

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL  
NEW BOMBAY BENCH, NEW BOMBAY.

Tr. Application No.90/87.

Shri S.R.Borkar,  
Industries Officer,  
Bambolim,  
Goa.

... Applicant.

v/s.

1. Union of India through  
the Administrator of Goa,  
Daman and Diu having his office  
at Cabo Raj Niwas,  
Dona Paula, Panaji, Goa.
2. Shri R.S.K. Sancoalkar,  
Industries Officer,  
Directorate of Industries  
& Mines, Panaji,  
Goa.

... Respondents.

Coram: Hon'ble Member(J), Shri M.B.Mujumdar,  
Hon'ble Member(A), Shri M.Y.Priolkar.

Oral Judgment:

(Per Shri M.B.Mujumdar, Member(J))

Dated: 11.4.1989.

Writ Petition No.180/85 filed by the applicant  
Shri S.R.Borkar, challenging the promotion of the  
Respondent No.2 Shri R.S.K.Sancoalkar is transferred to  
this Tribunal under Section 29 of the Administrative  
Tribunals Act, 1985, and here it is numbered as  
Transferred Application No.90/87.

2. The relevant facts for the purpose of this  
judgment may be narrated as follows: The applicant was  
appointed as Industries Inspector in the Directorate  
of Industries and Mines, Panaji, Goa on 21.10.1970. He  
was confirmed as Industries Inspector on 21.2.1981.  
On the contrary, Respondent No.2 Shri Sancoalkar was  
appointed as Economic Investigator in the same  
Directorate on 20th January 1971 and in due course he was  
confirmed in that post on 26.9.1981. The post of  
Industries Inspector and Economic Investigators are  
feeder posts for the post of Industries Officer.

3. In 1979 there were 3 posts of Industries Officers in the Department. These posts were held by Shri Karwarkar, Shri Panvelkar and Shri Fernandes. Shri Karwarkar was compulsorily retired by way of punishment on 28.5.1979. He filed a Writ Petition in the Panaji Bench of the Bombay High Court and it was allowed on 24.10.1984. In the mean while a Departmental Promotion Committee (DPC) was constituted for selecting suitable candidate for the post which had fallen vacant due to the compulsory retirement of Shri Karwarkar. The only two persons who were eligible for promotion to that post were the applicant and Respondent No.2 Shri Sancoalkar. The DPC considered the Annual Confidential Reports (ACR) from 1974-75 to 1978-79 and graded Shri Borkar as 'Adverse', 'Fair', 'Adverse', 'no assessment' and 'Fair' for these years respectively. During 1977-78 the applicant was absent due to sickness and hence no assessment was recorded by the DPC for that year. On the contrary, Respondent No.2 Shri Sancoalkar was graded 'Very good', 'Good', 'Very good', 'Very good' and 'Very good', for these years. Hence by order dated 24.8.1979 Respondent No.2 Shri Sancoalkar was promoted on ad hoc basis as Industries Officer. It was mentioned in the order that his appointment was purely on ad hoc basis and would not bestow on him any claim for regular appointment. This clarification was given probably because of the pendency of the writ petition filed by Shri Karwarkar. His ad hoc appointment was continued upto 29.1.1985. However, by an order dated 29.1.1985 he was promoted to the post of Industries Officer on regular basis w.e.f. 19.7.1983 on the recommendations of the DPC.

No fresh DPC meeting was held after 10.7.1979 and it is clear that Respondent No.2 was promoted by this order on the recommendations of the same DPC. We may point out that Respondent No.2 was promoted on regular basis w.e.f. 19.7.1983 because Shri Panvelkar, Industries Officer was promoted on ad hoc basis as Under Secretary on 3.6.1980 and his promotion was regularised w.e.f. 19.7.1983 that is why Respondent No.2 was promoted on regular basis w.e.f. that date.

