

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No.
T. A. No.
XXXX

146/90

199

DATE OF DECISION 28.2.91

C.S.Gopalakrishnan Nair Applicant (s)

Mr.K.Ramakumar Advocate for the Applicant (s)

Versus

Union of India represented by the Respondent (s)
Secretary ,Ministry of Personnel,P.G.& Pension,
Department of Personnel,New Delhi and 23 others

Mr.K.Prabhakaran Advocate for the Respondent (s)

CORAM:

Mr.PVM Nambiar
Mr.A.K Basheer
Mr.M.R.Rajendran Nair

The Hon'ble Mr. S.P MUKERJI, VICE CHAIRMAN

The Hon'ble Mr. A.V.HARIDASAN, JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? No
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

(Hon'ble Shri S.P.Mukerji, Vice Chairman)

° In this application dated 9th February 1990 the applicant who has been working as Air Customs Officer at the Air Port, Trivandrum under the Collector of Central Excise and Customs, Cochin has challenged the impugned order dated 30.1.1990 promoting respondents 5 to 19 from the post of Inspector, Central Excise to officiate as Superintendent of Central Excise. He has also challenged the provisions contained in para 2.3.1 of the procedure to be observed by the Departmental Promotion Committee at Annexure-B as violative of Articles 14 and 16 of the Constitution. He has prayed that respondents 1 to 4 be directed to take into account the gradings of 'Outstanding' and 'Very Good' given to the applicant for the purpose of promotion to the post of Superintendent.

2. The applicant has been working as Inspector, Central Excise at Cochin since 16.2.1975. His next promotion is to the post of Superintendent, Group-B which is a selection post to be made by selection by the Departmental Promotion Committee after assessing the eligible candidates and preparing a Select List. Till 31.3.1989 in accordance with the procedure laid down at Annexure-A in

preparing the Select List the candidates were to be graded on the basis of Confidential Reports as 'Outstanding', 'Very Good' or 'Good'. All 'Outstanding' officers being placed above the 'Very Good' officers followed by 'Good' officers in the Select List. Within the same category of 'Outstanding' or 'Very Good' or 'Good' the gradation was to be in accordance with their seniority in the lower grade. On 10.3.1989 the impugned guidelines through an Office Memorandum at Annexure-B was issued changing the mode of preparing the Select List or panel through the process of selection. While the old procedure^{of keeping 'Outstanding' above 'Very Good' and so on} was maintained in respect of promotions to or within Group-A post, for promotions to Group-C, ^{Group-B} and Group-A posts upto and excluding the level of Rs.3700-5000 only those with the benchmark of 'Good' and above were to be included in the panel and in the Select List they are to be graded on the basis of their seniority in the feeder category without reference to the grading obtained by each of them. By this modification an 'Outstanding' officer who used to be placed above 'Good' and 'Very Good' officer in the panel was to be placed below 'Good' and 'Very Good' officers in the panel if he happened to be junior to such 'Good' or 'Very Good' officers. The applicant's grievance is that by this modification the grading of 'Outstanding' or 'Very Good' becomes irrelevant in face of seniority and accordingly the post of Superintendent of Central Excise, which according to the Recruitment Rules is a selection post, has been downgraded to a non-selection post. The modified procedure defeats the very purpose of selection as an attempt to identify the best amongst the candidates. According to the applicant for filling up the 18 vacancies of Superintendents, the Departmental Promotion Committee(DPC) met on 30th January 1990. In accordance with the rules three times the vacancies, i.e., 54 candidates were to be considered. The applicant's rank in seniority was 50th. Because of the modified procedure at Annexure-B the applicant's name was omitted from the impugned panel at Annexure-C and his 'Outstanding' and 'Very Good' reports which he had earned during the last 12 years were completely ignored. His contention is that if his grading had been taken into account, he would have been included in the promotion list by superseding

2

his seniors who did not have higher grading of 'Outstanding' or 'Very Good'. By the modified procedure his seniors who have the benchmark assessment of 'Good' got included in the Select List neutralising the element of selection. He has challenged the non-inclusion of his name in the Select List as violative of Articles 14, 16 and 21 of the Constitution and the impugned circular at Annexure-B as violative of the statutory Recruitment Rules at Annexure-D framed under Article 309 of the Constitution. According to this statutory rules recruitment by promotion is to be made by selection which has been violated by following the modified procedure at Annexure-B. He has also challenged the modified procedure as discriminatory as it applies to Group B and Group C posts but not to Group A posts. He has also contended that while making promotion from the grade of U.D.C higher marks were given to 'Outstanding'/'Very Good' reports. For promotion to the post of Superintendents such reports do not carry any weight at all.

3. Respondents 1 to 4 in the counter affidavit have contended that the Government is within its power to lay down procedure to be followed by the Departmental Promotion Committee for various posts and grades. The guidelines at Annexure-B, therefore, are not violative of Articles 14 and 16 of the Constitution. They have conceded that the post of Superintendent, Group B is a selection post and selection was made by the Departmental Promotion Committee which met on 30.1.90. For 17 vacancies they considered 51 officers including the applicant. He was placed at Sl.No.49 in the consideration list. In accordance with the guidelines contained in the O.M of 10.3.1989 the question of supersession of any person with overall grading of 'Good' or higher did not arise. The Recruitment Rules provide that Group B post of Superintendent is a selection post and the impugned guidelines/procedure laying down how the selection should be made do not take away the element of selection prescribed in the Recruitment Rules. According to these guidelines only those candidates whose performance is above average should be taken into account for promotion. The screening out of average is itself a process of selection and does not obliterate the element of selection. For Group C and Group D posts the benchmark grade is 'Good' and provides that all officers whose overall grading is equal to or better than the benchmark are

