

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No. 346/89
~~T. A. No.~~

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DATE OF DECISION 31.7.90

V. Ibrayi Applicant (s)

M/s. M.K.Damodaran &
C.T.Ravikumar Advocate for the Applicant (s)

Versus

Union of India represented by Respondent (s)
M/o Communications & 3 others.

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

CORAM:

The Hon'ble Mr. S.P.Mukerji, Vice Chairman

The Hon'ble Mr. N.Dharmadan, 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? *Yes*
4. To be circulated to all Benches of the Tribunal? *Yes*

JUDGEMENT

(Shri S.P.Mukerji, Vice Chairman)

The applicant who has been working as Higher Grade Telegraph Assistant under the General Manager, Telecommunications, Trivandrum has in this application dated 1.5.89 challenged the impugned order dated 12.8.88 at Annexure-6 rejecting his representation for promotion to the post of Telegraphmaster and for re-fixing his seniority among Telegraphmasters. He has also challenged the Circle Gradation List of Telegraphists and Telegraphmasters at Annexure-4 praying that he should be ranked at Sl.No. 39 in the Gradation List of Telegraphmasters. The brief facts of the case are as follows:

2. The applicant was selected and joined as Telegraphist on 10.1.1964. He passed the qualifying examination for promotion as Telegraphmaster in 1980. He was promoted as Assistant Telegraphmaster on an adhoc basis with effect from 16.5.81. Telegraphists

are entitled to be promoted as Telegraphmaster either on merit-cum-fitness in the 1/3rd quota or on the basis of seniority-cum-fitness in the 2/3rd quota. The applicant's grievance is that the DPC which met on 5.7.83 for promotion against the 1/3rd quota did not include him in the panel while his juniors (respondents 3 & 4) in the Gradation List of Telegraphists were included in the panel. It was surprising for him that even though he was found fit for promotion as Assistant Telegraphmaster with effect from 16.5.81 by the order issued on 27.4.82, though on an adhoc basis, and no adverse entries had been communicated to him, he was superseded by the DPC on 5.7.83. Aggrieved by his supersession he filed a writ petition No.6524/83 against the order dated 11.7.83 promoting respondents 3 & 4 and others against the merit quota of vacancies of 1981 and 1982 superseding him. This writ petition was transferred to the Tribunal as TA No.93/86. In the counter affidavit in that case the respondent Department had stated that the DPC did not find the applicant suitable for promotion without giving any reasons. The Tribunal disposed of the writ petition on the basis of the submission made by the Central Government Standing Counsel that the applicant had ^{by them} been promoted to the cadre of Higher Grade Telegraphist which is equivalent to Telegraphmaster and that the question of inter se seniority in the higher grade vis a vis his juniors who had superseded him would be considered by the Department. On the basis of the assurance given by the respondents in that case, the applicant submitted a representation dated 21.3.87 contending that the applicant was promoted as Higher Grade Telegraphist under the time bound promotion scheme with effect from 1.4.85 whereas he was entitled to be promoted on completion of 16 years of service on 30.11.83. Since his juniors had been promoted between 30.11.83 and 1.4.85, he sought seniority over them and further promotion to the grade of Senior Telegraphmaster. The applicant was informed to await the release of Circle Gradation List and when the same was published in the impugned seniority list at Annexure-4, he found that his name was not included in the seniority list of Telegraphmasters, whereas respondents 3 and 4 were included at rank No.39 and 40 and all others from

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rank no. 39 to 95 were junior to the applicant. By exclusion of his name from the seniority list, the applicant would be deprived of, for all times to come, promotion to the next higher category of Senior Telegraphmaster on the basis of his seniority. The applicant submitted a fresh representation on 1.12.87 praying that he should be promoted to the cadre of Telegraphmaster with effect from 11.7.83 with all consequential benefits and ranked at Sl. No.39 in the Gradation List of Telegraphmasters. The representation was rejected by the impugned order at Annexure-6. The applicant has contended that in 1983 when the DPC rejected him, he had no adverse entries, communication or disciplinary proceedings pending and by virtue of his seniority he was entitled to be promoted as Telegraphmaster. If he had any shortcoming or unsatisfactory record of service, he should have been forewarned about it.