4. By order dated 30.9.1980, the applicant was promoted on ad hoc basis as Industries Officer with the usual clarification that the appointment was purely on ad hoc basis and would not confer any claim on him for regular appointment. This order was passed because of the promotion of Shri Panvelkar as Under Secretary on ad hoc basis w.e.f. 3.6.1980. However, Shri Fernandes who was holding the third Post of Industries Officer retired on 1.10.1984 and hence the applicant was regularised by order dated 18.11.1986 w.e.f. the same date, viz. 18.11.1986. We may point out that a DPC had met on 15th October, 1986 for selecting an official for the post of Industries Officer. That DPC recommended the name of the applicant for that post and hence he was regularised by order dated 18.11.1986.

5. The applicant had filed the Writ Petition in the High Court on 23.8.1985 challenging mainly the order dated 29.1.1985 by which Respondent No.2 was regularised as Industries Officer w.e.f. 19.7.1983. The other prayers are consequential in nature.

6. The respondents have resisted the application by filing the affidavit of Shri Subhash V. Elekar, Under Secretary (Industries).

7. We have heard Mr. C. U. Singh, learned advocate for the applicant and Mr. M. I. Sethna, learned advocate for the respondent No. 1. Respondent No. 2 has not filed any reply nor he was present today. We have perused all the relevant record including the minutes of the two DPCs.

8. In view of the arguments advanced before us three points arise for our consideration. These are:-

(1) Whether the recommendations of the DPC meeting held on 10.7.1979 are vitiated on any grounds? (2) Whether Respondent No. 1 was justified in regularising the promotion of Respondent No. 2 Shri Sancoalkar as Industries Officer w.e.f. 19.7.1983 on the recommendation of the said DPC? and (3) Whether Respondent No. 1 was justified in promoting the applicant to the post of Industries Officer on regular basis w.e.f. 18.11.1986 and not from 1.10.1984, i.e. the date on which the vacancy arose due to the retirement of Shri Fernandes? We will deal with these points in the same order.

9. The DPC which had met on 10.7.1979 had considered the Annual Confidential Reports (ACRs) of the applicant and Respondent No. 2 for the period from 1974-75 to 1978-79. The grading received by the applicant for the years 1974-75, 1975-76, 1976-77 and 1978-79 were "Adverse", "Fair", "Adverse", and "Fair", respectively. In 1977-78 the applicant was absent due to sickness and hence the DPC could not record any assessment for that year. We were told that due to his absence in that year no CR was written.

10. Mr.C.U.Singh, learned advocate for the applicant challenged the gradings given by the DPC as well as its final recommendation on these grounds (i) The adverse remark for the year 1974-75 was never communicated to the applicant, (ii) The adverse remarks for 1975-76 were expunged on 17.2.1979 by the higher authority on the representation of the applicant, and (iii) Adverse remarks for 1976-77 were communicated to the applicant on 28.1.1980 i.e.  $6\frac{1}{2}$  months after the DPC met on 10.7.1979 and moreover, those adverse remarks were expunged on 28.11.1980 on the representation of the applicant.

11. It was not disputed on behalf of the respondents that the adverse remarks for the year 1974-75 were never communicated to the applicant. We have carefully gone through the CR of the applicant for that year. The remarks in columns 9 to 13 were in fact not adverse. In column 9 regarding recommendation to draw the increments the remark was 'yes'. Against column No.10 regarding knowledge of procedures and regulations the remark was 'good'. Against column No.11 regarding relations with the fellow employees the remark was 'good'. Against column No.12 regarding discipline the remark was 'fair' and against column No.13 regarding punctual attendance the remark was 'fairly punctual'. But some remarks against column Nos. 1 to 7 and 8 were slightly adverse. There are common remarks against column 1 to 7. Most of these are factual and not in fact adverse. These remarks which are some what adverse are underlined by red ink and they show that the applicant was not prompt in disposing the work and papers were pending with him despite instructions. (Some portion from the latter sentence is torn, but we have completed the sentence with reference to context). Against column No.8 it is mentioned that it was brought to the notice of

