

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No. 349/89 199
XXXXXX

DATE OF DECISION 6.8.1990

K.I.Jay Applicant (s)

M/s Asok M Cherian & CA Jay Advocate for the Applicant (s)

Versus

Union of India rep. by the Respondent (s)
General Manager, Southern Railway,
Madras & 10 others. }

Smt. Sumathi Dandapani (for Advocate for the Respondent (s)
R1-5)

CORAM:

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

and

The Hon'ble Mr. A.V.Haridasan - Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Y* >
2. To be referred to the Reporter or not? *no*
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

(Mr.A.V.Haridasan, Judicial Member)

The grievance of the applicant, an Assistant Electrical Engineer, Southern Railway, Trivandrum is that the 6th respondent who was the Senior Divisional Electrical Engineer had out of personal grudge against him made certain adverse entries in his Annual Confidential Report for the year ending 31.3.1987 without following the procedure writing laid down for the Confidential Reports, that the 5th respondent, Chief Electrical Engineer has without considering ~~xxxxxx~~ his representation against the adverse entries decided that the adverse remarks would stand, and that the Departmental Promotion Committee (DPC) in short) constituted for considering his promotion to

the Senior scale has taking into account the adverse remarks on which his representation was pending found him unsuitable for promotion. He has prayed that the adverse remarks in his Annual Confidential Report(ACR in short) for the year ending 31.3.1987, Annexure-A2 and the order of the 5th respondent, holding that the adverse entry would stand may be quashed. He has also prayed that the Annexure-A4 and A7 orders by which the respondents 7 to 11, his juniors were promoted as superseding him may be quashed. The facts of the case can be briefly stated as follows.

2. Having joined the service of the Northern Railways as Class-III supervisor on 8.1.1960, while he was working as Assistant Electrical Engineer, on his request the applicant was transferred to the Southern Railway and took appointment here as the junior most in the cadre of Assistant Electrical Engineer on 1.9.1982. Next promotion available to the applicant is to the category of Senior Scale Officer. Promotion to that category is made by a process of selection done on a duly constituted promotion committee based on the confidential reports of the Senior most Class-II officers. There was no adverse remarks in the Confidential Report of the applicant until the year ending 31.3.1986. While so, the applicant was served with a letter No.CPF/ELEC/87 dated 12.10.1987 of the 5th respondent communicating adverse remarks made in the ACR of the applicant for the year ending 31.3.1987. A copy of this is Annexure-A2. The applicant submitted a

representation before the Chief Electrical Engineer raising objections against the adverse remarks made in the ACR stating that there was no basis for the adverse remarks, and that the Senior Divisional Electrical Engineer had made the adverse entry because of his personal grudge against him and praying that the adverse entry may be expunged.

While the above representation at Annexure-A3 was pending with the Chief Electrical Engineer, the 5th respondent who was the second Reviewing Officer with regard to the ACR of the applicant, the Departmental Promotion Committee met to consider the suitability of seniormost eligible candidates for promotion to the category of Senior Scale Officers. The DPC took into account Annexure-A2 adverse remarks and held that the applicant was not suitable for promotion. Respondents 7 and 8 who were juniors to the applicant were promoted, by order dated 1.8.1988 of the third respondent, Annexure-A4. Against his supercession the applicant made a representation on 16.8.1988, Annexure-A5. Thereafter on 20.4.1989 the applicant received the Annexure-A6 order of the 5th respondent holding that the adverse entry mentioned in Annexure-A2 would stand. In the meanwhile by order dated 16.4.1989, the 4th respondent promoted the respondents 9 to 11 who were further juniors to the applicant, to the Senior Scale. According to the applicant, the impugned adverse entry in his ACR

(Annexure-A2) was made in violation of the instructions of the General Manager, Southern Railway contained in letter No.Z.561/I/C dated 29.3.1985 and are reiterated in subsequent letter of the General Manager dated 17.3.1986.

According to these instructions the applicant has stated adverse remarks can be recorded only on the basis of specific and substantial failings by the officer reported upon after he had been notified of the shortcomings and given adequate time to improve and the adverse remarks recorded should be shown to the officer reported upon and he should be given an opportunity to represent on the adverse remarks before the report is sent to the accepting authority along with the representations if made.

The applicant has stated that the adverse entry in the impugned ACR was not made after giving the applicant notice of his shortcomings if any and nor was it shown to him before forwarding to the reviewing officer. The applicant has averred that the 6th respondent was not at the time when the ACR for the year ending 31.3.1987 was written by his Controlling Officer and that, he had recorded adverse entries only with a view to spoil his career out of personal enmity. The applicant has a further grievance that the reviewing officer has not applied his mind to the facts mentioned in his representation and has held that the adverse entry would stand in Annexure-A6 order which is not a speaking order. The further

grievance of the applicant is that the DPC has taken into account the Annexure-A2 adverse entry at the time when his representation was pending with the 5th respondent. Therefore the applicant states that the adverse entry, Annexure-A2 and the order Annexure-A6 are vitiated and that the finding of the DPC that he was unsuitable for promotion basing on the adverse entries contained in Annexure-A2 at a time when representation against the same was pending is erroneous. The applicant further contends that as no further adverse entry in the ACR has been communicated to him, the DPC should not have taken into account the that they that impugned order at Annexure-A2 and A6/may be quashed,the promotion of his juniors by Annexure-A4 and A7 orders without considering him may also be quashed, and that the date on which he may be directed to be promoted w.e.f/his junior,the the 7th respondent was promoted as Senior Scale Officer.

