

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.237/08

Thursday this the 20th day of August 2009

C O R A M :

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

T.K.Haridas,
Senior Engineering Assistant,
Doordarshan Kendra, Kudappanakkunnu,
Thiruvananthapuram.

...Applicant

(By Advocate Mr.T.M.Raman Kartha)

V e r s u s

1. Union of India represented by Secretary,
Ministry of Information and Broadcasting, New Delhi.
2. Prasar Bharathy, Broadcasting Corporation of India,
New Delhi represented by Chief Executive Officer.
3. Director General,
All India Radio, Akashavani Bhavan, New Delhi.
4. Chief Engineer (Training) Technical,
All India Radio and Doordarshan, Kingsway, Delhi.
5. Director, Doordarshan Kendra,
Kudappanakkunnu, Thiruvananthapuram. ...Respondents

(By Advocate Mr.N.N.Sugunapalan,Sr. & Mr.S Sujin [R2-5]
Mr.T.P.M.Ibrahim Khan,SCGSC [R1])

This application having been heard on 7th August 2009 the Tribunal
on 20th August 2009 delivered the following :-

O R D E R

HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER

The applicant has filed this Original Application under Section 19 of
the Administrative Tribunals Act, 1985 seeking the following reliefs :-

.2.

1. To call for the records leading to Annexure A-5 and Annexure A-6 and set aside the same.
2. To direct the respondents to fill up the posts of Assistant Engineers according to the seniority in the examination and also in the notified vacancy of 131 before conducting any departmental competitive examination pursuant to Annexure A-4 and Annexure A-5.
3. Issue an appropriate direction directing the respondents to promote the applicant as Assistant Engineer pursuant to his successful completion of the examination and according to his rank in the General quota.
4. To direct the respondents to consider Annexure A-7 representation submitted by the applicant and pass appropriate orders.

By the Annexure A-5 Circular Memorandum dated 10.3.2008 and the Annexure A-6 Circular Memorandum dated 4.4.2008, the 2nd respondent, namely, the Prasar Bharathy, Broadcasting Corporation of India, New Delhi represented by its Chief Executive Officer has notified the dates and other details for the Departmental Competitive Examination for promotion of Senior Engineering Assistants in All India Radio and Doordarshan to the grade of Assistant Engineers under the 75% exam quota against the vacancies for the year 2007-2008. Tentatively, 101 vacancies (Gen. 68, SC 13, ST 20) were identified. Senior Engineering Assistants with 3 years service in the grade as on 1.1.2007 or Senior Engineering Assistants with 8 years regular service in the combined grade of Senior Engineering Assistants and Engineering Assistants as on 1.1.2007 were eligible for appearing in the examination. The eligible candidates were required to send their willingness in the prescribed proforma through the respective Zonal Chief Engineers on or before 11.4.2008. The examinations were accordingly held on 22nd, 23rd and 24th May 2008 as per the revised schedule.

✓

.3.

2. The respondents have earlier conducted a similar examination for the year 2006-2007 for filing up 131 (Gen. 85, SC 16, ST 30) vacancies of Assistant Engineers in terms of Annexure A-1 Circular Memorandum dated 20.4.2007. Applicant was also a candidate for the aforesaid examination and he was issued with Annexure A-2 Hall Ticket dated 4.6.2007. Based on the said list the respondents, vide Annexure A-4 order dated 6.2.2008, promoted 51 Senior Engineering Assistants as Assistant Engineers. Though the applicant's position among the list of 219 candidates qualified in the written examination was 31, he was not promoted. According to him, when 131 posts were available and only 51 posts have been filled up, there was no need for the respondents for inviting application for fresh Departmental Competitive Examination as notified vide Annexure A-5 and Annexure A-6 Memorandums dated 10.3.2008 and 4.4.2008. The applicant made the Annexure A-7 representation dated 3.4.2008 to the 3rd respondent stating that in terms of the aforesaid order dated 6.2.2008, only 33 vacancies in general quota have been filled up leaving 52 vacancies unfilled. He has also raised the question as to why he was denied promotion when he had secured the 31st position in the list of 219 candidates who have passed the written list and 52 vacancies were left unfilled. He has, therefore, requested the authorities concerned to promote him to the grade of Assistant Engineer against the vacancies of 2006-2007.



.4.

3. In the reply filed by the respondents 2-5, they have stated that the 131 vacancies indicated in Annexure A-1 Circular dated 20.4.2007 was only tentative as stated so in para 2 of the Circular itself. However, the actual number of vacancies up to 31st March were only 51 for which DPC was held. As the applicant was ranked 31st in the written examination, he was also duly considered by the DPC for promotion. The weightage for written examination and ACRs were 70% and 30% respectively. The merit list was prepared on the basis of the sum total of the marks obtained in the written examination and the marks given for ACRs. There were many candidates like the applicant who had secured higher marks in the written examination but were not finally promoted because they have scored lesser marks in ACR assessments.

4. The respondents have also filed Annexure R-1 "gist of ACR under 75% quota" along with M.A.465/09 in this O.A. While the applicant got 41.07 marks out of 70 marks in the written examination, he could secure only 22 marks out of 30 marks for the ACR. Thus the total marks secured by him was only 63.07. Those candidates who got the higher marks have been given appointments subject to the extent of vacancies available.