3. The respondents in the counter affidavit have indicated that though he was promoted on an ad hoc basis as Assistant Telegraphmaster on 16.5.81, he was found by the DPC which met on 5.7.83 as not suitable for promotion as Telegraphmaster. They have denied the allegation of the applicant that he was superseded because of his Union activities as most of other officials promoted belong to the applicant's Union. They have stated that even though the promotion was to be made on the basis of seniority-cum-fitness, ^{since} ~~for~~ the DPC found him _{to} unfit for promotion, his seniority alone will not entitle him to promotion. His case for promotion as Higher Grade Telegraphist under the time-bound promotion scheme was considered by the DPC held on 9.2.84 and again on 25.7.84, and on both these occasions, he was not found suitable for promotion due to unsatisfactory record of service. However, the DPC which met on 9.8.85 considered his case again and selected him for promotion as Higher Grade Telegraphist which is in the same scale as that of Telegraphmasters.

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4. In the rejoinder, the applicant has argued that nothing has been said as to why he was found to be unsuitable because there was no disciplinary proceedings or adverse report communicated to him. He claims that on completion of 16 years of service he was eligible as Telegraphmaster on 30.11.83. He has further argued that the assurance given by the Department in TA 93/86 that his inter se seniority in the grade of Telegraphmaster will be considered entitles him to find a place above respondents 3 and 4 in the seniority list of Telegraphmasters. He has also argued that the prospects of promotion from Higher Grade Telegraphist are much less than those as Telegraphmaster and by denying him the promotion as Telegraphmaster with effect from 1983 his career has been adversely affected.

5. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. It appeared to us to be a little odd that when on 27.4.82 the applicant, who was working as a Telegraphist, was found fit to be promoted to the next higher grade of Assistant Telegraphmaster with effect from 16.5.81, he should have been found unfit for promotion as Telegraphist by the DPC which met on 5.7.83, when those junior to him and who had never been promoted from the Telegraphist cadre to Assistant Telegraphmaster were found fit for such promotion. The applicant alleged that it was because of his Union activities that he had been victimised, that no adverse entry had been communicated to him which would have warranted his being declared to be unfit for promotion, even on the basis of seniority-cum-fitness. The learned counsel for the respondents was good enough to produce the Confidential Reports written on the applicant so that it could be ascertained whether there was any adverse entry entered which had not been communicated to him, but on the basis of which his performance was found to be unsatisfactory. The learned counsel was also good enough to produce the proceedings of the DPC meetings held on 5.7.83, 9.2.84 and 9.8.85.



6, In the meeting held on 5.7.83, the DPC considered the suitability of 6 candidates, including the applicant, and recommended 5 of them to be suitable for promotion as Telegraphmaster. The applicant was the solitary candidate who was found by them to be unsuitable for promotion due to "unsatisfactory record of service". Respondents 3 & 4, who were junior to the applicant, were, however, included in the panel of suitable candidates. The DPC which met on 9.2.84 considered 16 candidates for promotion of Telegraphists to the next higher grade under One Time Bound Promotion Scheme and found 7 candidates, including the applicant, to be not fit for promotion. Again the DPC met on 25.7.84 and found the applicant to be unsuitable for promotion due to "unsatisfactory record of service". The DPC which met on 9.8.85, however, found the applicant suitable for promotion to the higher grade.

7. We have gone through the Confidential Roll entries of the applicant for the years between 1978-79 and 1984-85 with the following results:

I. 1978-79

He was adjudged to be of average intelligence and ability, but his conduct, character, and knowledge of rules were found to be good. He was found to be very devoted with good expression on paper. As a Signaller his accuracy and speed in transmission and technical knowledge were found to be good. He was found to be very courteous with no public complaints. On an overall basis, he was found to be "a very sincere and painstaking Signaller". His integrity was found to be beyond doubt and he was adjudged to be fit for promotion.

II. 1979-80

His intelligence was found to be above average, his conduct as exemplary, and his character was assessed to be hard working, careful and thorough with high degree of devotion to duty. He was found to be taking keen interest in the disposal of traffic. He was found to be always helpful and courteous to the public. Generally

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he was reported to be "a highly conscientious, hard working and dependable official--can be depended upon in difficult situations".

III. 1980-81 (a) from 1.4.80 to 6.7.80

His intelligence and conduct were found to be above average and excellent. He was reported to be hard working, careful, thorough and neat and clean, highly devoted to duty with good knowledge of rules and procedures with very good speed and accuracy, and assessed as "a dependable, hard working and highly devoted worker".

(b) from 7.7.80 to 31.3.81

He was reported on all counts to be of average level and his performance was found to be just satisfactory. He was found to be fit for promotion, and nothing adverse was noticed about his integrity.

IV. 1981-82

His intelligence was found to be of average level, conduct and character as satisfactory. He was found to be devoted to duty; his expression was found to be good; accuracy - good; technical knowledge - good. Under general performance, it was recorded that "the performance is on an average rate. Can be improved a lot if a little more interest is taken". It was also remarked under general assessment that "the official not taking any keen interest in his duties. He got the ability and knows to work. Had orally advised for a few occasions to improve". His integrity was found to be alright, and he was found "fit in the ordinary ^{way} ~~way~~" for promotion.

The Reporting Officer was one ^{Shri.} E.N. Warriar, who started reporting on him from this year.

The Reviewing Officer, while assessing the applicant as an average worker, observed that "adverse remarks not supported by documents". The adverse remarks were not communicated to the applicant.

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Special report in connection with the "Non-cooperation" agitation during May 1982 for the period from 1.5.82 to 16.5.82.

Shri E.N.Warrier, in the Special Report, indicated that the applicant "exhibited gross indiscipline and sense of utter irresponsibility by taking part actively in the illegal non-cooperation agitation by a section of NFPTE during 1st fortnight of May 1982. Actively participated in the illegal non-cooperation agitation by a section of NFPTE Union during the first fortnight of May 1982. Not paid due attention to his duties though he was physically present in the Section",.

The adverse report for May 1982 was communicated to the applicant on 3.8.82 and his acknowledgement received on 6.8.82.

V. 1982-83

Shri Warriar found the applicant to be of average intelligence and his conduct, though found to be satisfactory, it was indicated that his attitude towards Supervisors was impertinent. He was irregular in punctuality and his character was found to be satisfactory. On other items, he was assessed as fit, good, or satisfactory. It was also indicated that he was "not taking a sincere activeness in his duties; Warned and advised." It was also indicated that "Though the official could work very well, not taking real interest".

These adverse remarks were communicated to the applicant on 24.5.83, but the further adverse remarks recorded by Shri Warriar that the applicant "has got a tendency not to work hard himself but making others too not to work sincerely and making problems against the administration. (Orally instructed. But no use. Retalitating with impertinent behaviour)" were not communicated to the applicant because, perhaps, the Reviewing Officer indicated that the "remarks regarding instigating others is not substantiated. Other adverse remarks are justified".

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VI. 1983-84

Shri Warriar, again reporting upon the applicant, found him to be of good intelligence, and average ability of officials of his grade. His conduct was found to be unsatisfactory with impertinent attitude with his superiors. His character was satisfactory; knowledge - good; but he was found to be lacking in devotion to duty. He was found to be speedy and accurate with good expression, but his performance was found to be not satisfactory. He was found to be disobeying and misbehaving with superiors. His work and conduct were generally assessed as not satisfactory. He was found to be adamant; impertinent towards superiors, and it was indicated that he was warned by the head of office and by the divisional head.

These adverse remarks were communicated to him on 16.5.84

VII. 1984-85

Shri Warriar, reporting on him again, found the applicant to be of average ability, and on other counts, he was reported to be satisfactory and good. His performance was also found to be satisfactory and it was indicated that "considerable improvement has been noticed in his work and conduct under the year of review".

8. The resumé of the Confidential Reports as given above would show that, until Shri Warriar came in the picture, the applicant had been assessed as good, very devoted, sincere, painstaking, hard working, dependable, and always fit for promotion. From 1981-82, when Shri Warriar became the Reporting Officer, adverse entries started to figure in the annual entries. The adverse entries given to the applicant by Shri Warriar during 1981-82 that "he was not taking interest in his duties and he could improve a lot" were commented upon by the Reviewing Officer that they were not supported by documents. In spite of this, the adverse remarks were allowed to stand without being communicated to the applicant. The very damaging reports were entered by Shri Warriar in the Special Report for the period from 1.5.82 to 16.5.82 because of the applicant's participation in the so called illegal agitation. These remarks were communicated to the applicant. The occasion to enter a special report for 15 days and placing it on the confidential dossier, except to damage the applicant's

prospects, is not very clear to us. Again in 1982-83, Shri Warriar entered a bunch of adverse reports, but the report that the applicant had a tendency not to work hard himself but making others too not to work sincerely, and that he was making problems against the administration, were not communicated to the applicant, even though the Reviewing Officer had indicated that the remarks about instigating others were not substantiated.

9. The DPC met on 5.7.83 after the aforesaid entries, right upto 1982-83, including those adverse remarks which were not communicated to the applicant, had been made. The uncommunicated remarks had neither been expunged nor were they rejected by a competent authority. It can, therefore, be reasonably presumed that the uncommunicated adverse remarks played their full role in projecting a very unsatisfactory picture about the applicant's performance. It is, therefore, not surprising that the DPC which met on 5.7.83, 9.2.84, and 25.7.84 should have rejected the applicant for promotion as Telegraphmaster.

10. Now it is an established law that adverse reports cannot be acted upon or taken into account to deny promotion unless it is communicated and opportunity given to the officer reported upon to explain and ^{submit} ~~place~~ any representation to be disposed of. The Supreme Court gave this ruling in Gurdayal Singh Fijji Vs. State of Punjab and others, AIR 1979 SC 1622, reiterating the same in Brij Mohan Singh Chopra Vs. State of Punjab, ATR 1987 (1) SC 513. This principle has been adopted by the Tribunal and the High Courts in a catena of cases: 1981 (1) SLJ 33, 1987(1) SLJ (CAT) 1, 1986(6) ATC 821, 1987(1) ATR 467, 1984(2) SCR 297. It was further held by the Supreme Court in Brij Mohan Singh Chopra Vs. State of Punjab mentioned above, that adverse reports recorded prior the promotion cannot be taken into account for compulsory retirement. Since the applicant had been promoted as Assistant Telegraphmaster on 27.4.82, even otherwise, the

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adverse entries of 1981-82 ~~are not included~~, the applicant could not be taken into account by the DPC.

11. The Supreme Court in S. Maheswar Rao Vs. State of Orissa & another, Judgement Today 1989(3) 376, held that where the adverse report had been communicated, but the period of final representation within six months had not expired, and the Review Committee considered the case in the meantime and recommended compulsory retirement, the process of assessing the official on the basis of adverse report is vitiated. In the case before us it is clear that the adverse reports for 1982-83 were communicated to the applicant on 30.5.83 while the DPC met within less than one-and-a-half months on 5.7.83 and yet considered the communicated and uncommunicated reports of 1982-83. Thus, the assessment of the DPC is doubly vitiated, ^{once} by inclusion of uncommunicated adverse remarks and ^{again} by consideration of communicated remarks prematurely. In the same fashion, the adverse remarks for 1983-84, communicated to him on 16.5.84, were considered prematurely by the DPC which met on 25.7.84.

12. We have already adverted to the fact that the adverse reports surfaced and disappeared along with a particular Reporting Officer. That should put us on guard so far as Shri Warriar's assessment is concerned, especially when the Reviewing Officer ^{more than one} on ~~certain~~ occasions ^{expressed} expressed his unconcealed reservations about the same.

13. It may be argued that the uncommunicated adverse remarks were those about which the Reviewing Officer had expressed his reservations. But, unless the Reviewing Officer had indicated his unreserved disagreement and rejection of the adverse remarks recorded by the Reporting Officer, the same cannot be exempted from being communicated to the applicant. Regarding the adverse remarks of 1981-82, the Reviewing Officer simply stated that "adverse remarks not supported by documents". He did not indicate whether he accepts them or not. As a result, the adverse remarks were not communicated to the applicant, while prejudicing the applicant's case for promotion in full before the DPC.

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14. We have already expressed our doubts about pushing in a 'special report' of 15 days between 1.5.82 and 16.5.82 bearing nothing but two columns of adverse remarks against the applicant for gross indiscipline by taking part in the illegal agitation. Further, the special report had not been endorsed by the Reviewing authority in the prescribed form.

15. In the above circumstances, we feel that the rejection of the applicant as unsuitable by the DPC which met on 5.7.83, 9.2.84 and 25.7.84 is not in accordance with law and rules of natural justice.

16. The applicant does not appear to have been given a fair deal even by his delayed promotion on 9.8.85 as Higher Grade Telegraphist. It may be recalled that he had moved with others the Kerala High Court in a writ petition which was transferred to the Tribunal as TA 93/86 claiming promotion as Telegraphmaster on the basis of his seniority and other grounds. That transferred writ petition was dismissed with the following direction:

"However, as certain others have already been promoted to the post of Telegraph Master/Higher Grade Telegraphist earlier, there appears to be a dispute between the applicants on the one hand and such promotees on the other. It was submitted by Counsel of Respondent that the question of inter-se seniority as amongst the promotees including the applicants will be duly considered by the 1st Respondent in case the applicants file a proper representation in that behalf. In view of this submission it was agreed by counsel that there is no scope for the grant of any of the reliefs as claimed in this application. It is open to the applicants to submit their representation to the 1st Respondent as regards the question of seniority which will have to be duly considered and disposed of by the 1st respondent."

The respondents seem to have given an impression to the Tribunal that since the applicant had been promoted as Higher Grade Telegraphist which is in the same grade as Telegraphmaster, it is a matter of time for the respondents to decide his seniority in the grade of Telegraphmaster/Higher Grade Telegraphist by taking into account the applicant's claim for promotion as Telegraphmaster when his juniors were promoted in 1983. To us it appears that the impression given by the learned counsel for the respondents to the Tribunal at that time could have been that the question of his seniority with Telegraphmasters will be considered, but that is not met by the respondents and stating that Higher by not including the applicant in the Gradation List of Telegraphmasters

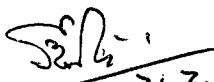
Had that impression not been given the applicant perhaps would have pressed his application for decision on merits.

Grade Telegraphist to which he was promoted in 1985 is of a different category altogether. The applicant is justified in claiming a place in the seniority list of Telegraphmasters on the basis of the assurance given by the respondents to the Tribunal. The applicant cannot be faulted in his averment that by being isolated as Higher Grade Telegraphist he will be deprived of the brighter prospects available to his junior Telegraphists who have been promoted as Telegraphmasters, and he had been wrongly superseded.

17. In the facts and circumstances, we allow this application, set aside the impugned order at Annexure/6, and direct the respondents 1 & 2 to convene a Review DPC as on 5.7.83, 9.2.84, and 25.7.84 for considering the applicant for promotion as Telegraphmaster on the basis of seniority-cum-fitness or One Time Bound Promotion Scheme, as the case may be. In assessing the applicant's performance the adverse entries of 1981-82, 1982-83 and 1983-84 which had not been communicated to the applicant by these dates should not be placed before the Review DPC. Those adverse reports which had been recorded prior to 27.4.82 also should not be placed before the Review DPC. If any of these DPCs find him fit for promotion as Telegraphmaster, the applicant should be given promotion as Telegraphmaster from the date his next junior was promoted through that DPC, with all consequential benefits of seniority in the grade of Telegraphmaster. We also direct that in case the applicant is not found fit for promotion by any of the Review DPCs, his promotion as Higher Grade Telegraphist should be taken to be equivalent to promotion as Telegraphmaster, and he should be graded in the seniority list of Telegraphmasters with effect from the date he took over as Higher Grade Telegraphist.

There will be no order as to costs.


(N. Dharmadan) 31.7.90
Judicial Member


31.7.90
(S.P. Mukerji)
Vice Chairman