3. On behalf of the respondents 1 to 6 a reply statement was filed opposing the application, contending that the procedure in which the ACR was written was perfectly regular, that after the change in the format of writing ACR from 31.3.1987 onwards adverse entry in the ACR need be communicated only by the the Reviewing Authority, that the adverse comment was made by the 6th respondent on the basis of his observation that the 5th respondent has considered his representation and the impugned order Annexure-A6 was issued only after due consideration of

his representation, that the DPC has assessed the suitability of the applicant that he was not found suitable on the basis of his performance, and that as there has been no irregularity in the manner in which the ACR was written in which his representation was considered or in the manner in which he was found unsuitable for promotion by the DPC, the applicant is not entitled to any relief.

4. We have heard the arguments of the learned counsel have on either side and carefully gone through the records.

5. The 5th respondent has recorded adverse comments in the ACR of the applicant for the period ending 31.3.1987. The applicant was working under the 6th respondent from April, 1986 to September, 1986 and from September, 1986 to March, 1987 he was working under the Deputy Chief Engineer, Headquarters. Normally the ACR of the applicant should have been written by the Deputy Chief Engineer under whom he was working at the time of writing of the ACR by the reporting officer, though the 6th respondent also could have written the ACR, since for a part of the period under observation the applicant was working under him.

The impugned adverse entry, Annexure-A2 is as follows:

"The following remarks have been made in your Annual Confidential Report for the year ended 31.3.1987:-

"He does not involve himself in his work.
He gives excuse for non-performance.

"He does not apply himself to the task. He lacks initiative and a continuous follow up is required from superior officers.

"He does not understand the problems of Scheduled Castes and Scheduled Tribes.

"He lacks in dedication to work. He is not systematic in his work. xx xx He does not maintain quality output.

"He lacks in insight and ability to quickly go to the heart of a matter and take decisions. He does not weigh pros and cons of alternatives.

"He has no capacity and lacks in resourcefulness in handling unforeseen situations on his own. He is not willing to take additional responsibilities and new areas of work.

"He does not set an example by his own conduct. He goes on leave and reports sick to extend period of absence from headquarters. He has no capacity to motivate and obtain the willing support of others.

"His proposals are not concise and persuasive. He does not formulate points logically or present them clearly in an effective manner.

"His personal relations with superiors and colleagues was not good. He lacks in capacity to work as a member of a team."

This is being communicated to you to enable you to improve your working.

Please acknowledge receipt."

According to the general instructions issued by the General Manager in the matter of writing Confidential Reports dated 7.3.1986, Annexure-A1 adverse remarks should be recorded only on the basis of specific and substantial failings after the concerned officer has been informed and given adequate time to improve. The respondents have produced certain documents to show that the applicant had

been given notice of his shortcomings. The only document which pertain to the period relevant to Annexure-A2 are Exts.R8 and R9. Ext.R8 reads as follows:-

"On the 5th instant I had given you instructions to have the oil changed in CP.210 at AVD/TSS after the capacitor bank had been energised on the 3rd instant. I have also instructed you to inform me the test results of the oil for according approval for switching on the breaker again.

The breaker has been energised without advising the test results of the oil and without obtaining my permission when you have been specifically instructed to convey the results and get the approval for energising the equipment. It is highly irregular on your part not to have followed these instructions. ATPC on duty had specifically brought to your notice that before closing CP.210 the same has to be informed to the undersigned. You have instructed ATPC that it is not necessary to inform the undersigned and authorised him to close the breaker.

This amounts to disobedience of instructions. I want to place on record your indifferent way of working. I don't want to discourage you but would like to reiterate that you shall abide by the instructions. You have also been trying to foster indiscipline amongst the supervisors working under your control.

It is necessary that you should improve in your out-look. The system cannot afford to have individuals who try hard not to fit in the harmonious functioning of the organisation.

The receipt of this letter should be acknowledged."

To this letter the applicant has given the reply Ext.R9 which reads as follows:

"The matter was already clarified on the same day itself on phone that as you wanted me to put back CB-210 into service by the quickest

possible time, I took my initiative and exercised my authority to re-commission the same after changing the oil in it, satisfied with the test results. I had no intention to disobey your instructions otherwise.

The reason for issuing such a confidential letter to me on accepting my explanation on phone on 5.5.86 and that too after a lapse of 18 days is not understood by me. Obviously it shows your biased attitudes towards me.

