

(15)

CENTRAL ADMINISTRATIVE TRIBUNAL  
BOMBAY BENCH

Original Application No: 556/91

Transfer Application No: --

DATE OF DECISION:

9-11-94

K.D.Nandgave

Petitioner

Mr. M. S. Ramamurthy

Advocate for the Petitioner

Versus

U.O.I. & Ors

Respondent

Mr. S. S. Karkera for Mr. P. M. Pradhan

Advocate for the Respondent(s)

CORAM:

The Hon'ble Shri B.S.Hegde, Member(J)

The Hon'ble Shri M.R.Kolhatkar, Member(A)

1. To be referred to the Reporter or not?
2. Whether it needs to be circulated to other Benches of the Tribunal?

M

*M.R.Kolhatkar*  
(M.R.KOLHATKAR)  
M(A)

(16)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL  
BOMBAY BENCH

O.A.556/91

Krishna Dnyanba Nandgave,  
Juhu-Shital Coop. Hsg. Scty. Ltd.,  
M.H.B. Colony, Gulmohar Cross Road, No. 9,  
Andheri (West),  
Bombay - 400 049.

.. Applicant

-versus-

1. Union of India  
through  
The Secretary,  
Dept. of Revenue,  
Ministry of Finance,  
Govt. of India,  
New Delhi - 110 001.

2. Collector of Central Excise,  
Bombay - II,  
Piramal Chambers, Parel,  
Jijibhoy Road, Bombay 400012.

3. D.G. Bhaaley,  
Superintendent (Technical)  
Central Excise Dept.,  
O/O Collector of Central  
Excise Bombay II,  
Piramal Chambers,  
JijiBhoy Road, Parel,  
Bombay - 400 012.

.. Respondents

Coram: Hon'ble Shri B.S. Hegde,  
Member (J)

Hon'ble Shri M.R. Kolhatkar  
Member (A)

Appearances:

Mr. M.S. Ramamurthy  
Counsel for the  
applicant.

Mr. S.S. Karkera  
proxy for  
Mr. P.M. Pradhan  
counsel for the  
respondents.

JUDGMENT:  
(Per M.R. Kolhatkar, Member (A))

Date: 9-11-94

1. The applicant joined Customs and  
Excise Department as Sub-Inspector on 10.10.1961.  
He was promoted as Inspector (OG) on 13-12-1971  
and Inspector (SG) in 1983. According to the

*Am*

applicant he earned his promotions in the normal course and till the year 1986 the record of the applicant was consistently good. However, the applicant worked under respondent No.3 Shri D.S.Bhaaley, Superintendent, in 1986. According to the applicant the third respondent reportedly expects substantial payment from his subordinate staff so as to keep the ACRs clean. On 14-1-1987 vide page 21 the applicant was conveyed the following adverse remarks in his CR for the year 1986:

"PART-II FACTUAL EVALUATION of important items of work

(a) Shri Nandgave attended correspondence Inward, Outward for name sake only. He used to sign documents without proper checks. He is not bothered for Trade Notices, Circulars and Notifications.

(b) He has Poor health which has bearing on his performance.

PART-III OTHER Assessment by Reporting Officer:

Knowledge of law and procedure is satisfactory. He cannot analyse problems and find solutions independently. Quality of work is ('Just Adequate')

(2) Promptness in attending to work

He is not active in field duties and slow in office work. He is not prompt. (POOR)

(3) Industry and conscientiousness:

He has poor health, he can not work hard. He has remain absent from duty without prior permission and did not submit any leave application or intimation.

*Now*

(4) Executive abilities displayed:

He does not take initiatives. He avoids responsibilities. (POOR)

Same remarks as in Col. No. 3 above.

(5) Discipline

He is indisciplined officer. He behaves with officers and assesses very badly. (POOR)

(6) Punctuality in attendance

He comes office not in time. He was on leave for nearly three months. He is not punctual (POOR)

PART-III

(7) OTHER OBSERVATIONS, if any

He has poor health which has bearing on his performance (POOR)

PART-IV Remarks of reviewing Officer

(1) Overall assessment of performance and qualities:

(JUST ADEQUATE)

PART-V Countersignature by the next higher officer with remarks, if any.