the applicant that he was not attending to the papers in time though it was brought to his notice. This column is regarding reprimand for indifferent work or for any other causes. Then for the year 1975-76 the Reporting Officer as well as the Reviewing Officer had not made any adverse remark at all. But the counter signing authority i.e. the Secretary, Industries and Labour had passed some adverse remarks. The adverse remarks were expunged on 27.2.1979 i.e. more than 5 months before the DPC had met. We may point out that the fact about the expunging of the adverse remarks passed by the Secretary, Industries and Labour was brought to the notice of the DPC. In the ACR for that year, the expunged portion was circled in red ink with an endorsement that the said portion was expunged. In our view this fact must have been taken into consideration by the DPC and that is why it must have graded the applicant as 'fair' for that year. Lastly, there were some adverse remarks against the applicant for the year 1976-77. But these were communicated to the applicant on 28.1.1980 i.e. after the DPC had met. That is why the DPC had graded him as 'adverse' for that year. May it be noted that these adverse remarks were expunged on 28.11.1980 on the representation made by the applicant.

12. There cannot be any doubt that the DPC has erred in taking into consideration the uncommunicated adverse remarks for 1974-75 and 1976-77. But the point to be determined by us is whether due to this error the recommendation of the DPC should be held as vitiated. We have gone through the ACRs of the applicant for these years carefully and we are of the view that even if the

adverse remarks were not there he would not have been selected by the DPC. To be more specific the Respondent No.2 was graded as 'very good' for 4 years and good for remaining 5th year. Even assuming that the DPC would have graded the applicant as 'very good' or 'good' for these years we do not think that he would have been selected by the DPC for the post of Industries Officer, in preference to Respondent No.2.

13. Mr.C.U.Singh, learned advocate for the applicant relied on three cases in this respect. These are: (i) Amarkanth v. State of Bihar, AIR 1984 S.C. 531, (ii) AIR 1987 S.C. 948 and (iii) AIR 1987 S.C. 1201. In Amarkanth's case the Supreme Court has no doubt taken the view that if the Selection Committee takes into consideration uncommunicated adverse remarks which are subsequently expunged by the Government then the decision of that committee would be vitiated. In the second case the Supreme Court has taken the view that uncommunicated adverse remarks or adverse remarks against which representation is pending cannot be relied upon by the DPC for denying promotion to the employee or for his compulsory retirement or for any other purpose. In the third case the Supreme Court has held that guidelines regarding communication of adverse remarks are directory in nature, but gross violation thereof may be fatal. Mr.Singh has relied on the third case in view of the fact that the adverse remarks for the year 1977-78 were communicated to the applicant on 28.1.1980 i.e. more than  $2\frac{1}{2}$  years after the date on which they should have been communicated in normal course. Still after considering all the ACRs of the applicant

for 5 years from 1974-75 to 1978-79 and even after ignoring the adverse remarks for 1974-75 and 1976-77 we do not think that the applicant could have been recommended by the DPC for the post of Industries Officer, in preference to Respondent No.2. In no case cited by Mr. Singh the Supreme Court has taken into consideration the overall effect of the ACRs on the recommendation of the DPC or Selection Committee even by ignoring the adverse remarks for some years. We do not think that technicality should be given ~~to~~ undue importance whenever we are in a position to take a overall view on the basis of the record before us. We cannot ignore the fact that under section 14(1) of the Administrative Tribunals Act the jurisdiction, powers and authorities excercisable before the Act by all the Courts including the High Court under Article 226 of the Constitution of India, but excluding the Supreme Court, is vested only in this Tribunal. Generally while excercising jurisdiction under Article 226 of the Constitution the High Courts ~~were~~ <sup>are</sup> reluctant to decide facts which are in dispute. But the subordinate Courts ~~were~~ <sup>are</sup> required to decide facts in dispute. As we are given jurisdiction of all the Courts including that of the High Court under Article 226 of the Constitution we cannot refuse to decide the overall effect of all the materials placed before us. Of course, if this would have been a border line case we would have left the matter to a Review DPC. But after considering the ACRs of the applicant for the relevant years and the grading given by the 1979 DPC to him as well as to Respondent No.2 Shri Sancoalkar, we are not inclined to set aside the selection of Respondent No.2 made by that DPC. In other

words, we are not inclined to accept the first point raised by Mr. Singh.

