

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 595/91 & 1067/92
Transfer Application No.

Date of Decision : 7.3.95

S.K. Iyengar

Petitioner

Shri. G.K. Masand

Advocate for the
Petitioners

Versus

Union of India & Ors.

State of Maharashtra & Ors. Respondents

Shri. P.M. Pradhan

Advocate for the
respondents

C O R A M :

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.R.Kolhatkar
(M.R.Kolhatkar)
Member (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A. 595/91 & O.A. 1067/92

O.A. 595/91

S.K. Iyengar .. Applicant

Vs.

Union of India & Ors. .. Respondents

O.A. 1067/92

S.K. Iyengar .. Applicant

Vs.

State of Maharashtra & Ors. .. Respondents

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

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

APPEARANCES

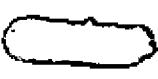
1. Shri. G.K. Masand, Counsel
for the applicant.

2. Shri. P.M. Pradhan, Counsel
for the respondents

JUDGMENT

DATED : 7.3.95

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

As the facts and circumstances in these two
O.As are similar, we pass a common judgment. 

2. O.A. 595/91 is in respect of expunction
of adverse remarks in the confidential report and
consequential relief of promotion. O.A. 1067/92
by the same applicant is in respect of promotion
in which certain instructions of the respondent No.1
in respect of bench marks and criteria for consider-
ation of officers for promotion to the grade of
Spl.Inspector General has been challenged, and on

that basis, relief in respect of promotion has been claimed. The main reliefs in the ~~latter~~ O.A are as below :

"(a) That this Hon'ble Tribunal will be pleased to declare that the Respondents 1 to 3 are not entitled to prescribe the grading of 'very good' viz. 'A' Grade for promotion of the officers from the rank of Deputy Inspector General of Police to the rank of Special Inspector General of Police and that the grading B+ viz. positively good is sufficient and adequate for an officer of the rank of DIG for promotion to the post of Special Inspector General of Police.

(b) That this Hon'ble Tribunal will be pleased to declare that G.R dated 31.1.1990 has prospective application, to be applied to ACRs written after the said date and has no application to the ACRs written prior to that date, which continue to be governed by G.Rs dated 28.1.1975; 1.4.1976 and 19.9.1977 (Ex.K, K-1 & K-2 respectively).

3. We do not consider it necessary to go into the details of the instructions challenged by the applicant because in our view these issues are no longer res integra. The same issues were raised in O.A. 762/90 (Aftab Ahmed Khan vs. State of Maharashtra & Ors.) decided by this Bench on 12.11.91 in which the Tribunal rejected identical contentions of the applicant in that case on the same grounds. We follow that judgment and do not feel called on to deal with these grounds. We, therefore, mainly consider the case in O.A. 595/91 relating to expunction of adverse remarks and consider the reliefs of promotion as consequential relief. Whatever we say in relation to the promotional aspects in O.A. 595/91 would also apply to the residuary reliefs in respect of O.A. 1067/92 and we therefore dispose of the matter by passing a common judgment keeping in view the facts that while in O.A. 595/91 the array of official respondents consists only of *My* Government of Maharashtra and no private respondents.

in O.A. 1067/92 the array of official respondents include Government of India and there are five private respondents who are junior to the applicant and who the officer claims have superseded him.

O.A. 595/91

4. In this O.A. the facts are as below :

The applicant is an I.P.S Officer, belonging to 1966 Batch. There were certain entries in his A.C.R for the year 1983-84 including "is quite hard on subordinates". These adverse remarks were communicated by the Government on 09th October, 1984 and the same were expunged by the Government (Respondent No. 1) by letter dated 12.4. 1988. These facts are not in dispute. Subsequently, the applicant was communicated following remarks in respect of ACR 1985-86 vide D.O letter dated 26.9.1988.