to be included in the panel on the basis of their seniority without reference to the overall grading obtained by each one of them. The respondents have questioned how the applicant could assert that his grading was Outstanding/Very Good for the last 12 years because the C.C.Rs are confidential documents. It is for the Departmental Promotion Committee to grade an officer irrespective of the grading that may be shown the C.C.Rs. They have justified the different procedure of giving higher weightage to Outstanding/Very Good entries in case of promotion of U.D.C's to the post of Inspectors on the ground that promotion of the ministerial grade of U.D.C to the executive post of Inspector call for more rigorous screening. Respondents 12 and 14 in the counter affidavit have averred that even by the modified procedure promotion to the post of Superintendent of Central Excise still remains a selection process. But the grading system has been narrowed down to the grading "equal to or better than the benchmark of good". The applicant cannot claim a rank higher than that of his seniors by virtue of his allegedly 'Outstanding/Very Good' entries as the modified procedure does not make any distinction between the benchmark grading of 'Good' and the higher gradings of 'Outstanding/Very Good.' According to them a senior officer who has put in considerably long period of service and is assessed to be reasonably Good or meritorious cannot be asked to give way to someone junior to him on the basis of his Very Good/Outstanding reports. The guidelines are clarificatory or explanatory in nature and do not violate the rules. They have also argued that the applicant cannot be said to have developed a vested right in the matter of his promotion which has been violated by the modified procedure. Respondents 5 to 11, 13, 17, 19 and 20. have argued that the DPC is entirely left to make its own classification of the officers irrespective of the confidential reports which is one of the documents which the DPC takes into account for making their own objective assessment of the various candidates. According to these respondents the zone of consideration which was 5 or 6 times the number of vacancies vide the O.M of 1976 and 1977 was reduced to 3 times the number of vacancies vide the O.M of 1980 so that

rampant supersession of seniors by too junior officers is avoided. The subjective assessment in the C.C.Rs was also considered by the Joint Consultative Machinery of the Central Govt. employees headed by the Cabinet Secretary. The Sub Committee of the J.C.M after detailed deliberations recommended an open reporting system in a modified form to ensure more objectivity and impartiality in CRs. In this context the new guidelines effective from 1.4.89 at Annexure-B were issued. By these guidelines benchmark ^{gradings} have been prescribed for different grades/ ^{for candidates} to become eligible/ ^{for promotion} by selection methods. They have argued that though the Recruitment rules provide for promotion to the grade of Superintendent Group B as by selection, the methods of selection have not been defined in those rules. The new procedure by screening in candidates with Good and better than Good grading has maintained the element of selection. The Government is fully authorised to define modalities of selection which cannot be interpreted to rest only on weightage to 'Outstanding' and 'Very Good' gradings. If 'Outstandings' are to be preferred to 'Very Good' and 'Good' it will be giving overwhelming importance to the reporting officers over the DPC and "undue advantage or unwanted disqualification need not be given to those who are experienced in the post of feeder cadre". Giving weightage to seniority and therefore longer experience in the feeder category cannot be held to be violative of Articles 14 and 16 of the Constitution. It has also been stated that 75% of the recruitment in the feeder category of Inspectors is now being made from Graduates by direct recruitment whereas the minimum prescribed qualification was Matriculation earlier. Thus the modified criteria for promotion from Inspectors to Superintendent are not without reason and justification. The promotional avenues for Inspectors are very meagre. Hence the criterion of promotion to Superintendent's grade need not be very rigorous. The number of qualified and eligible Inspectors is about 250 and the old procedure would have resulted in supersession on a very wide scale. The applicant, according to the respondents, should have no grievance as no person junior to the applicant has been promoted.

52

They have also disputed the applicant's argument that the guidelines are discriminatory between Group A on one hand and Groups B, and C on the other by stating that they belong to different categories. They have also distinguished between promotion from UDCs to Inspectors on one hand and promotion from Inspectors to Superintendents on the other hand to justify the weightage given to 'Outstanding' and 'Very Good' entries for promotion as Inspectors. The additional respondent No.24 that is the Kerala Central Excise Executive Officers' Association has argued that the modified procedure of providing a benchmark grading of 'Good' and arranging all candidates with that benchmark or higher grading on the basis of seniority has been the demand of the Association. Under the old procedure of turn promotion and supersessions used to take place and the Association including the applicant challenged that procedure before the High Court of Kerala in O.P. 942/79K . They had also through the Association given a declaration at Annexure -R24(A) not to accept out of of turn promotion till a decision is taken by the High Court in O.P No. 942/79K . They have stated that the impugned procedure²² was upheld as not violative of equality. Their argument is that once a senior officer has crossed the benchmark minimum limit for promotion it will be discriminatory to refuse promotion to him while promoting a junior. They have argued that officers fit for promotion to higher post form one class and further classification will be possible if there is an intelligible differentia having a rational nexus to the object of the statute. Further classification even though possible such classification cannot be compelled. Their final argument is that Annexure-B discloses the policy of the Government which cannot be challenged. In the rejoinder the applicant has stated that the procedure laid down for selection cannot run counter to the rights of the applicant to be assessed with reference to the quality of his performance. By ignoring the 'Outstanding' and 'Very Good' reports the modified procedure for selection cannot violate Articles 14 and 16 of the Constitution. Ignoring 'Outstanding' and 'Very Good' entries would lead to arbitrariness and an irrational approach in the matter of selection and defeat the very purpose of such entries to have a bearing on selection. With the hierarchy of reporting officers and counter signing officers the ratings in the C.Rs cannot be written off as unreliable to be ignored. The guidelines also suffers from infirmities and illegalities

