

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

OA NO. 28/06

WEDNESDAY THIS THE 12th DAY OF SEPTEMBER, 2007

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER**

E.B. Vijayan Nair
Deputy Commissioner of Income Tax
Central Circle, Aayakar Bhavan
Trichur-680001

.. Applicant

By Advocate Mr. P. Balakrishnan

Vs.

1 Union of India represented by
the Secretary, Ministry of Finance:
Department of Revenue
New Delhi.

2 The Chairman,
Central Board of Direct Taxes
New Delhi.

3 The Chief Commissioner of Income Tax
CR Building, IS Press Road,
Cochin

.. Respondents

By Advocate Mr. TPM Ibrahim Khan, SCGSC

O R D E R

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant who is a Deputy Commissioner of Income Tax (now retired) has filed this original application aggrieved by his non promotion to the cadre of Joint Commissioner of income Tax whereas

his juniors got promoted by the Annexure A1 impugned order dated 27.5.2005 of the 1st respondent. As per the All India Civil List 2004, the applicant's seniority in the feeder cadre for promotion to the cadre of Joint commissioner of Income Tax is at S.no 130. By the impugned order, it is shown that S Nos131 &132 and other 31 juniors to the applicant have been promoted. He made a representation to the 2nd respondent immediately, though 6 months have elapsed, tas no response was received. and since he was to retire on 31.5.2007, he has approached the Tribunal seeking the undermentioned reliefs :-

- a) May be pleased to call for the records of the case and to hold the annexure A1 order to the extent of not promoting the applicant as illegal and void in law.
- b) To direct the respondents to promote the applicant retrospectively from 25.7.2005, the date of Annexure A1 order by placing him at Sno 91 in the said order, and accord all benefits flowing therefrom including arrears of pay and allowances etc.
- c) To issue such other order or direction as the hon Tribunal deems appropriate in the facts and circumstances of the case.


2 According to the applicant, in all 37 years of his service, he has not been admonished by any superior officer nor has he been informed of any adverse remarks in his record and there is no justifiable reason to overlook him for promotion.

3 The respondents have filed a reply stating that the applicant was duly considered by the Departmental Promotion Committee for the

vacancies pertaining to the year 2004-05, held on 16th-28th Feb, 2005 in the UPSC along with other eligible candidates, but the DPC did not recommend his name for promotion based on his performance reflected in the Annual Confidential Reports(ACRs). It is also submitted that his representation was under consideration and there being no provision for issuing notice to the officers who are declared 'unfit' by the DPC, he was not informed of his non inclusion.

4 The applicant has filed a rejoinder, in which he has alleged that no reasons for declaring him as 'unfit' have been given by the DPC as seen from the averments in the reply statement, hence the only conclusion that can be drawn is that the remarks in the applicant's ACRs were below the benchmark prescribed for promotion and if that was so, such gradings should have been communicated to him treating them as adverse and he should not have been condemned unheard without any notice.

5 The respondents filed an additional reply statement, seeking to bring to the notice of the court an Office memorandum issued by the Department of Personnel & Training bringing to the notice of all the departments the latest decision of the Hon. Supreme Court of India in the matter of Union of India vs S.K.Goel & others that "the Departmental Promotion Committee enjoy full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence the interference by the High court is not called for". In view of the above ruling of the Apex court, the respondents have averred that no judicial review of the DPC proceedings



which have been conducted in accordance with standing government instructions is warranted.

6 We heard the Learned counsel, Sri Balakrishnan for the applicant and Sri V.Shaji for the respondents. We also called for the minutes of the DPC meeting and the ACR record of the applicant and perused the same.

7 It was urged by the Learned counsel for the applicant that the Mumbai bench of this Tribunal had considered an identical case of an applicant belonging to the same cadre and same Department in OA 782 of 2003 and allowed the OA directing the respondents to convene a review DPC and consider the applicant therein by ignoring the ACRs of the years wherein downgrading was observed and therefore this applicant was also entitled to the same treatment. The High court of Mumbai has also confirmed the said order of the Tribunal.

8 On the other hand the counsel for the respondents heavily relied on the recent judgement of the Apex Court in S.K.Goel's case mentioned supra holding that DPC Proceedings should not be subjected to judicial review and DPCs enjoy full freedom to devise their own methods for assessment of suitability.

9 The main question arising for our consideration is whether the respondents had followed due procedures in the consideration of promotion of the applicant and whether denial of promotion to the applicant

h

was illegal and void in law? Both questions of fact and law are involved in this case and we shall deal with them separately.