The fact is that the ATPC tried to contact you but since you were busy attending meetings with DRM/MAS the ATPC could not succeed in contacting you then and in order to save in time, I authorised him to close the circuit breaker.

Referring to para 3 of your above confidential letter the allegation against me that you have also been trying to foster indiscipline amongst the supervisors working under your control" is not clear to me. Would you kindly make clear the charges so that I shall be able to defend myself. On the contrary I am the one who stands for discipline and never for indiscipline.

The pity is that I am yet to find a single person who is really having pride in his job in the TRD organisation of MAS Division as the objective in motivation of staff is to inculcate pride in their job. The exodus of young and senior supervisors from TRD organisation is a glaring example for the same.

By nature I do function taking initiative and exercise the authority enjoined to the post I hold and I do not want to surrender my authority either. Because of showing initiative and exercising my authority if you find me a mis-finding in the harmonious functioning of the organisation under your kind control, I earnestly request you that I may please be transferred from the TRD organisation at the earliest."

 The adverse entries in Annexure-A2 do not at all pertain

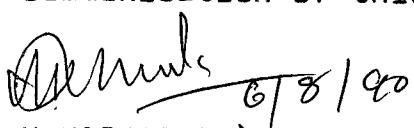
to the facts mentioned in Ext.R8. From Exts.R8 and R9 it can be reasonably inferred that the relationship between the applicant and the 5th respondent was not at all cordial. The applicant had in his representation Annexure-A3 stated that the 6th respondent had personal enmity towards him, that he had tried to spoil his ACR in the year 1985 to 1986, that it was set right after the Chief Electrical Engineer had given a personal hearing, and that the remarks made by the 6th respondent being biased should be expunged. The 5th respondent has not given a personal hearing to the applicant on his representation, and the Annexure-A6 order holding that the marks in Annexure-A2 should stand does not disclose an application of mind.

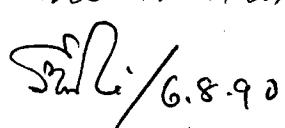
In the face of the allegation of bias, and the allegation that the 6th respondent had during the previous year tried to spoil the applicant's CR and that, that attempt was unsuccessful since the Chief Electrical Engineer on a personal hearing was satisfied that the adverse entry need not be made, the 5th respondent should have adverted to this aspect in his order Annexure-A6 and should have given the applicant a personal hearing. In these circumstances, we find that Annexure-A6 order that the adverse comments in the impugned ACR, Annexure-A2 should stand cannot be held valid. Further, though the applicant had submitted his representation against the Annexure-A2 adverse remark as early as 28.10.1987, the 6th respondent had disposed of the same only on 28th March, 1989. The

disposal of this representation was made long after the DPC considered the suitability of the applicant and other officers for promotion to the senior grade in 1988. It is fundamental that noncommunicated adverse entries in the ACR and adverse entries against which representations are pending cannot be looked into by the DPC while considering the suitability of the officer for promotion. This guiding principle has been violated in placing the adverse entry in the ACR which was pending consideration by the Reviewing Authority before the DPC. The 6th respondent who according to the applicant is biased against him and who had according to him recorded adverse comments by reason of this grudge has not filed a reply affidavit. The Deputy Chief Personnel Officer who has filed the reply statement on behalf of the respondents would not have been in a position to say what weighed with the 6th respondent in recording the adverse comments. He cannot be expected to say whether the 6th respondent had any personal spite against the applicant or not. For these reasons also we find that the adverse entry in Annexure-A2 cannot stand. The DPC should not have taken into account the adverse comments in the ACR of the applicant for the period ending 31.3.1987 and the other adverse entries, if any, which were not communicated to him while it considered the suitability of the applicant for promotion. It is further seen that the 6th respondent has not routed the ACR of the applicant through the first reviewing officer who also would be entitled to offer his comments. This is against the

guide-lines. On an anxious consideration of these aspects of the case, we are convinced that ~~great~~ injustice has been done to the applicant in holding him unsuitable for promotion by the DPC on the basis of the impugned adverse comments in the ACR which have been found to be unsustainable.

6. For the reasons aforesaid, we quash and set aside Annexure-A2 and A6. We direct that a review DPC should be held to review the case of the applicant for promotion on the date when the 7th respondent was considered for promotion, and if necessary on the date when respondents 9 to 11 were considered for promotion, without taking into account the Annexure-A2 adverse entry or any other later adverse entries in the ACR which have not been communicated to the applicant and to promote the applicant on the date when the 7th respondent was promoted, if he is found suitable for promotion, or if he is not found suitable on that date to promote him with effect from the date on which the 9th respondent was promoted, if he is found suitable then; to adjust his seniority accordingly to fix his pay accordingly and to pay him all consequential monetary benefits. The action in the above lines should be completed within a period of two months from the date of communication of this order. There is no order as to costs.


(A.V. HARIDASAN)
JUDICIAL MEMBER


(S.P. MUKERJI)
VICE CHAIRMAN