and will not lead to the selection of the best. The respondents have not specifically refuted his assertion that he has been earning Outstanding/Very Good entries. He has also argued that the post of Superintendent is in the supervisory cadre in the executive wing and merit cannot be ignored.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The only issue in this case is whether the revised guidelines issued in 1989 laying down that for promotion to Group C and Group B posts no distinction is to be made between 'Outstanding', 'Very Good' and 'Good' officers and they should be graded in the panel strictly on the basis of their seniority, is legal or not. Let us be clear on one point before we go any further. We have not been called upon ^{nor we do propose} to question the recruitment policy whether promotion to the post of Superintendent from the post of Inspector, Excise should be by promotion ^{based on} / merit or promotion on seniority. The policy of promotion has been laid down in the statutory Recruitment Rules at Annexure-D issued on 17.12.86 in accordance with which the post of Superintendent is a 'selection' post. That policy has not been changed by amending the Recruitment Rules. The rules remain the same and the post still continues to be a 'selection' post. The applicant's grievance is that by changing the guidelines laid down for selection through Annexure-B and doing away with the distinction between 'Outstanding', 'Very Good' and 'Good' candidates, the ^{respondents} / have virtually converted the character of the post from 'selection to 'non-selection' through the back door. The guidelines have been challenged as violative of Articles 14 and 16 of the Constitution because for Group C and Group B posts, the ^{distinctive} merits of 'Outstanding' and 'Very Good' officers have been overlooked and they have been placed at par with 'Good' officers. Further, the guidelines have been alleged to be discriminatory between Group A post on one hand and Group B and Group C posts on the other, because for Group A posts advantage to 'Outstanding' and 'Very Good' officers to be placed above 'Good' officers has been maintained while such an advantage has been withdrawn for promotion to Group B and Group C posts. The question, therefore, which

falls for our consideration is not the policy of making promotion to the post of Superintendent by selection but the forensic validity and administrative propriety of doing away with the distinction between 'Outstanding', 'Very Good' and 'Good' officers for the purposes of promotion to 'selection' posts.

5. In Service Jurisprudence it has been the time-honoured and well recognised policy that where promotions are provided from feeder categories to particular posts, promotion can be either by the process of selection by 'merit with due regard to seniority' or by 'seniority subject to the rejection of the unfit'. Either of these two methods of promotion has its advantages and disadvantages. Seniority has an important role to play as it reflects longer period of service put in and to some extent reflects longer experience also. Promotion entirely based on seniority ^{by} giving exclusive weightage to experience and age, ~~does not~~ provide any incentive at all for doing better than others and earning 'Good', 'Very Good' or 'Outstanding' reports, because so long as one is not rejected as being unfit for promotion, one gets promoted in his turn and a junior person with 'Outstanding' reports may not get promotion for years ^{so} ~~that~~ he loses all incentive for putting in his best. Since public interest lies in getting the best out of the employees and to select the best man for the post, competitive examination or test for direct recruitment and selection on merit for promotion is a universal practice in all the countries and organisations whether public or private. The difficulty arises in making comparative objective assessment of the merits of the various candidates. The system of having annual confidential reports to be written by the immediate superior officers to be reviewed by one or two higher levels was devised to have documentary historical record of the quality of performance of each employee. These records are kept in a confidential dossier to be examined by a Selection Committee ^{consisting} of persons who are supposed to be not only objective but also experts in assessing the performance records of each candidates. In certain cases the performance records over years are supplemented by an interview and even a written test. The whole objective is to have a foolproof assessment of the quality

and potential of a candidate compared with other candidates so that the best amongst the lot can be handpicked and promoted. Such a system if correctly operated would have been ideal. In practice, however, the experience has been that the confidential reports could be overly liberal or diluted for certain extraneous reasons, that the reporting officers could have been influenced by extraneous considerations and an objective Selection Committee could have been easily misdirected by the subjective assessment of the reporting or reviewing officers. It is also felt that large scale supersessions by selection process especially at the lower levels or where the prospects of promotion are very meagre, can demoralise those in the feeder category. Against this background and keeping in view ^{the} nature of posts, prospects of promotion etc., the Recruitment Rules ^{where} promotion quota are indicated also indicate whether the promotions are to be by selection by merit with due regard to seniority or by seniority subject to the rejection of the unfit. The policy ^{element} of recruitment ends at this stage. Once, however, keeping all relevant factors in view the Recruitment Rules provide for a post to be filled by selection with due regard to seniority, the time-honoured practice has been to have a manageable list of eligible candidates in accordance with their seniority in the feeder cadre. The size of the list could be three to five times the number of vacancies. Too large a size of the list of eligible candidates by having a higher multiple of the number of vacancies has to be avoided for eliminating the possibility of too junior an 'Outstanding' officer superseding large number of the senior officials of mediocre performance higher in the list. The eligible candidates included in the list which is also known as 'zone of consideration' are then subjected to a comparative assessment through annual confidential reports and if necessary oral and/or written tests. They are then arranged on the basis of the merit grading and a merit list is prepared. Where the merit list is prepared on the basis of marks awarded to them on their confidential reports and oral/written tests, the merit list is drawn up so that those obtaining

PM

higher marks are above those obtaining lesser marks. Where however only qualitative assessment of the confidential reports is made, the eligible candidates are given overall assessment as 'Outstanding', 'Very Good', 'Good', 'Average', 'Unfit' etc. All 'Outstanding' candidates are placed en bloc above all 'Very Good' candidates who are placed en bloc above all those who are only 'Good'. The gradation within each category of 'Outstanding' or 'Very Good' or 'Good' is determined by their inter se seniority. It will thus be seen that merit plays a predominant role but not an exclusive role in the matter of selection. Seniority determines whether a candidate even though eligible will come within the zone of consideration or not and it also determines the inter se ranking within the category to which the candidate has been assessed. The categories of 'Outstanding', 'Very Good', 'Good' etc. are the categories which have been recognised in writing the confidential reports and generally figure in the column where the reporting officer or the reviewing officer has to give his overall assessment of the candidate for the reporting year. The Selection Committee or the Departmental Promotion Committee are however not bound by the assessment made in the C.R and they ^{for example} may ^{by} examining the overall record of an officer, the type and level of the post that he has been holding may grade an 'Outstanding officer' as 'Very Good' or vice versa.