I have seen the Range File regarding the reported absence of this officer. Absence without prior sanction leave or intimation is a serious matter, if without reasons. Since leave is not sanctioned, it requires to be commented adversely. I would rate the officer to be totally unsuitable for Government Job. The remarks are 'VERY POOR'.

2. The applicant sent a representation against these remarks on 10-2-1987 vide page 26 Ex. 'B'. In this representation, apart from denying that there was any justification for writing the adverse remarks the applicant generally took the stand that respondent No. 3, the Reporting Officer, has spoiled his C.R. because he is allergic.

to him. Regarding his absence he stated that he was on medical leave on medical ground, that the leave application was sent and the leave has been sanctioned. The applicant appears to have assumed that his reviewing officer was Shri A.K.Khopkar whereas his reviewing officer was Shri ~~Sirohi~~. The representation of the applicant was rejected by letter dated 2-6-1987 vide page 32. Subsequently applicant came to know that on 6-5-1989, 50 Inspectors were promoted to the grade of Superintendent, Central Excise Group 'B' including an Inspector who was junior to him. He, therefore, represented against this supersession and mentioned that in 1986 ~~he~~ he was on medical leave, that he has since recovered and he has done work to the entire satisfaction of the superiors during 1987, 1988 and 1989 and, therefore, to consider his case sympathetically for promotion. This representation appears at page 33 dt. Nil May '89. He followed up this with a reminder dt. 18-12-90 at page 35 to which the reply was sent on 20-2-1991, at page 36, informing him that no Inspectors of Central Excise Group 'C' who had been graded below the bench mark 'GOOD' ~~are~~ to be empanelled as per guidelines for promotion to the grade of Superintendent and since he was graded as 'Unfit' by the DPC he has not been included in the panel for promotion to the grade of Superintendent. The applicant made a further representation on 26-4-1991 consequent on promotion of another

batch of 68 Inspectors ~~had~~ requesting to consider his case sympathetically for promotion, vide page 38, Ex. 'G'. He was informed by letter dated 7-8-91, vide Ex. 'H' that his case was considered for promotion by the DPC held in March '91 and June '91 and he was found unfit for promotion to the grade of Supdt. Gr. 'B' and hence he was not promoted. At Ex. 'I' page 41 the applicant has also enclosed an extract of letter dated 17-12-1990 from Ministry of Finance stating as below:

"It is also clarified that 'Just Adequate' signifies the performance of the Government Servant as average and since average is not treated as adverse, 'Just Adequate' cannot be treated as adverse and, therefore it need not be communicated to the Government servant concerned."

3. In the O.A. the applicant has challenged the clarification given on 17-12-1990 referred to in above, the adverse entries in the C.R. for the year 1986 and his non promotion which according to him is due to the clarification and due to the adverse entries for the year 1986. The reliefs sought by the applicant are as below:

"1. that the instructions of the Government of India, that 'Just Adequate' classification in ACR of a Government servant neednot be communicated as circulated under Asstt. Collector(Vig.)Central Excise, Bombay-II, in February, 1991 be declared bad in law, particularly in view of the guidelines to the DPC under DOP & TOM No.22011/5/86-Estt(D) dated 10.03.89, laying down that grading below the bench mark 'GOOD' would disentitle a person for promotion.

ii. that the adverse remarks for the year 1986 together with the decision communicated under letter dated 2nd June, 1987 of Asstt. Collector (P&E), be declared null and void, and nonest in law.

iii. that it be declared that the DPC or DPCs should not have taken into account the adverse remarks of 1986 because the representation dated 10.02.1987 against the said adverse remarks has not been disposed of so far by any valid order according to law.

iv. that it be declared that the non-empanelment of the applicant for promotion to the grade of Superintendent by the DPCs which met on 29/30-6-1990, March, 1991 and June, 1991 or the grading of the applicant by the said DPCs as 'Unfit' for such promotion, is bad in law, illegal and null and void.

v. that the respondents be directed to consider the claim of the applicant for promotion to the grade of Superintendent through a review DPC and consider such claim ignoring the adverse remarks communicated for the year 1986 or any other adverse material contained in ACRs for the other relevant years, which results in the grading of the applicant below the bench mark 'Good' and which have not been communicated so far and grant promotion to the applicant to the grade of Superintendent on the basis of such consideration, from the date that orders were issued promoting any junior of the applicant to the said grade.

vi. that respondents be directed to grant all consequential benefits to the applicant, consequent on his promotion to the grade of Superintendent, Central Excise & Customs, from the due date, as claimed by prayer (v) above.

4. The respondents have resisted the claim of the applicant. According to the respondents the application was filed on 25-9-91 and challenge to the memorandum rejecting representation against adverse entry in the CR for the year 1986 dated 2-6-1987 is time barred. The applicant has no cause of action so far as various letters informing him that the DPC held made him to be unfit for promotion are concerned. Respondents have stated that the contention of the applicant that the CR prior to 86 was ~~consistently~~ good was factually incorrect as there ~~were~~ adverse entries for the years ~~1962, 1978, and 1985/~~ as well as 1986. Adverse entries for the year 1985 were partly expunged by the Collector pertaining to the adverse remarks on his poor health but the other remarks remained. It was open to the applicant to make further appeal against rejection of his representation about adverse remarks in respect of <sup>the</sup> year 1986 communicated under letter dated 2-6-87 but he has not chosen not to do so, and therefore they have ~~expunged~~ become ~~final~~ final. The respondents contend that the allegations against Reporting Officer viz. Shri Bhaaley are baseless. According to the respondents, so far as his non promotion is concerned, in view of the Department of Personnel and Training O.M. dated 10-3-1989 No.22011/5/86-Estt(D) the successive DPC's have taken into consideration 8 years record of all candidates including the applicant as prescribed in the Recruitment Rules dt. 17-12-1986. The same was considered by the DPC according to the relevant rules and guidelines. According

to the respondents the applicant was issued suitable intimation officially from time to time by Reporting Officer regarding his behaviour and adverse ~~remarks/entries~~. This is apart from adverse remarks for the year 1986. Regarding the challenge to the clarification issued by the Govt. under letter dated 17-12-90 the respondents contend that in view of the manual for Establishment and Administration the average remarks cannot be taken as adverse in respect of an Officer. However, the same manual has clarified that the average remarks cannot be ~~regarded as~~ complimentary to the officer. It is only performance that is above average and performance that is really note worthy which should entitle an officer for recognition and suitable rewards in the matter of promotion. In the present case, the applicant was awarded a grading of 'Average' by the DPC, which is below the prescribed benchmark of 'Good'. Respondents, therefore, contend that there is no merit in the various contentions of the applicant. The ~~O.A.~~ is liable to be rejected.

5. In his rejoinder the applicant has stated that the adverse remarks for 1962 and 1978 are ~~estate~~ and not relevant for considering his promotion/i.e. in 1989. There were no other adverse remarks other than ~~those~~ relating to the applicant's state of health ~~in 1985~~, that against remarks of 1986 his representation dt. 8-2-87 was simultaneously sent to the Collector; that the findings of the DPC classifying him as unfit is perverse and arbitrary and in any case the Tribunal should consider the CRs before finally deciding the matter.

6. We accepted the contention of the applicant that CRs and DPC records were required to be seen and directed the respondents to produce the same which have been produced.

7. We first consider the contention of the applicant that except for 1986 when adverse remarks were awarded to him by Reporting Officer which according to him were not warranted, his record is clean, that the adverse remarks for the year 1986 should be taken as malafide and honest; that since the representation dt. 10-2-87 was simultaneously addressed to higher officers and since there is no reply from higher officers the representation should be taken as outstanding. Therefore the adverse remarks in 86 may not be taken into account, that the term 'just adequate' recorded is and not an adverse remark therefore action of the DPC/treating as adverse is untenable and therefore he should be considered for promotion as if there are no adverse remarks.

8. We find that it is not correct to say that except remarks about poor health there were no adverse remarks in the CR of the applicant in the year 1985. On perusal of the file we notice that there were adverse remarks in the CR for 1985, that they were not recorded by Shri Bhaaley but by another Reporting Officer and that they were communicated under memorandum dated 24-2-1986. The same are reproduced below:

"PART-III : Other Assessment by Reporting Officer

Col.No.3: Industry and conscientiousness:

(He cannot work hard due to bad health)

He tries to seek help from others.

