

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Dated this the 22nd day of February, 2002

Coram: Hon'ble Mr. Justice Ashok Agarwal - Chairman
Hon'ble Mrs. Shanta Shastry - Member (A)

O.A. 373 OF 2000

R. Elangovan,
Accounts Officer,
Office of C.D.A. (O),
Pune.
(R/o 7/3 Chitra Gupta Complex,
Itidayathalla Road,
Bhawani Peth, Pune.
(By Advocate Shri S.P. Saxena)

- Applicant

Versus

1. The Union of India,
through the Secretary,
Ministry of Defence,
DHQ, PO New Delhi.
2. The Controller General of
Defence Accounts,
West Block V, R.K. Puram,
New Delhi - 110 066.
3. The Financial Advisor,
Defence Services,
Ministry of Defence (Finance),
South Block, New Delhi.
4. The Controller of Defence Accounts (O),
Golibar Maidan, Poona.
5. Shri V.K. Ramakrishnan
Senior Accounts Officer,
O/o C.D.A. (O),
Pune.
6. Shri Manohar Singh,
Senior Accounts Officer,
O/o C.D.A. (O), Pune.
7. Shri T.M. Sethumadhavan,
Senior Accounts Officer,
O/o C.D.A. (O),
Pune.
8. Shri K. Vishwanathan,
Senior Accounts officer,
O/o, CDA (O), Pune.

....2/-



9. Shri C.S.Hinge,
Senior Accounts Officer,
O/o CDA (O),
Pune.
(By Advocate Shri R.R.Shetty)

- Respondents

ORAL ORDER

By Hon'ble Mrs.Shanta Shastri, Member (A) -

The applicant who was functioning as Accounts Officer was due for promotion to the post of Senior Accounts Officer carrying the pay scale of Rs.8000-13,500/-. According to the applicant the promotion was to be on the basis of seniority-cum-fitness. As per the rules, a DPC was convened. The applicant was considered for promotion. However, he was not recommended in the final panel as he did not come up to the benchmark of "Good". His juniors that is respondents 5 to 9 were promoted. Being aggrieved, the applicant approached this Tribunal with a direction to the respondents to convene a review DPC in reconsideration of his case on promotion with all consequential benefits. The contention of the applicant is that it was not even a promotion but a mere upgradation to a higher scale and what was required was just seniority-cum-fitness. No benchmark was necessary to be considered. He had not been communicated any adverse entries prior to the holding of the DPC. Therefore, it has to be presumed that he had good enough a record to be considered fit for promotion to the post of Senior Accounts Officer and even if any benchmark was earmarked, in that case, if the applicant was not found upto the benchmark, such entries should have been communicated to the applicant before rejecting his case for promotion. The applicant has relied upon the

decision in the case of U.P.Jal Nigam and others Vs. Prabhat Chandra Jain & others, ((1996) 33 ATC 217) (SC)). It has been held therein that an extreme variation in gradation such as 'outstanding' gradation in one year followed by 'satisfactory' in the succeeding year, may reflect an adverse element compulsorily communicable. Reason for such a change must be recorded in the personal file and the employee must be informed of the change in the form of advice, otherwise, the downgrading cannot be sustained.

2. According to the respondents, the DPC had considered the applicant's case in accordance with the guidelines contained in the Department of Personnel & Training's O.M. dated 10.4.1989 on the basis of seniority-cum-fitness. For this purpose the DPC followed the following norms:-

- (a) Last ACR should be above average but the condition
- (b) As to only one average report for last 3 years and
- (c) At least three reports above average have been satisfied.

In case of the applicant he had earned three "Average" reports for the years 1995-96, 1996-97 and 1997-98. Therefore he was considered "Not yet fit" for promotion in the DPC held on 29.10.1998. This criteria was applied uniformly to all.

3. The learned counsel for the respondents contended that in the applicant's case the ratio laid down in the case of U.P.Jal Nigam (supra) is not applicable. He has received "Average" CRs

....4/-

consecutively. Further the learned counsel stoutly defended the stand of the respondents. It is not necessary to communicate the remarks which are not adverse in nature even though such remarks may not lead to the benchmark grading. The learned counsel has relied on the judgment of the Hon'ble Supreme Court in the light of the Five Judge Bench judgment in the case of R.L. Butail Vs. Union of India & others, (1970 (2) SLR 926). Para 12 of the said judgment reads as under:

"12. These rules abundantly show that a confidential report is intended to be a general assessment of work performed by a Government servant subordinate to the reporting authority, that such reports are maintained for the purpose of serving as data of comparative merit when questions of promotion, confirmation etc. arise. They also show that such reports are not ordinarily to contain specific incidents upon which assessments are made except in cases where as a result of any specific incident a censure or a warning is issued and when such warning is by an order to be kept in the personal file of the Government servant. In such a case the officer making the order has to give a reasonable opportunity to the Government servant to present his case. The contention therefore, that the adverse remarks did not contain specific instances and were, therefore, contrary to the rules, cannot be sustained. Equally unsustainable is the corollary that because of that omission the appellant could not make an adequate representation and that therefore the confidential reports are vitiated."