"Has good knowledge of work and has good power of expression both on paper and in discussions. He is likely to buckle in under difficult circumstances and get irritated and confused. His relations with subordinates are rather tough. His ability for guiding S.Ps either in law and order matters or crime matters is limited. His speed of disposal is rather slow. An average DIG. Not yet fit for promotion"

The applicant points-out that the adverse remarks were communicated belatedly i.e. 2½ years, after the period 1985-86 was over. Secondly, the remarks "is quite hard on subordinates" in respect of the year 1983-84 were expunged and almost identical remarks reappear in the ACR for 1984-85, namely 'His relations with subordinates are rather rough'. The applicant represented against the remarks on 22.12.88 and received reply on 6.9.90. The Government informed him that the Government has decided that the following remarks communicated to the applicant should be modified as shown against the

remarks :

<u>Original remarks</u>	<u>Remarks as modified</u>
1. He is likely to buckle in under difficult circumstances and get irritated and confused.	Hard on subordinates
2. His relations with subordinates are rather rought	
3. Not yet fit for promotion	Not yet due for promotion

Further the government has decided to expunge the following adverse remarks :

1. His ability in guiding S.Ps either in law and order matters or crime matters is limited.
2. His speed of disposal is rather slow
3. An average D.I.G "

The applicant contends that Respondent No. 1 had no authority to modify the remarks. Secondly, the modified to remarks 'hard on subordinates' was expunged from the A.C.R for the year 1983-84 and thus is contradictory.

It is difficult to believe that when such remarks have been expunged from the year 1983-84, the same remarks can be reintroduced by way of modification in the subsequent year. Thirdly, the remarks 'not yet due for promotion' are not in accordance with the Government Orders on the subject which envisage that against the column 'fitness for promotion', the appropriate entries are "FIT FOR PROMOTION", "NOT FIT FOR PROMOTION" or "UNFIT FOR PROMOTION". The remarks to the effect that the applicant was not due for promotion were, therefore, entirely unwarranted and, in any case, cannot be considered as adverse. The applicant therefore contends that so far as adverse entries in the ACR for the year 1985-86 are

concerned, they should be quashed or they should be treated as non-est. The applicant further states that he had appealed against the orders of the State Government conveying the modified remarks the same but it was disposed of by the Chief Secretary by his letter dated 23.1.1991 in a perfunctory and non-speaking manner.

5. So far as consequential relief of promotion is concerned, It is prayed that the applicant's case for promotion to the post of Special I.G. of Police should be considered on the above footing through a review D.P.C.

6. Respondents have opposed the O.A.s. So far as the expunction of the adverse remarks in the ACR for the year 1983-84 are concerned, it is contended that they are not at all relevant for the purpose of deciding legality or otherwise of the adverse entry in the ACR for the year 1985-86. So far as the delay in communication of the adverse entries in the ACR for the year 1985-86 are concerned, it is true that under the provisions of Rule 8 of the All India Services (Confidential Rolls) Rules, 1970, the adverse remarks are to be communicated ordinarily within a period of three months from the date of receipt. However, the said remarks were written by the reporting authority for the year in question on 31st July 1986 and the reviewing authority reviewed the same on 7th August 1986 and only after screening of the same, the said remarks were communicated to him, after a lapse of 2½ years namely 22nd September 1988 only because of administrative reasons. So far as expunction/modification of the remarks are concerned,

according to the respondents, this action was taken in accordance with provisions of Rule 10 of All India Services (Confidential Rolls) Rules 1970. The Rule provides and empowers the Government either to tone down or expunge the remarks in the confidential rolls in the nature of and therefore the modified remarks were/toned down remarks and were in accordance with rules. So far as the remark 'not yet due for promotion' is concerned, respondents contend that whether it is adverse or otherwise is absolutely irrelevant for the purposes of deciding the issue involved in the present application and that if the applicant himself considers the same not to be adverse, there is no question of his making any grievance in respect thereof. The respondents further state that so far as the appeal of the applicant against the toning down/expunction of the remarks is concerned, he was informed by the letter dated 23-1-1991 that under rule 10(2) of the All India Services (Confidential Rolls) Rules, 1970, the orders passed by the State Government on the representation by the applicant are final and, if at all, the officer wishes, he could submit a memorial to the President of India as envisaged by Rule 25 of the All India Services (Discipline and Appeal) Rules, 1969.