Overall grading 'Poor'

Col.No.7: Other observations if any

( (a) Officer is having poor health and remained on leave on medical ground.)

PART IV Remarks of the Reviewing Officer

Col.No.11: Overall assessment of performance and qualities.

(He maintains poor health;) has no initiative or interest in his work and also lethargic.

'He is 'Poor' "

On representation from the applicant the adverse remarks put in the bracket alone ~~as~~ were expunged. Even if those remarks are ignored there are other adverse remarks relating to the performance of the applicant and his overall grading is poor.

9. So far as the C.R. for 86 is concerned, we have gone through the file including the comments of two officers namely Shri Bhaaley and Shri Khopkar. In his comments it has come out that apart from adverse remarks Shri Bhaaley had not issued any separate memos against the applicant. Some of the comments of Shri Bhaaley are not reasonable when he says that Shri Nandagave has no right to challenge the knowledge of Shri Bhaaley his superior officer. However, on consideration of the original remarks, the representation of the applicant which at places does give an impression of being unbalanced and the comments of Shri Bhaaley and Shri Khopkar, we find that there is hardly any need for interference with the remarks as recorded by the Reporting Officer. The overall

assessment of the Reviewing Officer is "just adequate". Thus reviewing officer has upgraded the overall assessment of the Reporting Officer which was "poor". It is the counter signing Officer who has however made following remarks which need further examination:

"I have seen the Range File regarding the reported absence of this Officer. Absence without prior sanction leave or intimation is a serious matter, if without reasons. Since leave is not sanctioned, it requires to be communicated adversely. I would rate the officer to be totally unsuitable for Government Job. The remarks are 'VERY POOR'."

It appears to us that counter signing officer has merely on the basis of the fact that the officer reported upon went on leave without prior sanction and without further verifying whether the leave was sanctioned has made the remarks that the officer is totally unsuitable for the government and job down graded his assessment as very poor. In our view these remarks are perverse and arbitrary and therefore we consider that they are fit to be expunged. Consequently the final categorisation of the officer would be "just adequate".

10. We, therefore, come to the question as to whether the categorisation 'just adequate' can be considered ~~as~~ by the DPC ~~as~~ not constituting the bench mark of 'Good'. First of all, we must point out that the term 'just adequate' is ~~a~~ term of art. That term is normally used in the case of officers under probation. The proforma for writing of CRs of officers under probation and judging their suitability for confirmation

enjoins the reporting officer to certify or does whether the officer does/does not fulfil the requirement of the job or whether he fulfil the requirement of the job just adequately or whether he more than fulfills the requirement of the job. According to us since the term adequate or just adequate is not regarded as adverse and since just adequate is better than average we would therefore consider that the overall assessment of the officer for the year '86 has to be treated as not less than good which is the bench mark as per the promotion guidelines.

11. The next question therefore is whether for the classification of the officer as "unfit" by the DPC needs to be interferred with. Here the respondents have relied on the case of Hukam Singh Saini vs. Delhi Administration & Others, 1991(2)(CAT)SLJ 555, which is a case decided by the Principal Bench on 3-1-91 where the Tribunal held that Tribunal could not alter the decision of DPC unless malafide was established. For this purpose it relied on two Supreme Court judgment as below:

"The Supreme Court in B.S.Minhas v. Indian Statistical Institute(1983)4 SCC 582 in para 27 observed,"It is not for the court to determine who is the superior of two candidates. It is for the authorities to select among the available candidates."

Again in Mir Gulam Hussain v. Union of India (1973)4 SCC 133, it has been observed,"In cases of selection for promotional posts, if a senior official is passed over, he generally complaints that his non selection is malafide as there were no adverse remarks in his C.R.

Such contention does not deserve to be accepted, for absence of A.C.R.(adverse) merely means that the person was discharging the function of the present post satisfactorily. It does not lead to a necessary inference of his fitness or suitability for the promotion, for the qualities manning superior promotional post may be higher."

In regard to adverse entries in the CR for 1985 the applicant relies on the case of B.G.Chitale vs. Union of India & Ors. decided by Principal Bench on 17-1-1992 vide (1992)21ATC 60, where a reference has been made to the New Bombay Bench judgment in Vasant Waman Pradhan v. State of Maharashtra. According to him following the ratio of Vasant Waman Pradhan's case when the adverse remarks relating to health is expunged the overall grading also ought to ~~be~~ <sup>been</sup> have revised. However, there were further remarks in Chitale's case which would not help the applicant. It observed that "by the mere fact that the adverse entry relating to his health was expunged, the competent authority was not required to revise the grading given to the applicant." We consider that even after expunction of the adverse remarks regarding health, there are several other adverse remarks relating to the overall performance of the applicant not related to health. Therefore so far as the CR for 85 is concerned that does not require any change. The applicant relies on the judgment of the Gujarat High Court in Fernandes v. Central Board of Direct Taxes(Spl.Civil Appeal No.3545 of 1979) decided on 2-8-83 where the court held that in view of non communication of fall in standard, which is

to be treated as adverse remark <sup>it</sup> must be communicated to the individual concerned, and if it had not been communicated, the report containing the fall in standard has to be ignored. The same was relied upon by the C.A.T. Madras Bench in Kailash Nath Gupta vs. U.O.I. & Ors decided on 1-3-88 in which the Tribunal after referring to Fernandes judgment directed to ignore uncommunicated remarks which showed fall in standard. In our view the applicant was conveyed adverse remarks in 85 and 86. Subsequently no adverse remarks were communicated to him. It is not disputed that adverse remarks for 85 & 86 were communicated to him. The question of non communication of remarks in the nature of fall in standards does not arise. Therefore Fernandes' judgment and K.N.Gupta's judgment does not help the applicant in any way. The applicant next relied on the judgment of the Bombay Bench of the CAT in Bhaktadas Roy vs. U.O.I. & Ors. decided on 18-2-93 in which the Tribunal ~~relied on the~~ judgment of CAT Jabalpur decided on 17-5-89 which in Jugal Kishore Goel vs. U.O.I. held that if the minimum bench mark for consideration for promotion was "Very Good" and the ranking of the officer as good was not enough then the remark 'Good' has to be treated as adverse and had to be conveyed to the applicant. The Tribunal followed the ratio of Jugal Kishore Goel's judgment. The Tribunal held that "as the minimum bench mark for the promotion to the post of Chief Commissioner of Income Tax was "Very Good" and as the petitioner was ranked for ~~two~~ years 1988-89 and 1989-90 as "Good" these remarks ought

to have been communicated to the applicant. Because of the failure on the part of the respondents to communicate these remarks to the applicant we find that it would be necessary to direct the respondents to constitute the review DPC." According to us this judgment also does not help the applicant because apart from the CRs for the years 1985 & 1986 apart from the CRs for the years 1985 & 1986 to which we have referred above, it is not clear on what basis the applicant was treated as unfit by the DPC. It appears therefore that the correctness of the decision of the DPC would have to be decided with reference to the facts of the case. We, therefore, considered the CRs of the applicant for the relevant years with the following findings.

Overall assessment in the CRs of the applicant from the year 1981 onwards.

- (1) 1981 Fit for promotion in natural course. "Health not good" "just adequate".
- (2) 1982 Health is good - Fit if due (Good)
- (3) 1983 Very Good/when due
- (4) 1984 Very Good. Fit for promotion
- (5) 1985 Poor - ~~Very poor~~ <sup>CRs</sup>
- (6) 1986 Just adequate/not yet fit  
Very poor
- (7) 1987 Good
- (8) 1988 Good
- (9) 1989-90 Good - ~~Very poor~~
- (10) 1991 Adequate
- (11) 1991-92 Very Good
- (12) 1992-93 Very Good."

On a perusal of the above summary it appears that the categorisation of the officer in the year 1985 is poor and the categorisation of the officer in the year 1986 is just adequate. We have already directed to equate it as Good. The categorisation of the officer in the year 1991 is adequate. In the face of this it is not very clear to us as to why the officer was regarded as "unfit" for promotion by the DPC. According to the rules, officers regarded as unfit are left out and the remaining officers are categorised with reference to the bench mark. It appears to us that the DPC has been influenced by the remarks of the counter signing officer in the CR for 1986 that the officer is unfit for government service. We have already pointed out that this remark is perverse and is required to be expunged and directed to its expunction accordingly.

12. On considering all the pleadings we dispose of this O.A. by passing the following order:

O R D E R

- (i) O.A. is allowed.
- (ii) Remarks of the countersigning officer in the CR for the year 1986 viz. (I would rate the officer to be totally unsuitable for Government job. The remarks are 'very poor') are directed to be expunged.
- (iii) Consequent on expunction of this remark the review DPC should be held for the years 89,90,91 and the suitability

of the officer for promotion on the basis that are honest and the expunged remark should be reassessed treating the remark adequate " or just adequate as equivalent to 'Good' should be reassessed.

(iv) If the applicant is held to be entitled to promotion by any of the review DPC he should be given all consequential benefits; including pay fixation. However, the arrears of pay should be confined to the period <sup>of</sup> one year prior to the date of filing of the application;

(v) the action in this regard should be completed by the respondents within four months.

(vi) There will be no order as to costs.

*M.R.Kolhatkar*

*B.S.Hegde*

(M.R.KOLHATKAR)  
Member(A)

(B.S.HEGDE)  
Member(J)

M

(47)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GULESTAN BLDG. NO. 6, PRESCOT RD, 4TH FLR,  
MUMBAI BENCH  
MUMBAI-400 001.

ORDER ON CP-165/95 in ORIGINAL

APPLICATION NO. 556/91.

DATED THIS 2<sup>nd</sup> DAY OF DECEMBER, <sup>January</sup> 97.

**CORAM :** Hon'ble Shri B.S. Hegde, Member (J).  
Hon'ble Shri M.R. Kolhatkar, Member (A).

K.D. Nandgave,  
Inspector, Central Excise Department,  
Division-VIII,    
Range-VIII,  
Andheri,  
Mumbai.

... Contempt Petitioner

By Advocate Shri M.S. Ramamurthy.

v/s.

Union of India & Ors.

And

1. Shri N. Obhrai,  
Commissioner of Central Excise,  
Bombay I Collectorate,  
M. K. Road, Churchgate,  
Bombay - 400 020.

2. Shri K. K. Srivastava,  
Additional Commissioner of  
Central Excise,  
Bombay-II Collectorate,  
Piramal Chambers, Lalbaug,  
Bombay - 400 012.

... Respondents

By Advocate Shri P.M. Pradhan.

TRIBUNAL'S ORDER

I Per Shri M.R. Kolhatkar, Member (A) I

This OA was decided on 9/11/94. The Tribunal had passed a detailed Interim Order in this CP on 18/11/96. In terms of the Interim Order, two affidavits have been filed. In the affidavit by Shri K.K. Srivastava, Additional Commissioner dated 21/8/97, it is stated that said Shri Srivastava was not concerned with the matter in any manner except communicating the result of the applicant <sup>ling</sup> as conveyed by the Cadre Control Authority. In the affidavit filed by Shri N. Obhrai, then Commissioner of Central Excise, Bombay-I, it is stated that the review DPC was

held on 19/6/95. The detailed composition of the review DPC is also set out in the affidavit. It is stated that in so far as first two years are concerned, even in the review DPC, applicant was found unfit for promotion and as far as the third year is concerned DPC found him below the bench mark and hence found him unfit for promotion. It is further stated that at the time of considering the case of the petitioner, the entire record was placed before the committee which was supplied with necessary documents.

2. The counsel for the Contempt Petitioner has argued that after reading the judgement of the Tribunal, no body of reasonable persons could come to the same conclusion as the earlier DPC. According to him the affidavit filed in this case was pretended compliance and not real compliance.

3. We have considered the matter. It is well settled that a Government Officer has no right to promotion; he has only a right to be considered for promotion. It is also well settled that the Tribunal may not step in the shoes of the DPC and direct promotion of an officer irrespective of the decision of the DPC. We are therefore doubtful whether we can grant any further relief in this matter especially as part of CP whose scope is also narrow.

4. Taking an over all view of the facts and circumstances of the case, we are not inclined to pursue the CP further. CP-165/95 is discharged.

*M.R. Kolhatkar*  
(M.R. KOLHATKAR)  
MEMBER (A)

*B.S. Hegde*  
(B.S. HEGDE)  
MEMBER (J)

abp.

*JMC*