5. According to the counsel for the applicant, the applicant got just 22 marks out of 30 marks for ACRs only because he was graded as 'Good' for three years and 'Very Good' for two years out of the 5 years ACRs from 2000-2001 to 2004-2005. On the other hand, there were candidates who were graded as 'Outstanding' and 'Very Good' and thereby they could

✓

score higher marks and find their place in the select list. He has further argued that in terms of the Apex Court judgment in Dev Dutt Vs. Union of India and others (AIR 2008 SC 2513) all entries whether poor, fair, average, good or very good in the Annual Confidential Report were to be communicated to him within a reasonable period so that he could make a representation against them. As he was denied such an opportunity for making representation for upgrading his gradings of 'Good' and "Very Good" to 'Outstanding', he had suffered adversely in his promotional prospects. The relevant part of the aforesaid judgment is extracted below :-

"9. We do not agree. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved.

10. 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.

11. 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.

12. 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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

38. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O requiring communication of the entry, or even if there is a Rule/G.O prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will over ride all rules or government orders.

40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

6. Counsel for the respondents, on the other hand, relied upon the judgment of the Apex Court in Union of India and another Vs. S.K.Goel and others (AIR 2007 SC 1199) in which it has been held that the Government instructions regulating recording of Annual Confidential Reports provide for only communication of adverse remarks in the ACRs. As the applicant has not received any adverse remarks, rather he was

always graded above the prescribed bench mark of 'above average'. Therefore, there was neither any onus nor any requirement upon the respondents to communicate the entries in ACR to the applicant. The learned counsel has also relied upon the observations of the Apex Court in the said judgment that "merely because certain persons have been assessed by the DPC to be better than the respondent, did not imply that he should have been communicated his grading." The relevant part of the said judgment is extracted below :-

"23. In the instant case, respondent No.1 had received no adverse remarks and had rather been graded at the level of the prescribed bench mark of 'above average', therefore, as rightly pointed out by learned Additional Solicitor General, there was neither any onus nor requirement upon the appellant to have communicated the ACR entry to respondent No.1.

24. At the time of hearing, the original record was placed before us. We have carefully perused the same. The DPC, in our view, followed the prescribed norms as also applied its discretion vested in it to determine the comparative merit of the eligible officers and thereafter made recommendations in order of merit. There was thus no occasion or justification for interference in the order passed by the appellants, as upheld by the Tribunal."

7. We have heard the counsel for both the parties. From the Annexure R-1 list it is seen that there were several persons with gradings as 'Very Good' and 'Outstanding' who secured even 28.5 marks out 30 marks earmarked for ACR assessment. If the applicant had secured such marks for his ACRs, he also would have found his place in the list of promoted candidates as he had secured high position in the written part of the selection. If the gradings of 'Good' and "Very Good" awarded to the applicant in the ACRs for the years 2000-2001 to 2004-2005 were communicated to him, he would have got an opportunity to make representations to upgrade him as 'Outstanding' or as 'Very Good'. If



those representations were accepted, his gradings in all those years also would have gone up. Undoubtedly, the applicant was denied his valuable right for making a representation to upgrade his gradings in the ACRs for the aforesaid years. We, therefore, find that the applicant has rightly relied upon the judgment of the Apex Court in Dev Dutt's case (supra) wherein it has been held that every entry must be communicated to employee concerned so that he may have opportunity to make representation against it, if he is aggrieved. Consequently, we do not find any merit in the contention of the counsel for the respondents, relying on the earlier judgment of the Apex Court in S.K.Goel's case (supra), that only adverse remarks in the ACR have to be communicated to the employee concerned. In fact the Apex Court has considered the case of S.K.Goel (supra) in Dev Dutt's case (supra) which is a later one and observed as under :-

"23. Learned counsel for the respondent also relied upon the decision of this Court in Union of India and another Vs. S.K.Goel and others, AIR 2007 SC 1199 and on the strength of the same submitted that only an adverse entry need be communicated to the incumbent. The aforesaid decision is a 2-Judge Bench decision and hence cannot prevail over the 7-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."

8. In the above facts and circumstances of the case, even though none of the reliefs sought by the applicant in this OA referred to above can be allowed, we cannot ignore the arguments of the counsel for the applicant that Annexure R-1 gist of ACR under 75% (LDC Exam quota) has been

✓

prepared in violation of principles of natural justice as laid down by the Apex Court in Dev Dutt's case (supra). Admittedly, the applicant was graded as 'Good' for three years and 'Very Good' for two years during the assessment period between 2000-2001 to 2004-2005. Though, those gradings were not adverse to him as they were not below the bench mark, there is no denial of the fact that the applicant was denied the right of making representations against the low gradings granted to him. We, therefore, direct that the respondents shall communicate all the 5 years ACRs of the applicant from 2000-2001 to 2004-2005 and give him an opportunity to make individual representations against them. On receipt of such representations, the competent authority shall consider them in accordance with the rules and take decision whether those gradings were warranted in his case or whether they were to be upgraded. The decision in this regard shall be taken by the competent authority within a period of two months from the date of receipt of such representations from the applicant under intimation to him. If the competent authority has decided to upgrade his ACRs to higher gradings, a review DPC shall be held to assess his ACRs and grant him marks accordingly within two months thereafter. Consequently, his position in the select list prepared on the basis of examination conducted in terms of Annexure A-1 Circular Memorandum dated 20.4.2007 shall also be reviewed and if the applicant's case comes within the zone of 51 selected candidates, he shall also be given promotion to the post of Assistant Engineers from the date his junior has been given such promotion with all consequential benefits except arrears of salary and allowances to him within two months thereafter.



10.

9. With the aforesaid directions, the O.A is disposed of. There shall be no order as to costs.

(Dated this 20th day of August 2009)


K.GEORGE JOSEPH
ADMINISTRATIVE MEMBER


GEORGE PARACKEN
JUDICIAL MEMBER

asp