7. So far as the issue of promotion is concerned, the respondents contend that the applicant was considered in the meeting held by the Screening Committee on 8.5.90 and the annual confidential reports upto 1989-90 were considered and as he was not found fit for promotion he was not recommended for promotion by the Screening Committee. Since the A.C.R of the applicant for the year 1985-86 had undergone a change, his case was reviewed by the Screening Committee in its meeting held

on 1-7-91. However, still the applicant was not found fit to be promoted to the post of Special Inspector General of Police after evaluation of the entire records of the applicant and this recommendation was accepted by the Government on 4.8.1991. Subsequently, the screening committee which met on 10/7/1992 found him fit and accordingly the officer has since been promoted as Spl.I.G.of Police with effect from 3.2.93. According to the respondents, therefore, the applicant could have no grievance since, although he was denied promotion earlier, he has since been considered and promoted as per Rules.

8. We, first of all, consider the question as to whether merely because the adverse remarks in respect of A.C.R for 1985-86 were communicated belatedly, the applicant is entitled to contend that these remarks should be ignored. On this point, the applicant relies on State of Haryana vs. P.C.Wadhva (1987 (I) SCJ-115). In that case adverse remarks were communicated to the applicant after two years and three months of the close of the year. In para 14, the Supreme Court has observed as below :

"The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or, character, as the case may be. The adverse remarks should not be understood in terms of punishment but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. (In the instant case) it was communicated to the respondent after twenty seven months. It is true that the provision of Rules 5, 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly and substantial compliance will be sufficient.

But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provision of Rules 5, 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because three Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

9. The respondents, however have contended that the instructions relating to prompt communication of remarks are only directory and/merely fact of delay does not have the effect of obliterating the remark altogether. In this connection, they have referred to Lalit Bhatia IPS vs. State of Punjab & Ors (1994 (3) SLJ - 1) wherein the Chandigarh Bench observed with reference to above remarks as below :

"What emerges from the above observations of the Honourable Supreme Court is that as adverse remark in the ACR is more of an advisory nature than being punitive, the entire object of writing the remarks would fail if it is communicated after inordinate delay. It cannot be understood from the above observations that their Lordships have meant that if the adverse remarks are communicated after long delay, the remark should be struck down for that reason itself. To our mind in such circumstances while the adverse remarks are challenged by the officer concerned, the entire facts and circumstances namely the remarks, the comments of the Reporting Officer and the reason for the delay in communication of the remarks should be taken into consideration to arrive at a conclusion as to whether the making of the remark was justified. Therefore, we do not agree with the argument of the learned Counsel for the petitioner that on account of the delay in communication alone; the adverse remarks should be struck down.".

10. We are in respectful agreement with the interpretation placed by the Chandigarh Bench on the observations of the Hon'ble Supreme Court in Wadhwas's case. We are, therefore, of the view that the mere delay does not

entitle the applicant to the relief of expunction of the adverse remarks. We then come to the competence of the Government of Maharashtra to modify a particular adverse entry. Keeping in view the position of Rules, we have no doubt that what has been done by the Competent Authority to tone down the remarks Was as per rules and the contention of the applicant that the modified remarks amount to introduction of altogether new remarks and for representing against which the applicant should have been given a fresh opportunity is not sustainable in law. We therefore consider the contents of the modified remarks and their promotional opportunity to the applicant. We notice that some adverse remarks have been expunged and we do not go into that aspect. We, however, notice that the following remarks have been substituted as below :

<u>Original remarks</u>	<u>Remarks, as modified</u>
1. He is likely to buckle in under difficult circumstances and get irritated and confused.) Hard on subordinates
2. His relations with subordinates are rather rough.)
11. The contention of the applicant that the modified remark "HARD" has no relation with the first part of the original remark and therefore substitution of these <u>unrelated remarks</u> should be considered as invalid. This argument does not appeal to us. We must consider what is the over-all effect of the modified remarks and when so considered, we have no doubt at all that the first part of the remark "He is likely to buckle in under difficult circumstances and get irritated and confused" does not have a corresponding substituted phrase and, therefore, although	ON SUBORDINATES

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the State Government does not say so, these are remarks/required to be treated as having been expunged. We are, therefore, only left with the original remark 'His relations with subordinates are rather rough', which remarks [redacted] have been substituted by the remarks 'Hard on subordinates'. [redacted] The substituted remarks *prima facie* have a similar import and [redacted] do represent a [redacted] toning down of original remarks but the question which is urged by the counsel for the applicant is that these remarks should not be allowed to stand because similar remarks in the applicant's ACR for the year 1983-84 were expunged by the Department only on 12.4.88 and for the State Government, therefore to convey almost identical remarks, albeit in a modified form, only two years after the earlier occasion of expunging the remarks is contradictory and cannot be allowed to stand.