14. The second point arises on the assumption that the recommendation of the DPC in its meeting held on 10.7.1979 was proper and legal. Mr. Singh submitted that another DPC should have been constituted for making recommendation for filling up the post of Industries Officer after a vacancy in that post arose on 19.7.1983 due to regularisation of Shri Panvelkar as Under Secretary. As corollary of this submission, Mr. Singh submitted that the said DPC would have been in a position to consider the ACRs for 5 years before that date. But we cannot ignore the fact that Respondent No.2 was already selected by the DPC for the post of Industries Officer by the DPC in its meeting held on 19.7.1979. It is true that at that time the DPC was concerned with making recommendation for filling up the post which had fallen vacant due to compulsory retirement of Shri Karwarkar on 28.5.1979. But as Shri Karwarkar challenged the order of his compulsory retirement by filing writ petition in the High Court, the Government was required to promote Respondent No.2 to that post on ad hoc basis. That ad hoc appointment was continued till 29.1.1985. The applicant was also promoted as Industries Officer on ad hoc basis by order dated 30th September, 1980. This was possible because Shri Panvelkar was promoted as Under Secretary on ad hoc basis w.e.f. 3.6.1980. From 1.10.1984 another vacancy arose because of the retirement of Shri Fernandes, Shri Karwarkar must have been reinstated in service as Industries Officer after his writ petition was allowed by the High Court on 24.10.1984. Hence this is not a case where recommendation of the 1979 DPC was not implemented.

Of course, the recommendation could not be implemented by appointment of Respondent No.2 on regular basis because of the Writ Petition filed by Shri Karwarkar. However, by promoting Respondent No.2 on ad hoc basis the recommendation shall have to be treated as having been implemented. Mr. Singh drew our attention to the fact that the order dated 24.8.1979 by which Respondent No.2 was promoted on ad hoc basis as Industries Officer does not refer to the recommendation of the DPC. But R-2 was admittedly junior to the applicant. Hence it is obvious that the Government must have promoted Respondent No.2 on ad hoc basis because of the recommendation of the DPC. Non-mention of this fact may be due to an error or on account of administrative convenience. We may also point out that the applicant has chosen <sup>not</sup> to challenge the order dated 24.8.1979 specifically.

15. Hence we hold that the promotion of the applicant as Industries Officer on ad hoc basis by order dated 24.8.1979 as well as his regularisation in that post by the impugned order dated 29.1.1985 w.e.f. 19.7.1983 were both on the basis of the recommendation of the 1979 DPC. As R-2 was holding that post on ad hoc basis from 24.8.1979 till 29.1.1985 we do not think that it was incumbent on the Government to constitute another DPC after 19.7.1983. Hence we do not find force in the second point raised by Mr. Singh.

16. However, as regards the last point we find that the Government has no case. It may be recalled that the applicant was appointed as Industries Officer on ad hoc basis by order dated 30th September, 1980 and he was regularised in that post w.e.f. 18.11.1986 by the order

passed on the same date. He was regularised on the recommendation of the DPC in its meeting held on 15.10.1986. The vacancy for which he was recommended had arisen on 1.10.1984 due to retirement of Shri Fernandes. At that time the applicant was working as Industries Officer, on ad hoc basis. Hence we find no justification for not promoting the applicant as Industries Officer on regular basis w.e.f. 1.10.1984, that is from the date on which Shri Fernandes retired and a vacancy arose.

17. In result, we pass the following orders:

O R D E R

1. The applicant should be deemed to have been promoted to the post of Industries Officer on regular basis in the Directorate of Industries Officer on regular basis in the Directorate of Industries and Mines, Government of Goa, Diu, and Daman w.e.f. 1.10.1984. The order dated 18.11.1986 passed by the Administrator of Goa, Diu and Daman should be modified to that effect.
2. The applicant should be given all consequential benefits, due to him according to the rules, if any, on the basis of the above direction.
3. The application is partly allowed on the above lines only, with no order as to costs.

*W.H.*  
(M.Y. PRIOLKAR)  
MEMBER (A)

*M.B.*  
(M.B. MUJUNDAR)  
MEMBER (J).