6. For non-selection posts the question of preparing list of eligible candidates or having a zone of consideration as a multiple (three or five-times) of the number of the vacancies does not arise. This is because the panel for promotion is prepared preponderantly on the basis of the seniority list of eligible candidates to the exclusion of those who are considered to be unfit or unsuitable for promotion. For instance if there are three vacancies, while in case of a selection post all candidates who are within ^{say} the first 12 positions in the seniority list are to be assessed comparatively and competitively before the panel is drawn up, in case of a non-selection post the panel begins to be formed from the assessment of the first seniormost candidate without any comparison or competition with his juniors. If the seniormost candidate 'per se' is found fit he is placed at the top of the panel whereafter the second seniormost candidate

is taken up for inclusion. If he is also found fit he is included and the turn of the 3rd seniormost comes. The question of the 3rd or 4th fit candidate superseding the first or second seniormost candidate^{also} found fit for promotion does not arise. The growth of the panel by going down in the seniority list stops as soon as the required number of eligible fit candidates find their places in the panel.

7. Till 1989 the method of filling up selection post by promotion on the basis of merit with due regard to seniority and of filling up non-selection post on the basis of seniority subject to the rejection of the unfit was laid down by administrative instructions as given at Annexure-A which is quoted below:-

"1. Each Departmental Promotion Committee should decide its own method and procedure for objective assessment of the suitability of the candidates. Ordinarily a personal interview should not be regarded as necessary and the panel for promotion/confirmation may be drawn up on the basis of the assessment of the record of work and conduct of the officers concerned.

2. Selection method:- Where promotions are to be made by selection method as prescribed in the Recruitment Rules, the field of choice viz., the number of officers to be considered should ordinarily extend to 5 or 6 times the number of vacancies expected to be filled within a year. The officers in the field of selection, excluding those considered unfit for promotion by Departmental Promotion Committee, should be classified by the Departmental Promotion Committee, as 'outstanding', 'Very Good' and Good, on the basis of their merit as assessed by the D.P.C. after examination of their respective records of service. In other words, it is entirely left to the D.P.C. to make its own classification of the officers being considered by them for promotion to selection posts, irrespective of the grading that may be shown in the CRs. The panel, should, therefore, be drawn up to the extent necessary by placing the names of the 'outstanding officers' first, followed by the officers categorised as 'very good' and followed by the officers categorised as 'Good'. The inter-se-seniority of officers belonging to any one category would be the same as their seniority in the lower grade.

3. Non-selection Method - Where the promotion are to be made on non-selection basis according to Recruitment Rules, the Departmental Promotion Committee need not make a comparative assessment of the records of officers and they should categorise the officers as 'Fit' or 'not yet Fit' for promotion on the basis of assessment of their records of service. The Officers categorised fit should be placed in the panel in the order of their seniority in the grade from which promotion are to be made."

(emphasis added)

Since in the Recruitment Rules at Annexure-D the post of Superintendent, Central Excise has been indicated as selection post, in accordance with the old procedure (Annexure-A) 'Outstanding' candidates en bloc had to

be placed above those candidates assessed by the Departmental Promotion Committee as 'Very Good' and the latter would be placed en bloc above those who are assessed as 'Good'. The placement of the officers in the merit list belonging to each category would be governed by their seniority in the lower grade. This method was applicable irrespective of the pay scale or level or nature of the post, once the post is categorised in the Rules to be a selection post. If the post is a non-selection post, the procedure adopted by the DPC for preparing the panel as laid down in the old procedure (Annexure-A) was not to make any comparative assessment of all the eligible officers but include those eligible candidates in the order of their seniority who are found to be fit. In the selection method, therefore, the preponderant element was merit and within the same category of merit seniority played its role. In the non-selection method ^{of seniority} ~~subject~~ to the rejection of the unfit, seniority played the preponderant role of inclusion in the panel and the place in the panel. Again, the non-selection method was to be applicable to all levels of posts once the Recruitment Rules provided that the post will be a non-selection post to be filled by 'seniority-cum-fitness' or 'seniority subject to the rejection of the unfit.' On 10.3.89 the Department of Personnel & Training issued the O.M. No. F-22011/5/86-Estt.(D) dated 10th March 1989, extracts from which are at Annexure-B. The relevant extracts from that O.M. are quoted below :

"In modification of existing instructions issued in regard to the subject mentioned above the following procedure shall be observed by the Departmental Promotion Committees:-

Each Departmental Committee should decide its own method and procedure for objective assessment of the suitability of the candidates. No interviews should be held unless it has been specifically provided for in the recruitment rules for the post service. Whenever promotions are to be made by the method of 'selection' by DPC and the administrative ministry desires that an interview should form part of the selection process, necessary provisions should be made in the recruitment rules.

" 2.1.1 Selection Method

Where promotions are to be made by selection method as prescribed in the recruitment rules, the DPC shall, for the purpose of determining the number of officers who will be considered from out of those eligible officers in the feeder grade(s), restrict the field of choice as under with reference to the number of clear regular vacancies proposed to be filled in the year:

82

<u>No. of vacancies</u>	<u>No. of officers to be considered</u>
1	5
2	8
3	10
4	3 times the number of vacancies.

Guidelines for DPCs

" 2.1.2 At present 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. In order to ensure greater selectivity in matters of promotions and for having uniform procedures for assessment by DPCs, fresh guidelines are being prescribed. The matter has been examined and the following broad guidelines are laid down to regulate the assessment of suitability of candidates by DPCs.

" 2.1.3. While merit has to be recognised 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 and reflected in the annual confidential reports and based on strict and rigorous selection process.

" 2.1.4. Government also desire to clear the misconception about 'average' performance. While 'average' may not be taken as an adverse remark in respect of an officer, at the same time it cannot be regarded as complimentary to the officer, as 'average performance should be regarded as routine and undistinguished. It is only performance that is above average and performance that is really noteworthy which should entitle an officer to recognition and suitable rewards in the matter of promotion.

CONFIDENTIAL REPORTS

" 2.2.1 Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory.

Hence -

(a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to CRs for the 3 years equal to the required qualifying service. (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

" (d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

(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 the entries in the CRs, because it has been noticed that some times the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing Authority or the Accepting authority as the case may be has over ruled 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 purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after the due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of over-ruling the other, then the remarks should be read together and the final assessment made by the DPC.

" 2.2.2. In the case of each officer, an overall grading should be given. The grading shall be one among (i) Outstanding (ii) Very Good (iii) Good (iv) Average (v) Unfit.

" 2.2.3. Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.

" 2.3.1 The list of candidates considered by the DPC and the overall grading assigned to each candidate, would form the basis for preparation of the panel for promotion by the DPC. The following principles should be observed in the preparation of the panel.

(i) Having regard to the levels of the posts to which promotions are to be made, the nature and importance of duties attached to the posts for which promotions are to be made by selection method. For all Group 'C' Group 'B' and Group 'A' posts upto (and excluding) the level of Rs.3700-5000 excepting promotions for induction to Group 'A' posts or Services from lower groups, the bench mark would be 'Good'. All officers whose overall grading is equal to or better than the bench mark should be included in the panel for promotion to the extent of the number of vacancies. They will be arranged in the order of their inter-se seniority in the lower category without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the bench mark of 'good'.

Wherever promotions are made for induction to Group 'A' post or Services from lower groups, the bench mark would continue to be 'good'. However, officers graded as 'outstanding' would rank en bloc senior to those who are graded as 'Very Good' and officers graded as 'Very Good' would rank en bloc senior to those who are graded as 'Good' and placed in the

B2

"select panel accordingly upto the number of in the vacancies, officers with same grading maintaining their inter-se seniority in the feeder post.

- (ii) In respect of all posts which are in the level of Rs.3700-5000 and above, the benchmark grade should be 'Very Good' . However officers who are graded as 'outstanding' would rank en bloc senior to those who are graded as 'Very Good' and placed in the select panel accordingly upto the number of vacancies, officers with same grading maintaining their inter-se seniority in the feeder post.
- (iii) Appointments from the panel shall be made in the order of names appearing in the panel for promotion.
- (iv) Where sufficient number of officers with the required benchmark grade are not available within the zone of consideration, officers with the required benchmark will be placed on the panel and for the unfilled vacancies, the appointing authority should hold a fresh DPC by considering the required number of officers beyond the original zone of consideration.....

•••••

"3. NON-SELECTION METHOD:

Where the promotions are to be made on 'non-selection' basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as 'fit', guidelines in para 2.1.4. should be borne in mind. The officers categorised as 'fit' should be placed in the panel in the order of their seniority in the grade from which promotions are to be made."

(emphasis added)

8. The following essential features of the modified procedure as quoted above may be noted.

- i) **A: Selection Posts**
The DPC is to decide its own method and procedure for objective assessment of the merits of eligible candidates.
- ii) For promotion by selection a zone of consideration of eligible candidates as a multiple of the number of vacancies is to be fixed.(2.1.1)
- iii) A greater selectivity is to be ensured.(2.1.2)
- iv) Merit has to be recognised and rewarded.(2.1.3)
- v) Promotions should be earned not as a matter of course but by dint of hard work, good conduct and result oriented performance and based on strict and rigorous selection process. (2.1.3)

✓

- vi) The DPC should make its own assessment and should not depend entirely on the grading given in the C.R.(2.2.1(e))
- vii) For each officer the DPC should give overall grading "which shall be one among (i) Outstanding,(ii) Very Good,(iii) Good, (iv) Average, (v)Unfit".(2.2.2)
- viii) In case of Group C, Group B and Group A posts upto but excluding the level of Rs.3700-5000 , only those candidates who have been assessed as 'Good' should be included in the panel in the order of their seniority "without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the benchmark of 'Good'(2.3.1(i))
- ix) For Group A posts those who are 'Good' or above should be included in the panel but 'Outstanding' officers would be ranked en bloc above 'Very Good' who rank en bloc above 'Good'. The inter se seniority within each category of grading is to be maintained(2.3.1(i))
- x) For posts with the pay scale of Rs.3700-5000 and above the benchmark grade would be 'Very Good', i.e, those who have been assessed as 'Very Good' and above should be included in the panel but 'Outstanding' officers would be placed en bloc above those who are graded as 'Very Good' and inter se seniority within each category in the feeder posts to be maintained.
(2.3.1(ii))
B:Non-Selection Posts:
For non-selection posts comparative assessment of eligible candidates within the zone of consideration need not be made and eligible candidates included in the panel on the basis of their seniority, if they are assessed to be fit to be promoted.

9. The limited point at issue in the modified procedure is whether the provision in para 2.31(i) ^{supra (para 7)} indicating that for promotion by selection to Group C and Group B posts and Group A posts upto but excluding the level of Rs.3700-5000, the grading given by the D.P.C to the candidates as 'Outstanding' or 'Very Good' should be completely ignored and they are to be ranked in the panel on the basis of their seniority so long as they have been assessed as 'Good' or above. According to this provision an officer who has been adjudged by the D.P.C. as 'Outstanding' or 'Very Good' will be placed ^{in the merit list} below his senior ~~in the merit list~~ even though the senior is found to be only 'Good'.

10. We find it difficult to persuade ourselves to accept a provision of selection whereunder in the merit list a person who has been given by the D.P.C a higher ^{prescribed} merit grading is to be placed below a person given a lower ^{prescribed} merit grading merely on the ground that the person of lower ^{merit} is senior to the person of higher merit. In Janki Prasad vs. State of Jammu & Kashmir, 1973(1)SLR 719, the Supreme Court held that "Selection means that the man selected for promotion must be of merit. Where promotion is by seniority, merit takes the second place but when it is a selection, merit takes the first place and it is implicit in such selection that the man must not be just average". If a person of higher seniority but lower merit has to be given precedence over a person of lower seniority but higher merit provided he attained a certain minimum standard of suitability, the proper method of promotion is to declare the post as a non-selection post to be filled on the basis of seniority subject to suitability, ^{the} suitability being determined by prescribing a minimum level or standard of grading such as 'Fit', 'Good' or 'Very Good'. But, when as a matter of policy and after taking into account the nature of duties and responsibilities attached to the promotion post, the competent statutory authority in the Recruitment Rules designated the promotion post as a 'selection post' and the candidates are ^{to be} graded as 'Outstanding', 'Very Good', 'Good' etc., ^{then} the promotion has to be made on the basis of merit so that the best or those with the highest merit rating amongst the eligible candidates are appointed first and the next best later. Within the same category of 'Outstanding' or 'Very Good' or 'Good' of course they would take their turn on the basis of their seniority in the feeder category. Importing the concept of non-selection by allowing seniority to take precedence over merit in a post which statutorily has to be filled up by selection on merit will be violative of the statutory rules. Seniority is said to get precedence over merit, where the assessment of higher merit say of 'Outstanding' is wiped off by seniority. As soon as seniority takes precedence over merit rating at any level, the concept of selection is violated. In Sant Ram vs. State of Rajasthan, AIR 1967 SC 1910, the Supreme Court held "that it is a well established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone.

62 The principle is that when the claims of officers to selection posts are

under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available ".In M.P.Mathur vs. State of Bihar, 1971(1)S.L.R 385, the Full Bench of the Patna High Court held as follows:-

"An overall picture has to be taken and if, in the opinion of the appointing authority, a particular officer possesses merit superior to that of his seniors then irrespective of his position in the gradation list the selection for appointment has to fall on him. Of course, the phrase "with regard to seniority" can only mean that seniority cannot be ignored. Merit being equal or balanced or not decisively in favour of a junior incumbent, selection has to be made in favour of a senior one."

In Hari Dutt Kainthala etc. vs. State of Himachal Pradesh etc, 1974 SLJ 525, speaking for the Full Bench of the Himachal Pradesh High Court Hon'ble Justice R.S.Pathak as he then was, observed as follows:-

"I would therefore hold that having regard to the duties and responsibilities attaching to the post of District Judge and the position occupied by the District Judge in the judicial hierarchy, appointment to that post must be made by selection of the most meritorious officer upon an appraisal of the comparative merit of eligible Subordinate Judges.In my opinion, the principle of seniority-cum-fitness would not be a valid principle."
(emphasis added)

11. The argument of the respondents that the warrant of selection is met by merely demarcating a benchmark of 'Good'and including in the panel only those who are 'Good' and above and therefore, a further distinction between 'Very Good' and 'Outstanding' in preparing the merit list is not necessary, is to our mind a specious argument.If this argument is accepted then screening of candidates as 'suitable' or 'fit' and arranging them in the order of seniority irrespective of their individual merit rating would also have been a process of selection on merit. But this is designated as 'non-selection'method in the guidelines. Thus by the argument of the respondents the distinction between 'selection' and 'non-selection' would vanish. The process of selection involves not only firstly 'screening in 'candidates against a minimum benchmark level of merit rating say 'fit' or 'Good' or 'Very Good',but also and more importantly arranging the 'screened in 'candidates on the basis of merit rating above the 'screening-in' or benchmark level. If above the benchmark level two candidates have different merit ratings (Outstanding or Very Good) and they are placed on the merit list not on merit grading but on seniority, the process cannot be said to be of selection, irrespective of whether the benchmark is 'Fit',

'Good' or 'Very Good' . So long as above the benchmark grading, there are more than one recognised merit rating in the selection process, candidates with the higher merit rating must be placed above those with the next lower merit rating. The level of benchmark merit rating per se does not determine whether promotion is by selection by merit with due regard to seniority or by seniority subject to fitness or suitability, but it is the manner in which the candidates above the bench mark grading are arranged in the select or merit list, which qualifies the process as selection or non-selection. The initial screening for bench mark purposes is common to both selection and non-selection processes and cannot be invoked to dispense with post-screening gradation in the panel on ^{the basis of} merit rating above the bench mark rating. This is inherent in and 'sine qua non' of the selection process. The post-screening gradation on merit rating in the selection process can be dispensed with as it merges with the 'screening in process only when the bench mark rating itself happens to be the highest prescribed merit rating. For instance if for a particular post the bench mark rating is 'Outstanding' then further post screening gradation of 'Outstanding' candidates on merit does not arise and they have to be graded on seniority. Such ^a situation would have arisen in the present case only if for Group B and Group C posts the highest merit rating had been 'Good'. In that case once all the 'Good' candidates are screened in with the bench mark grading as 'Good', no further merit grading would have been necessary and they have to be arranged on the basis of seniority. But so long as the merit ratings even for Group B and C officials are prescribed (2.2.2 ibid) as 'Outstanding', 'Very Good' etc. and the bench mark grading is 'Good', the selection method dictates that ^{irrespective of seniority} 'Outstanding', 'Very Good' and 'Good' will be placed in that order in the panel. It is this mandate of selection which has been rightly retained for Group A posts (2.3.1(ii)) but wrongfully breached for Group B & C lower Group A posts (2.3.1(i)). In the aforesaid Hari Datt Kanithala case, the High Court of Himachal Pradesh held that promotion made on the basis of seniority-cum-fitness implies that an officer eligible

22

for promotion was considered only in his turn and if found fit he was promoted, his junior having no right to be considered at the same time for the post. The process of selection, however, implies picking up the "most meritorious officer upon an appraisal of the comparative merit of eligible" candidates. The violation of selection becomes all the more pronounced when we note that in the revised procedure the overall grading of each and every eligible candidate still has to be made in one of the categories of 'Outstanding', 'Very Good', 'Good', 'Average' and 'Unfit' (para 2.2.2 ^{para 7 supra and} -Annexure-B). This para does not say that for Group B and Group C posts grading would stop at the level of 'Good' and will not go higher to 'Very Good' or 'Outstanding' categories. Having before them a bunch of eligible officers who have been graded by them as 'Outstanding', 'Very Good' and 'Good', to tell the DPC that 'Outstanding' and 'Very Good' officers will have to be placed below 'Good' officers if the latter happened to be senior will be directing the DPC not to follow the mode of selection statutorily fixed. The Karnataka High Court in Vijayadevraj Urs vs. G.V. Rao and others, 1982(2)SLJ 399; held as follows:-

"In the case of a promotion by selection, the merit and suitability of the officer in all respects to hold the promotional post in the public interest, irrespective of his seniority is the primary factor. Seniority becomes relevant only when the merit of the two or more eligible officers is found to be equal in all respects and not otherwise."

In State of Mysore vs. C.R. Seshadri & ors, 1974(1)SLR 407, the Supreme Court held that "if the criterion for promotion is one ^{of} seniority-cum-merit, comparative merit may have to be assessed if length of service is equal or an outstanding junior is available for promotion."

12. The guidelines for the DPC start with the preamble that there should be greater selectivity (2.1.2 ^{para 7 supra +} -Annexure-B), that merit has to be recognised and rewarded (2.1.3), that promotion should not be as a matter of course but be earned by hard work, good conduct and result oriented performance and that promotion should be on strict and rigorous selection process (2.1.3). These unexceptionable objectives are completely defeated

22

by the provision in para 2.3.1(i) at Annexure-D which reads as follows:-

"They will be arranged in the order of their inter-se seniority in the lower category without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the bench mark of 'good'."

The inconsistency between the objective and the impugned provision as quoted above is too conspicuous to be ignored.

13. The aforesaid provision is also violative of Articles 14 and 16 of the Constitution inasmuch as it treats the 'Outstanding', 'Very Good' and 'Good' which have been recognised^g as unequal categories in para 2.2.2 (para 7 supra) are being treated as equal for the purposes of preparation of the merit list. The classification of the eligible candidates between 'Good', 'Very Good' and 'Outstanding' has^g the clear nexus with the objective of having the best persons in the order of merit, and their ^{de-}/classification' vide the impugned provision as quoted above not only has no nexus with the aforesaid objective but is positively destructive of the same. The declassification, therefore, has to be declared to be unconstitutional.

14. The aforesaid provision of declassification can be further faulted by the fact that it has been done with discrimination between the Group C, Group B and upto a certain level of Group A posts on one hand and Group A posts of and above that level on the other hand. To draw a line at a certain level of Group A posts of Rs.3700-5000 irrespective of the nature and importance of duties attached to the various posts appears to be arbitrary.

15. Having left the method of selection entirely at the hands of the DPC and having enunciated the principle that the benchmark grade is to be determined by not only the level of posts to which promotions are being made^g but also the nature and importance of duties attached to the post, to lay down a particular benchmark of grading for all Group B, Group C and certain levels of Group A posts without reference to the nature and importance of duties attached to individual posts also would be arbitrary.

16. We make it clear that while we find no difficulty in accepting the principle of prescribing^{any} benchmark grading for any class of posts or service which is like prescribing a minimum qualifying standard for

promotion to those posts/services, our judicial conscience is not reconciled ~~to the~~ total obliteration of the distinction between 'Outstanding', 'Very Good' and 'Good' categories prescribed in the preparation of the merit list, i.e, the panel for promotion to posts declared as 'selection posts'.

17. Now let us deal with some of the important points raised by the various respondents. We have already dealt with their contention that by fixing the benchmark grading as 'Good' and only screening in those candidates who are graded as 'Good' or 'Very Good' or 'Outstanding' the process of selection has been honoured. We do not agree with this, because the process of selection cannot be stopped or started halfway. Once the officers are ^{to be} graded as 'Good', 'Very Good' or 'Outstanding' ^(vide 2.2.2 in para 7 supra) so long as the 'Outstanding' candidates are not placed above the 'Very Good' and the latter above the 'Good' the process of selection would remain incomplete and unconsummated. By merging 'Outstanding', 'Very Good' and 'Good' officers and arranging them on the basis of their seniority, the respondents have switched over midstream from the process of promotion by selection to that of promotion by non-selection. In Government of India and another vs. C.A.Balakrishnan and another, 1975(1)SLR 31, the Supreme Court held that promotion made by treating the post to be a selection post when the rules provided for promotion by seniority-cum-fitness, is illegal and violative of Article 16 of the Constitution.

18. The respondents have virtually given themselves away by justifying the old selection procedure for promotion of UDCs as Inspectors on the ground that promotion was from ministerial to executive post. But the fact remains that UDC's is a Group C post and Inspectors are Group B posts and therefore in accordance with the impugned guidelines the 'Outstanding' and 'Very Good' UDCs have to be graded lower than the 'Good' UDCs in the merit list if the 'Good' UDC's happened to be senior. This is exactly what is not being done, as admittedly 'Outstanding/Very Good' juniors are ranked higher than 'Good' seniors. The impugned

guidelines therefore have signally failed in discriminating promotions on the basis of nature and character of the posts, by having a blanket arrangement for all Group B and Group C posts. This arrangement has been found to be unrealistic by the respondents themselves who had to brush aside the same for promotion of UDC's as Inspectors.

