ACR for the relevant period. In case both the Reporting Officer and Reviewing Officer had forfeited their rights to enter any remarks, the CR format with the self appraisal given by the officer to be reported upon will be placed in his ACR dossier." (emphasis supplied)

The language of the O.M. is mandatory. If the ACR is not initiated by the reporting officer for any reason beyond 30th June of the year in which the final year ended, he shall forfeit his right to enter any remarks in the ACR of the officer to be reported upon and he shall submit all ACRs held by him for reporting to the reviewing officer on the next working day. Likewise, the reviewing officer shall also forfeit his right to enter any remarks in the ACR beyond 31st August of the year in which the final year ended. In the light of these stern directions, the remarks made in the APAR of the applicant by the reporting/reviewing officers for the year 2008-09 on 30.09.2009 are illegal in as much as they had forfeited their right to report/review before they made the remarks. As per the said O.M., the CR form of the applicant with self appraisal given by him without remarks of the reporting / reviewing officers need only to be placed in his ACR dossier. This aspect was also not noticed by the DPC.

12. In ***Devdutt vs. Union of India and Others***, (2008) 8 SCC 725,



the Apex Court held that the gradings in the confidential report of the employee are to be communicated within a reasonable period so that the employee concerned get an opportunity to represent for improvement in said grading. This requirement flows from constitutional obligations of fairness, non-arbitrariness and natural justice. Paras 17 and 18 and 41 to 45 of the judgement in the aforesaid case, which are relevant to this O.A., are extracted as under:

"17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in **Maneka Gandhi v. Union of India** that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is a violation of the principles of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

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41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the



Constitution.

42. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the learned Single Judge as well as the impugned judgment of the learned Division Bench.

43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the "good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the "good" entry of 1993-1994 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

44. We, therefore, direct that the "good" entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.

45. With these observations this appeal is allowed. No costs."


13. Hon'ble Supreme Court has laid down the law as above. That is to say, non-communication of entries in the ACR which may affect the chances for promotion and other benefits, is arbitrary and violative of Article 14 of the Constitution. Accordingly, the non-communication of adverse entries in the ACRs of the applicant for the preceding 4 years of



2008-09 having a bearing on his promotion, is bad in law in spite of the OM dated 14.5.2009. Even communicating the adverse remarks in the ACRs of the applicant during the last 5 years, now, will not help the applicant as he has lost opportunities for improvement. In our view the applicant was not given a fair consideration by the respondents.

14. It is seen that the administration can be fast when it wants to be fast. It did not take even a day between the Reporting Officer and Reviewing Officer to complete APAR of the applicant for 2008-09. It would have been commendable had each of them done his part of the job by the scheduled dates of June 30th 2009 and August, 31st 2009 respectively.

15. It is easy to condemn and discard an employee. It is difficult to motivate and develop him. The ACR, though confidential, was never meant to be an instrument of oppression. The intention of communicating the adverse remarks in the ACR was to develop the potential of the officer reported upon by giving him an opportunity to improve himself. The APAR which is transparent and more objective in assessment of the employee because of transparency, is to be used with utmost circumspection and care as a tool to develop the human resources of the Board/Department. If it was not feasible on the part of respondents to adhere to the time schedule of writing the APAR it was open to them to take up the matter with Government of India and get extension of time limit. The principles of natural justice were discarded, when the DPC assessed the adverse entries in the ACRs which were not communicated



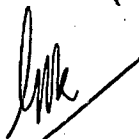
to the applicant, to his disadvantage.

16. In the light of the above, we are of the considered view that in the conspectus of the facts and circumstances of the case and the legal issues involved, it would be fair and just if the respondents are directed to hold the DPC again to consider the relevant ACRs of the applicant without taking note of the adverse remarks made therein for consideration of his promotion to the post of Statistical Investigator. Accordingly, it is ordered as under.

17. Annexures A-3 and A-5 to the extent they make the applicant unfit for promotion to the post of Statistical Investigator are hereby quashed and set aside. The respondents are directed to hold the DPC again and consider the applicant for promotion to the post of Statistical Investigator ignoring the adverse remarks in the relevant ACRs/APAR. Till then, Annexure A-6 notification to the extent it calls for applications to the post of Statistical Investigator on direct recruitment basis is kept in abeyance. If the applicant is found fit for promotion to the aforesaid post, consequential actions including cancellation of that part of Annexure A-6 which is kept in abeyance, shall follow. This exercise shall be completed within a period of three months from the date of this order.

18. The O.A. is allowed as above. No order as to costs.

(Dated, the 14th December, 2010)



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER