

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 174 OF 2009

Tuesday, this the 16th day of February, 2010.

CORAM:

**HON'BLE Mr. GEORGE PARACKEN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

Ali M.M.,
Sub Divisional Engineer (Retired),
Trunks & Call Centre,
Central Telephone Exchange,
Thiruvananthapuram.

... Applicant

(By Advocate Mr. Vishnu S. Chempazhanthiyil)

versus

1. The Chief General Manager,
BSNL, Kerala Circle,
Thiruvananthapuram.

2. The Principal General Manager,
Thiruvananthapuram SSA,
BSNL, Uppalam Road,
Thiruvananthapuram.

... Respondents

(By Advocate Mr. George Kuruvilla)

The application having been heard on 16.02.2010, the Tribunal on the same day delivered the following:

ORDER

HON'BLE Mr. GEORGE PARACKEN, JUDICIAL MEMBER

The applicant is aggrieved by the Annexure A3 letter No.ST-III/TBP/2007 of the 1st respondent dated 28.09.2007 by which he and other 14 Sub Divisional Engineers (SDE for short) were informed that the Departmental Screening Committee meetings were conducted to consider their cases for the time bound upgradation from the IDA scale of Rs.11875-300-17275 to the IDA scale of Rs.13000-350-18250 but found that they were not eligible for upgradation due to unsatisfactory service records, on all the three dates of review held on 01.10.2004, 01.10.2005 and 01.10.2006.

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2. The brief facts of the case are that the applicant was promoted and posted as SDE in May, 2000 at Central Telephone Exchange. Vide Annexure A1 Office Memorandum dated 18.01.2007, the Bharat Sanchar Nigam Limited (BSNL for short) has introduced the Time bound/Post based Executive Promotion policy for their Group 'B' level Officers. By the said policy, time bound IDA scale upgradation is provided for executives from the pay scale of Rs.9850-250-14600 to Rs.17500-400-22300. The first upgradation of IDA scale was admissible to Executives on completion of 04 years of service in the current IDA scale. The Departmental Screening Committee constituted for this purpose has to review the cases of the individual executive on the 1st of October every year from the year 2004 and adjudge their fitness for upgradation to next higher IDA pay scale on the basis of the performance rating in the ACRs, subject to clearance of disciplinary/vigilance case, if any, pending against them. The applicant having been appointed as an SDE in May, 2000 became eligible for the Time Bound IDA scale upgradation to the scale of Rs.13000-350-18250 w.e.f. 01.10.2004.

3. The Committee reviewed his case on 01.10.2004, 01.10.2005 and 01.10.2006 but his name was not included in any of the Senior SDEs lists of 2004, 2005 and 2006. He has, therefore, made the Annexure A2 representation dated 27.06.2007 for inclusion of his name in the list of eligible SDEs for higher IDA scale for the year 2004. Since other 14 SDEs were also not granted the upgradation, the 1st respondent, vide its Annexure A3 impugned letter dated 28.09.2007 informed all of them that the Screening Committee has found them not eligible for upgradation due to unsatisfactory service records on the respective review dates. Thereafter, the applicant made the Annexure A4 representation dated 28.12.2007 to the respondents stating



that he has never been informed earlier about any kind of unsatisfactory records and he was not involved in any kind of disciplinary/vigilance cases. As the respondents did not take any action on his representation, he approached the Hon'ble High Court of Kerala vide W.P.(C). No.9601 of 2008 (R) which was disposed of by the Annexure A5 judgment dated 04.04.2008 directing the General Manager, BSNL to take a decision in the matter. Accordingly, the respondents considered his aforesaid representation but rejected it vide Annexure A6 letter dated 11.08.2008 holding that there was no merit in it. The reasons for rejection indicated in the Annexure A6 letter are as under :-

"The Executives in BSNL are granted Time Bound Upgradation as per the promotional policy as contained in BSNL corporate office memorandum No.400-61/2004-Pers dated 18.1.2007 and 30.5.2007. According to the said policy, IDA pay scale upgradation to the next higher IDA scale in respect of the eligible executives will be judged by the prescribed Screening Committee on the basis of performance rating of ACRs subject to necessary disciplinary/vigilance clearance and no punishment is current. As per the promotion policy, the grading criteria fixed for pay scale upgradation from SDE to Sr. SDE is, "No adverse entry and not more than two averages in the ACRs of the previous five years". It is evident from the Exhibit P3 letter that the Screening Committee had considered the case of the petitioner for promotion with reference to the review dates 1.10.2004, 1.10.2005 and 1.10.2006. As the petitioner, Shri. M.M. Ali has earned more than two averages in his ACRs of the relevant periods, the screening committee did not recommend his case for pay scale upgradation for the review periods in keeping with the guidelines in the promotion policy.

As regards the allegation that Sri. M.M. Ali has been given no intimation regarding adverse entries in his ACR to disqualify him from getting pay scale upgradation, it is made clear that grading as average in the ACR on the basis of performance rating for the relevant period is not an adverse entry to be communicated. Average performance rating is not an adverse entry, but it is a disqualification preventing an executive from being considered for pay scale

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upgradation as enshrined in the promotion policy. Sri. M.M. Ali has not been granted pay scale upgradation as he has not fulfilled the conditions prescribed in the promotion policy."

4. The learned counsel for the applicant submitted that if the applicant could be promoted to the post of SDE in May, 2000 on the basis of his performance during the previous years as reflected in the CR dossiers, if any down fall in the performance was there in the subsequent years, he should have been informed about it and if no such communication was given, it will amount to violation of the principles of natural justice. He has also argued that it is well settled that any downgrading in confidential reports which would be prejudicial to an employee for his consideration for promotion, shall be communicated to him.

5. In this regard, Shri. Vishnu S. Chempazhanthiyil, the learned counsel for the applicant has relied upon the judgment of the Apex Court in U.P. Jalnigam and others v. Prabhath Chandra Jain and others, 1996 (2) SCC 363, wherein it has been held that an employee is entitled to be told that there was a fall in his performance which is likely to affect his promotional chances and thus give him an opportunity to correct himself. The operative part of the said judgment is as under :-

"We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good'



to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can previously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court.

The special leave petition is, therefore, dismissed."

6. Again, the Apex Court in Dev Dutt v. Union of India and others, 2008 (8) SCC 725, it has been held that whether an entry is adverse or not, depends upon its actual impact on employee's career and not on its terminology. According to the said judgment, all gradings, whether "very good", "good", "average" or "poor", are required to be communicated to the employees working in government offices, statutory bodies, public sector undertakings, or other State instrumentalities where constitutional obligations, principles of natural justice and fairness would apply. The relevant part of the aforesaid judgment is extracted as under :-



"9. In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

11. Learned counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office



Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

12. It has been held in *Maneka Gandhi vs. Union of India* that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it, which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide *State of U.P. v. Yamuna Shankar Misra*. Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average



- (v) Fair
- (vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

15. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

17. In our opinion, every entry in the A.C.R. 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

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been held by the Constitution Bench decision of this Court in *Maneka 11 Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark 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 violation of the principle 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.

19. Learned counsel for the respondent has relied on the decision of this Court in *U. P. Jal Nigam vs. Prabhat Chandra Jain*. We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in *U.P. Jal Nigam* (supra) cannot be said to have laid down any legal principle that entries need not be communicated. As observed in *Bharat Petroleum Corporation Ltd. vs. N.R. Vairamani* (vide AIR para 9): (SCC p.584).

"9. Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute, and that too, taken out of their context".

20. In *U.P. Jal Nigam's* case (supra) there is only a stray observation "if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading". There is no discussion about the question whether such 'good' grading can also have serious adverse consequences as it may virtually eliminate the chances of promotion of the incumbent if there is a benchmark requiring 'very good' entry. And even when there is no benchmark, such downgrading can have serious adverse effect on an incumbent's chances of promotion where comparative merit of several candidates is considered.

21. Learned counsel for the respondent also relied upon the decision of this Court in *Union of*



India & Anr. vs. S. K. Goel and on the strength of the same submitted that only an adverse entry need be communicated to the incumbent. The aforesaid decision is a two-Judge Bench decision and hence cannot prevail over the seven-Judge Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) in which it has been held that arbitrariness violates Article 14 of the Constitution. Since the aforesaid decision in Union of India vs. S.K. Goel (supra) has not considered the aforesaid Constitution Bench decision in Maneka Gandhi's case (supra), it cannot be said to have laid down the correct law. Moreover, this decision also cannot be treated as a Euclid's formula since there is no detailed discussion in it about the adverse consequences of non-communication of the entry, and the consequential denial of making a representation against it.

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

23. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above)."

7. We have heard counsel for the parties. It is an undisputed fact that the applicant was promoted as SDE in May, 2000 considering his past performance as reflected in his CR dossiers. Subsequently, he has earned more than two average gradings in his later reports. As held by the Apex Court in U.P. Jainigam and others v. Prabhath Chandra Jain and others (supra) as

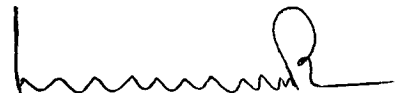
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well as in Dev Dutt v. Union of India and others case (supra), when an employee is down graded and such down gradation has an adverse affect on his promotional prospects, he should have been informed about it in tune with the principles of natural justice, so that he could have availed himself of an opportunity to make a representation to the competent authority to get such grading upgraded. Obviously, the respondents have denied such an opportunity to the applicant and the Departmental Screening Committee has taken into consideration of those uncommunicated downgraded CRs while considering his case for the time bound upgradation of the IDA scale and thereby violated the principles of natural justice. We, therefore, allow this O.A. and set aside the Annexure A3 letter dated 28.09.2007 to the extent it applies to the applicant. Since the only reason for denying him the upgraded IDA scale was his unsatisfactory service records containing more than two averages in the ACRs of the previous five years as noticed by the Departmental Screening Committee, we direct the respondents to ignore it and to grant him the time bound upgradation from the IDA scale of Rs.11875-300-17275 to the IDA scale of Rs.13000-350-18250 with effect from the prescribed date. The aforesaid direction shall be implemented by the respondents within a period of two months from the date of communication of this order. There shall be no order as to cost.

(Dated, the 16th February, 2010.)



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER



GEORGE PARACKEN
JUDICIAL MEMBER