The counsel for the respondents would urge that the remarks in respect of ACR for the year 1983-84 namely 'hard on subordinates' were expunged in relation to that particular year and ACR reflects the performance and behaviour of the applicant in relation to a particular year and although the words 'hard on subordinates' might have been expunged in respect of an earlier year, they can very well remain albeit by way of toning down in respect of a subsequent year depending on the conduct of the officer in that particular year. In our view, the original remarks "his relations with subordinates are rather rough" reported on the conduct of the officer [redacted] by way of the attitude of the officer in relation to the subordinates in that particular year. The modified remarks, however appear to describe not the conduct of the officer but a general characteristic of the Officer as being 'hard

on subordinates'. Now, if this is so, then it is difficult to understand how a general characteristic of the officer in identical terms which was expunged in respect of the earlier year 1983-84 could be allowed to be reintroduced very shortly thereafter by way of toning down of the earlier remarks. We have already noticed that the action/in toning down two remarks by a single remark, by ignoring the purport of an unrelated remark, ~~the~~ appears to be careless and shows non-application of mind and was required to be interpreted by us to mean that the unrelated remarks are to be treated as expunged. In the light of the further reasoning given by us above, we have no hesitation in holding that the modified remarks 'hard on subordinates' cannot be allowed to stand in the ACR of the applicant for 1985-86 and they are liable to be expunged just as identical remarks in respect of earlier year 1983-84 were also expunged.

12. We, therefore, next come to the remarks 'not yet due for promotion' which replace the remarks 'not yet fit for promotion'. The counsel for the applicant has pointed-out that the substituted remarks are not in accordance with the standard formula and their presence in the ACR is likely to be misunderstood even if they are not in substance adverse. The reply of the respondents ~~that~~ that if the remarks, in substance, are not adverse, the applicant need not have any grievance ~~does~~ not appear to be convincing. The very presence of the remarks (in the ACR viz "Not due for promotion") is liable to create a negative impression on the mind of any reasonable person who considers the remarks. While, therefore not inclined to interfere with the modified remarks as they appear, ~~we are constrained~~ we feel to give a direction that this remark should be interpreted to mean 'Fit for promotion in his

turn'.

13. The applicant next refers to the Supreme Court judgment in Amarnath Chaudhary v. The State of Bihar & Ors., vide 1984 (2)SCJ-289. In para 7 of this judgment, the Hon'ble Supreme Court distinguished the earlier judgment in R.L. Butail v. Union of India & Ors., (1971) 2 S.C.R. 926. In that case, para 15 of that judgment the Supreme Court considered the contention that the report for 1964 in respect of the officer was before the committee, without the representation of the officer. The representation of the officer made subsequently was actually rejected and the confidential report for 1964 remained unchanged. The Supreme Court held that in such a situation consideration of the ACR without taking into account the fate of representation does not make any difference. In Amarnath Chaudhary judgment, R.L. Butail case was distinguished, and directed that since the adverse remarks were subsequently expunged, the Selection Committee has to consider the case of the appellant taking into consideration, subsequent orders of expunction passed by the State. The Supreme Court, therefore, directed the respondents to reconsider the case of the appellant. Applicant would urge for consideration.

14. The respondents would contend that the case of the applicant in the present case has, in fact, been reconsidered in as much as in May 1990, DPC rejected in the case of the applicant and July '91, DPC reviewed the case of the applicant in view of the expunction of the adverse remarks. The counsel for the applicant however, contends that the "review DPC" has a specific meaning viz that the DPC ought to consider all the material that was before the DPC when the case of the applicant was

originally considered i.e. in May 1990. Admittedly, in the present case the respondents have not done so. They have not considered the case of the applicant alongwith the cases of the officers considered in May 1990 in a comparative perspective but they have a so-called purported to make review of the officer's case alongwith other officers whose cases were put up before them in June 1991. In our view, the review DPC therefore has not conducted ^{itself} in a proper manner and the applicant is entitled to have his case reviewed by a ^{proper} review DPC alongwith other officers whose cases were considered in May 1990.