19. We cannot accept the contention of the respondents that the impugned guidelines are clarificatory in nature when actually they are contrary to the guidelines which have been in vogue and are supported by judicial pronouncements for decades as far as selection process is concerned. The respondents' contention that the applicant does not have a vested right in the matter of his promotion under the old procedure is also not very convincing. If the applicant has been assessed by the DPC as 'Outstanding' or 'Very Good' he does have, not only a vested right but also a constitutional right of being treated differently from those who have been assessed as 'Good' or 'Average'.

20. The respondents contention that Government is fully authorised to define or demarcate the modalities of selection is well taken but that authority cannot be exercised in violation of Articles 14 and 16 of the Constitution whereby 'Outstanding' and 'Very Good' candidates have to be graded higher than candidates of inferior quality in the preparation of a merit list for promotion by selection. The respondents' contention that giving weightage to 'Outstanding' and 'Very Good' officers would be giving undue importance to the reporting officers who have written the confidential report is unwarranted when the guidelines themselves indicate that the overall grading of the various candidates will have to be made by the Departmental Promotion Committee which will not be bound by the assessment made in the confidential reports. The respondents contention that since 75% of the recruitment in the feeder category of Inspectors is now being made from Graduates by direct recruitment whereas the minimum prescribed qualification was Matriculation earlier and therefore selection process is not required, would be an argument for amending the Recruitment Rules and designating the post of Superintendents as non-

selection post to be filled by promoting Inspectors on the basis of seniority -cum-fitness. Such an argument would not justify keeping the post of Superintendents as selection post on one hand and breaching on the other hand the merit criteria inherent in the process of selection. Our reply would be the same to the contention of the respondents that the number of qualified eligible Inspectors being about 250, the old procedure would have resulted in supersession on a very wide scale. The remedy would lie in converting the posts of Superintendent to non-selection post instead of violating the principles of selection for filling up ^{what has been notified as} a selection post.

21. The respondents' argument that different criteria can be provided between Group A posts on one hand and Group B and Group C on the other hand as they belong to different category cannot also hold water. What is challenged is not the different mode of promotion between Group A and other posts but the different manner in which the same mode of promotion by selection is being applied between Group A posts on one hand and lower posts on the other. In the process of promotion by selection to higher Group A posts while 'Outstanding' junior candidates are placed higher than 'Very Good' or 'Good' senior candidates, for promotion by selection to Group B and Group C posts, the 'Outstanding' candidates are placed below 'Good' and 'Very Good' candidates on the basis of their seniority. The respondents' contention that the impugned procedure was upheld by the High Court of Kerala in O.P 742/79 is not correct because the judgment was delivered therein on 2nd March, 1982 when the impugned procedure issued on 10.3.89 was nowhere in the picture. On the other hand that judgment upheld the classification of persons as 'Outstanding', 'Very Good' and 'Good' as not violative of Article 14. It was held in that case that "no principle of law regards such classification as violative of equality. It is consistent with the principle of equality to classify fit persons on the basis of their varying degrees of merit and to give them preference on such basis. The fact that the principle of seniority is also observed in placing persons of equal merit makes it even more fair". This judgment fully and truly upholds the old procedure of selectivity through weightage given to 'Outstanding', 'Very Good' officers over 'Good' officers.

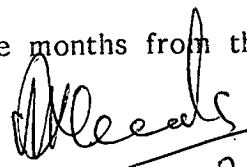
22. Again the respondents have tried to justify ignoring 'Outstanding' and 'Very Good' entries on the ground that the character roll entries

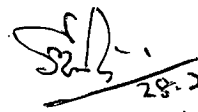
are not fully reliable. The remedy in that case lies in reforming the system of ^{writing} confidential reports and not in violating the mode of selection. Further, if the confidential reports are not reliable, the respondents cannot justify why the old procedure of keeping the 'Outstanding' and 'Very Good' officers above the 'Good' officers in the merit list has been retained for higher levels of Group A posts. We feel that with all the checks and balances involved in the writing of the confidential reports, with the three tier system of reporting officers, reviewing officers and accepting officers, with communication of adverse entries, representation and appeal against adverse reports and independent and expert assessment of confidential reports by a collective body like the Departmental Promotion Committee, one cannot write off the existing system of confidential ^{reports} as unreliable.

23. In the conspectus of facts and circumstances we allow this application, set aside the impugned order dated 30.1.1990 at Annexure-C and declare that the following clause in para 2.3.1(i) of Annexure-B as unconstitutional:-

"They will be arranged in the order of their inter-se seniority in the lower category without reference to the overall grading obtained by each of them provided each one of them has an overall grading equal to or better than the bench mark of 'good'."

We direct that a review DPC should meet for promotion by selection of Inspectors of Central Excise to the grade of Superintendents as on 30.1.1990 by following the guidelines to the exclusion of the aforesaid clause which has been declared to be unconstitutional. In other words the procedure indicated in the guidelines at Annexure-B for promotion to Group A posts from lower groups should be followed for promotion to the post of Superintendent, Central Excise by ranking 'Outstanding' Inspectors en bloc above those in the 'Very Good' category and by ranking 'Very Good' category en bloc above those who are graded as 'Good' in the select panel and maintaining old seniority in Inspector's grade within each category. Action on these lines should be completed within a period of three months from the date of communication of this order.


(A.V. Haridasan)
Judicial Member


(S.P. Mukerji)
Vice Chairman