3. Similarly, in another decision of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, (1993 SCC SCC (L & S) 521), the three Judge Bench of the Hon'ble Supreme Court held that "What is normally required to be communicated is adverse remarks - not every remark, comment or observation made in the confidential rolls. There may be any number of remarks, observations and comments, which do not

constitute adverse remarks, but are yet relevant for the purpose of F.R.56 (j) or a rule corresponding to it. It was further held that such remarks can be taken into consideration for the purpose of determining the question as to whether a person is 'fit' or 'unfit' to be promoted. Thus two judgments have been cited and relied upon in another Full Bench judgment of the C.A. T., Hyderabad in the case of Shri V.Pallam Raju Vs. Union of India & others, O.A.No.777 of 1993 decided on 10.2.1995. There again it has been held that "entry of 'Average' contained in the ACR and not communicated to a government servant can be looked into by DPC while determining the suitability of the candidate to a selection as well as to a non-selection post." The learned counsel therefore pleads that it is not necessary to communicate these remarks. Further it is not practical to communicate remarks because the grading comes to be known only during the DPC and the DPC also makes an independent assessment of the gradings given in the ACR.

4. We have heard the learned counsel on both sides. Coming to the applicant's fitness for being considered for promotion on the basis of seniority-cum-fitness we find that DPC adopted a uniform criteria for considering the concerned candidates to be fit for promotion. The applicant obviously could not fulfil that criteria as he had got three consecutive 'Average' CRs. We cannot find fault with the DPC. The DPC is free to have its own assessment.

5. As far as the 'Average' gradings given to the applicant are concerned, we have gone through the CR dossier of the applicant as produced by the respondents. We find that prior to

1995-96, the applicant had 'Very Good' grading and there is deterioration in his grading from the year 1995-96 onwards i.e. from the period when the ACR were considered by the DPC. There is certainly a steep fall in the grading of the applicant from 'Very Good' to 'Average'. In our considered view following the judgment in the case of U.P.Jal Nigam (supra), it is necessary to communicate these remarks in the ACRs of the applicant for the relevant period. In fact recently a Full Bench at Ernakulam has taken a similar view in OA 1304 of 2000 in I. Raju Vs. Chairman and Managing Director, BSNL, New Delhi & others, decided on 20.9.2001. The question which was referred to the Full Bench was when promotion is based on seniority-cum-fitness, whether incumbent is entitled to promotion only because of the fact of non-communication of adverse remarks in his ACRs for the relevant period ignoring the finding of the DPC by the Tribunal. The Full Bench answered the question as follows:-

" When promotion is based on seniority-cum-fitness the incumbent is entitled to be reconsidered for promotion when adverse entries in the ACRs have not been communicated to him for the relevant period ignoring the finding of the DPC that the incumbent is 'Not yet fit' on the basis of ACRs."

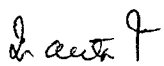
6. We have gone through the relevant judgments cited on both sides. We find from the judgment of the Hon'ble Supreme Court in the case of R.L. Butail (supra) that it was held therein that promotion withheld on account of adverse confidential report which was not communicated to the Government servant would not violate natural justice. In this judgment there does not appear

to be any discussion as to whether grading, though per se not adverse but adverse in the context of the benchmark is required to be communicated or not. That apart, much water has flown thereafter. This judgment was delivered in 1969. There have been other judgments of the Hon'ble Supreme Court where a contrary view has been taken. We have come across a judgment in the case of Udai Krishna Vs. Union of India, ((1996) 33 ATC 802) wherein a view was taken that whenever a grading which is not adverse by itself but which is not equivalent to the benchmark should be communicated. The Tribunal has also followed this judgment in Udai Krishna (supra) in another Full Bench judgment of Bangalore Bench.

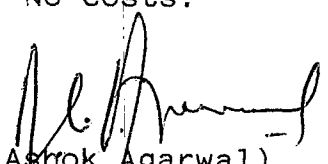
7. That apart, we have found that in the case of the applicant there is a definite steady fall in the gradings after 1995 and 1996 in his ACRs and on that ground itself following the judgment of the U.P. Jal Nigam (supra), we hold that the applicant should have been communicated the ACRs for the years 1995-96 onwards till 1998.

8. The learned counsel for the applicant has also drawn our attention to Miscellaneous Order passed in Department of Personnel and Administrative Reforms O.M. No.30.1.1978 wherein the Government has laid down that all adverse entries in the confidential report of the government servant both on performance as well as a basic qualities should be communicated along with the mention of good points within one month of their being

recorded. The communication should be in writing and reply in regard to that effect should be kept in the CR dossier of the government servant concerned. This view has been taken in respect of the judgment of the Hon'ble Supreme Court in R.L. Butail (supra) case. These instructions have been issued after the judgment in R.L. Butail's case. Accordingly, we direct the respondents to communicate the ACRs of the period from 1995-96 onwards till 1998 to the applicant and if the applicant makes any representation on the same within a period of three weeks from the date of receipt a copy of this order, the respondents shall consider the same and pass a speaking order under intimation to the applicant. If, as a result of the consideration of the examination, any change is made in the ACRs of the applicant, for the relevant period in favour of the applicant, then a review DPC may be held to reconsider the applicant for promotion to the post of Senior Accounts Officer. Now that the applicant has retired during the pendency of the OA, in case of a favourable decision, the applicant shall be entitled to the consequential retiral benefits based on notional pay fixation and the same should be complied with within a period of three months from the date of communication of a copy of this order. This OA stands disposed of accordingly. No costs.


(Smt. Shanta Shastri)
Member (A)

mb


(Anrok Agarwal)
Chairman

4/22/02
By *4/22/02*
Applicant's Representative (b)
4/24/02
h