15. The applicant would urge before us/while considering the case of the applicant by the review DPC, the ratio of the case of V.W.Pradhan vs. State of Maharashtra & another (1991 (1) (CAT) 257) ought to be kept in view. According to the applicant, the review DPC should be directed to consider the case of the applicant strictly in accordance with the I.P.S. (Pay) Rules which envisage that the case of the officer is to be considered on the basis of merit with due regard to the seniority. According to the applicant, this term is interpreted in V.W. Pradhan case, by this Tribunal so as to accord due regard to seniority and any other instructions of the Government of India or Government of Maharashtra. ~~giving~~ Not ~~Weightage~~ of the seniority should be ignored and the case of the applicant should be considered by taking into account his seniority as such. As observed in A.A.Khan's case, V.W.Pradhan case was indistinguishable as the questions involved therein were whether it was possible to give different grading on the basis of the same record for the posts of DIG Level I and Special I.G.P without giving any reasons for doing so.

and also the Tribunal had found that the Selection Committee had ignored the Tribunal's earlier direction in that case that it should consider whether expunction of the adverse remarks for 1981-82 and 1983-84 would result in a substantial improvement in that applicant's previous grading of B(Good).

We are inclined to follow the reasoning in A.A.Khan's case and ^{are} unable to accept the contention that seniority as such is required to be given a special weightage. The counsel for applicant relies on observations in para 6 of G.W.Pradhan's judgment in which the Tribunal observed that the minutes of the Establishment Board disclose ^{that} no weightage whatsoever was given to seniority and the sole reason ^{for} not selecting the applicant was that on an evaluation of his character rolls he was categorised as B(Good) ~~as~~ and not B+ (Positively good). The Tribunal went on to refer to M.L.Coopor case (AIR 1974 SC 87). In that case it was observed that :

"the required number has thus to be selected by a comparison of the merits of all the eligible candidates of each year. But in making this selection, seniority must play its due role. Seniority would however be only one of the several factors affecting assessment of merit as comparative experience in service should be. There could be a certain number of marks allotted, for purposes of facilitating evaluation to each year of experience gained in the service."

16. What was said in Capoor's case, however, was in relation to IAS/IPS (Appointment by Promotion) Regulations 1954 but what we are concerned with is Rule 3(2)A of the Pay Rules. It is now well established by a series of judgments including the latest judgment of SC in Chandra Gupta I.F.S v. The Secretary, Govt.of India & Ors (JT 1994(6) SC-132), wherein in para 38 & 39

it is stated as below :

38. Therefore, what is essential is merit and not mere seniority. This Court in Sant Ram Sharma v. State of Rajasthan 1968 (1) SCR 111 at 118 has stated as follows :

"...it is a well established rule that promotion in selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is therefore available."

39. Again, this Court in State of Mysore v. Syed Mahmood 1968 (3) SCR 363 at 366 held thus :

"Where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone."

17. The contention of Shri. Masand, learned counsel for the applicant that a special weightage is to be given to seniority while considering the officer for the post of Special Inspector General of Police does not, therefore appeal to us ~~nor is it~~ warranted by case law. Any observations to the contrary in V.W. Pradhan's case are not considered binding on us.

18. In the result, we dispose of the O.A.s by passing the following order :

O R D E R

O.A is allowed. The respondents are directed to consider the case of the applicant by constituting a review DPC on the footing that ~~there are~~ ^{no} adverse remarks in the ACR of the applicant for the year 1985-86 and that the remark 'not due for promotion' is to be treated as 'fit for promotion in his turn'

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The case of the Applicant is to be considered by Review D.P.C. as in May 1990 and thereafter, in comparative perspective alongwith the cases of other officers on the basis of what is stated above. The record of the officer is to be considered in accordance with Ministry of Home Affairs Guidelines dated 04/09/1989 and the Government of Maharashtra G.R. dated 31.1.1990 whose validity is upheld. There would be no order as to costs.

M.R.Kolhatkar

(M.R. KOLHATKAR)
MEMBER (A)

B.S.Hegde

(B.S. HEGDE)
MEMBER (J)

J*