10 From the record produced before us it is seen that the DPC met on 16th-18th Feb 2005 under the chairmanship of The Member UPSC for preparation of a panel for promotion to the grade of Joint Commissioners of Income Tax for 117 vacancies pertaining to the year 2004-05. The Committee considered 137 officers in which the applicant figured at S N o 126 and he was assessed as 'unfit' by the committee. The norms and procedure for DPCs are prescribed in the DOP&T O.M dated 10.4.89. The benchmark prescribed for promotion to the level of Jt. Commissioner is 'Very Good'. The above facts are undisputed. The abstract of the ACR s of the applicant for the relevant years is as shown under:-

Year	Grading
1998-99	Very Good
1999-2000	Good
2000-01	Good
2001-02	Good
2002-03	Very Good

11 From the above it is evident that the applicant had secured only two gradings fulfilling the benchmark in the five year period, though in the subsequent years he had 'Very Good' gradings. The DPC ostensibly has declared him unfit due to the above reason. As no reasons are required to be recorded in accordance with the instructions, the Committee has only classified the officers as 'fit' and 'unfit'. The applicant is not the only one so categorised, several of his seniors as well as his juniors have been


declared as unfit. The DPC is enjoined only to follow the prescribed norms and make its recommendations in the order of merit. We do not see any reason prima facie to interfere with its findings on that count.

12 The main submission that has been made by the counsel for the applicant is that the gradings in the ACRs which fell below the benchmark should have been treated as adverse and communicated to the applicant and since they were not communicated, the DPC erred in taking them into account for declaring the applicant as unfit. The decision of the Mumbai bench in OA 782/2003 has been relied upon by the counsel in this regard. On this issue, whether down grading and gradings below the benchmark have to be communicated, there has been much confusion created by plethora of judgements by Courts and Tribunals. Before going into the legal questions, let us examine the Rule position. As mentioned earlier, the principles regarding recording of confidential reports and communication of adverse remarks and related matters have been laid down in administrative instructions issued from time to time and there are no statutory rules in this regard. These have been codified in Swamy's compilation on confidential reports and para 20 on page 26 therein may be noticed in this regard, wherein it has been laid down clearly in the DPAR O.M dated 22nd May 1975, that "the grading of officers being done on the basis of the general remarks in the report should not also be communicated, even if it is adverse." This position has been reiterated in the DOP&T O.M. dated 28th March 2006 (page 29, para 26 of the compilation) referred by the respondents at Annexure R1. Thus, according to the existing instructions, the overall grading given in the ACR

should not be communicated even when the grading given is below the benchmark prescribed for promotion to the next higher grade. Therefore, in the instant case strictly according to the instructions in force, the DPC cannot be said to have erred in taking into account the gradings in the ACRs of the applicant for making an overall assessment. The DPC followed the prescribed norms and acted within its mandate.

13 Coming to the legal position averred by both the parties, there exists a confused scenario with judgements both for and against holding the field. There is also confusion generated by interpretations of the terms 'downgrading, benchmark, adverse' etc given in different contexts. For eg. the term downgrading essentially refers to a situation when a superior officer tones down the assessment of a lower authority in a particular year, but it is also interpreted in many of the orders to refer to a grading which is below the bench mark. This is not a correct interpretation as the performance of an employee may vary from year to year, either deteriorate or improve on account of various reasons and still not show any adverse characteristics. The present instructions regarding communication of adverse remarks do not extend to this area of 'grading' and acceptance of such a principle would require a drastic change in present procedures as it would amount to making the confidential assessments open at every stage to all the employees and to the best of our knowledge such a policy change has not been made so far.

14 The applicant in the instant case has heavily relied on the decision in OA 782/2003 of the Mumbai bench. That decision has followed the



decision in Binoy Gupta's case by the Bombay High Court and the decision of the Apex Court in U.P Jal Nigam and others vs Prabhat Chandra Jain and others reported in 1996 33 ATC 217. It is now known that subsequently, the Hon. Supreme court has declared in its judgement dated 22.11.2005 in UOI and another v. Major Bahadur Singh that the judgement of the court dated 31.1.1996 in U.P Jal Nigam and others in SLP (Civil) No 16988/95 has no universal application and the judgement itself shows that it was intended to be meant only for the employees of UP Jal Nigam. The case of Binoy Gupta is also distinguishable as in the case of the applicant therein, there was a downgrading of the Reporting officer's remarks by the Reviewing officer which was not communicated.

15 The specific issue under consideration here is whether a grading given in a particular ACR which falls short of the benchmark should be treated as adverse and communicated. On account of the conflicting decisions, this matter came to be considered by two Full benches of this Tribunal. In the case of Manikchand vs Union of India and others, reported in AT Full Bench Judgements(2002-03) 160 it was ruled that it is not necessary to communicate the remarks which are below the benchmark prescribed for promotion in respect of a selection post but there is no quarrel for communication of those gradings which had been downgraded or there has been a steep fall in the light of U.P Jal Nigam case(supra).

The reasoning was as under:-

15 "Considering the position, in our considered view, there is no need to communicate the non adverse remarks or grading to the concerned government servant, besides the Government servant has only a right to be considered for promotion and not right for actual promotion or selection. Therefore it cannot be said that

only principles of natural justice will be violated if the grading/entry below the benchmark are not communicated to the government servant.

16 Further it is also to be seen whether it would be practicable to communicate every remark/grading in all the ACRs continuously in respect of all the persons. There will be thousands of employees, in whose cases, such entries may need to be communicated. It would require scrutiny of the ACR dossier to find out whether the person concerned would meet the benchmark or not. Also not every person would be eligible for promotion. Only those coming under the zone of consideration will need to be considered. Also it will depend on the number of vacancies. Thus, communication of remarks/grading, which are not adverse per se, but which fall short of benchmark could be a gigantic exercise requiring lot of manpower and consuming lot of time. The effort may not be commensurate with the result to be achieved."

16 The matter has been laid at rest by another Full Bench decision at the Principal Bench in A.K.Dawar vs Union of India decided on 16.4.2004.

The reference before the full bench was the following;

" whether the grading of 'Good' in the Annual confidential report, given to a government employee, when the grading prescribed in the benchmark is 'very good' for the next higher post, should be treated necessarily as adverse and so required to be communicated to him in accordance with the law and rules.'

Considering the various decisions of the High Courts, the following observations were made answering the reference.

"Consequently, if a person earned a "good" report in his Confidential report, it cannot be taken to be an adverse remark when there is no downgrading. Adverse remarks can indicate the defects and deficiencies in the quality of work, performance and conduct of an officer. It may not include the words in the nature of counsel or advice. The adverse remarks have to be seen at the time when they are recorded. If the Reporting and Reviewing officers have recorded the performance of an officer to be "Good", necessarily his total and overall performance have to be

considered , later on, it cannot therefore be held that merely because on a subsequent date , he may not meet the benchmark, the remarks would automatically turn colour and become adverse..

14.....We therefore subscribe to the view taken by the Punjab and Haryana High court in the case of M.S.Preeti and of the Delhi high court in the case of Rajender Kumar. We answer the reference as under:-

If there is no downgrading of the concerned person in the Annual confidential report, in that event, the grading of 'Good ' given to the government employee irrespective of the benchmark for promotion being "very good" need not be communicated to be treated as adverse. '

17 The full import of these decisions appears to be that if there is a downgrading in the ACR i.e when the remarks given by a reporting officer are toned down by the Reviewing officer, then irrespective of whether there is a steep fall or not, the same shall be communicated to the person or in the alternative be ignored. As regards 'grading' in general from year to year, for example from 'Very Good' to 'Good', the same need not be communicated. Since the full bench of the Tribunal has decided to adopt the above views of the Delhi and Punjab and Haryana High Courts, in accordance with the doctrine of precedent, these decisions are binding on this bench also.


18 In Ashwini Kumar Singh vs Public Service Commission 2004 SCC (L&S)95, the Apex Court stated that courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Picking out a line from here and there would not be in accordance with law. We have already discussed why the UP Jal NIGAM case does not hold the field

h

any more and how Binoy Gupta's case relied on by the Mumbai Bench is distinguishable on facts. Therefore the ratio of the Full Bench decision is applicable here. The Apex Court has made it clear that its judgement in the UP Jal Nigam case has no universal application, that being so, each case has to be tested on its merits.

19 In the facts of this case, the applicant's record does not indicate any downgrading as such which required to be communicated to him as adverse. There are no variations in the assessments of the Reporting and reviewing officers, nor is there any steep fluctuation in his record. The variations are from 'Very Good' to 'Good' and vice versa. There are also no adverse remarks in the entire record. The mere fact that for two relevant years he has secured "Good" gradings only which happen to be below the benchmark for promotion does not automatically lead to a conclusion that it is adverse and requiring to be communicated or ignored in the event of non communication. There is no steep fall from the previous year and the variation is only from very good to good and vice versa. We are therefore of the considered view that the applicant's case is different from that of the applicant in OA 782/2003 before the Mumbai bench with whom he has sought parity of treatment.

20 Following the ratio decidendi of the Full bench observations and in the light of the legal position as discussed above we reject this contention of the applicant that the DPC should have ignored the below benchmark gradings in his record as they were not communicated. We also take note of the latest decision of the Hon Supreme Court reported in 2007 AIR



SCW 1235, in the matter of Union of India vs S.K.Goel that the DPCs enjoy full discretion for making an objective assessment and a judicial review of the same is unwarranted. In the light of the discussions of facts and law, the contentions of the applicant have to be rejected only.

21. For the reasons stated above, we do not see any grounds to interfere with the impugned order. OA is dismissed.

Dated 12th September, 2007.



DR.K.B.S. RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE-CHAIRMAN

kmn