

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 628/92

Transfer Application No:

DATE OF DECISION: 11.8.1994

Shri K.P.Desai

Petitioner

Shri K.K.Singhvi with Sh.V.S.Masurkar

Advocate for the Petitioners

Versus

Union of India & Ors.

Respondent

Shri M.I.Sethna

Advocate for the Respondent(s)

CORAM :

The Hon'ble Shri N.K.Verma, Member (A)

The Hon'ble ~~xxx~~ Smt. Lakshmi Swaminathan, Member (J)

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

Lakshmi Swaminathan

(LAKSHMI SWAMINATHAN)

MEMBER (J)

N.K.Verma

(N.K.VERMA)

MEMBER (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, BOMBAY

O.A.NO. 628/92

Shri K.P.Desai

: Applicant

v/s.

Union of India & Ors.

: Respondents

COURT : Hon'ble Member (A) Shri N.K.Verma

Hon'ble Member (J) Smt. Lakshmi Swaminathan

Appearance

Shri K.K.Singhvi
with Shri V.S.Masurkar
Advocate
for the Applicant

Shri M.I.Sethna
with Shri A.I.Bhatkar
Advocate
for the Respondents

JUDGMENT

(PER: N.K.Verma, Member (A))

Dated: 11.8.91.

In this OA the applicant who is an Assistant Director in the Directorate of Enforcement, Government of India, Bombay has prayed for quashing the impugned order dated 25.11.1991 by which two officers junior to him have been promoted to the post of Deputy Director w.e.f. 25.11.1991 with a request to direct Respondent No.1 to promote the applicant as Deputy Director from the same date and pay him all the benefits including seniority, etc. (ii) that the Tribunal may direct the Respondent No.1 to produce the records and papers pertaining to the promotion of Respondents No.3 and 4

N.K.Verma

including the papers relating to selection process processed by the Departmental Promotion Committee. He also requested for grant of interim relief that pending the hearing and final disposal of the application, the operation of the impugned order dated 25.11.1991 may be stayed.

2. While the case was admitted, no interim relief was granted in terms of the OA. However, the applicant through a Misc.Petition prayed that nobody should be promoted in the post of Deputy Director until the final disposal of the OA. This Tribunal on 1.3.1993 granted the interim relief by directing that any promotion to the post of Deputy Director made hereafter will be subject to the final disposal of the OA. and the applicant shall also be considered for promotion if he is within the zone of consideration in all future DPC to be held for the purpose. The matter got stuck for quite sometime when the applicant prayed for inspection of certain documents through a Misc.Petition filed by him against which the respondents claimed privilege. The Tribunal in its order dated 20.8.1993 over-ruled the privilege claimed by the respondents and directed the inspection by the applicant ~~of~~ his ACRs for the years 1986-1990. The case was thereafter decided to be heard on 10.9.1993. In the meantime, the respondents approached the ^{High} Supreme Court in which privilege claimed was rejected. The ^{High} Supreme Court ultimately dismissed the SLP in December,1993 and the matter came up for hearing on 18.1.1994. The case was heard on several dates in between final hearing on 21.4.1994.

3. The facts of the case are that the applicant was working as Assistant Director in the Enforcement Directorate and as per the Seniority List dated 3.5.1991 the Respondents No. 3 & 4 were junior to him. There were two vacancies of Deputy Director, the next higher post to the post held by the applicant, in the year 1991. The applicant along with the Respondents No.3 and 4 were eligible for consideration for these two posts. However, the DPC which was held to make selection on merit recommended Respondents No. 3 and 4 fit for promotion and they were accordingly promoted by the impugned order dated 25.11.1991. The applicant feels that the DPC has not done selection according to rules and after taking into consideration his self-assessments in making the recommendation.

4. The respondents took a preliminary objection that the applicant is not entitled to promotion simply on the basis of his seniority and since the post of Deputy Director is promotion on selection, this has to be recommended by the DPC for which a bench mark of 'Very Good' has been prescribed. Since the applicant could not achieve this minimum bench mark, he was left out of the select list. The applicant's case was considered by the DPC along with three others including one officer who was under suspension and the two officers junior to the applicant were found eligible for the promotion by the DPC which was ^{Chaired} ~~chaired~~ by a Member of U.P.S.C.

5. In a rejoinder the applicant assailed the

procedure adopted by the DPC in not giving him a grading "Very Good". According to the applicant, he was entitled for the bench mark over and above or at least at par with Respondents No. 3 and 4 who are the private respondents in the case and who had filed their affidavits along with the Government respondents. He insisted on the production of the necessary Departmental Promotion Committee papers before the Tribunal for ascertaining the legality, validity and veracity of his grading. Accordingly, the respondents were directed to produce the ACRs file and the DPC proceedings for perusal of the Tribunal which was done after a great deal of delay and after claiming privilege which was rejected by this Tribunal and also by the Hon'ble Supreme Court.

6. During the hearing the applicant was represented by Shri V.S.Masurkar and also Shri K.K.Singhvi. S/Shri Singhvi and Masurkar based the claim of the applicant on his best performance. The applicant had joined service in 1964 as an Assistant Enforcement Officer who was promoted as Chief Enforcement Officer in the year 1976 after superseding 9 officers. He was promoted as Assistant Director in the year 1983 and was the senior most officer in that very post in view of the fact that his immediate senior has been put under suspension. For the post of Deputy Director, his annual confidential report for five preceding years had to be considered. The officer had apprehension of some kind of failure and he had made certain allegations in this regard as early as

N. N. N.

No. 3 & 4 be given officiating promotion to the grade of Deputy Director in the Directorate of Enforcement under the Department of Revenue". The minutes do not show as to how the assessment of "Good" has been arrived at in the case of the applicant. Though no malafides have been attributed to the Departmental Promotion Committee which consisted of a Member of the UPSC as Chairman and two other senior officers of the Government, Shri Singhvi, maintained that the DPC erred in not giving the applicant the Bench Mark of "Very Good". According to the copies of the ACRs supplied to him, the officer had earned minimum three "Very Good" during the years under reference. He cited the case of Shri S.D.Suchdeva vs. Director General, Employees' State Insurance Corporation And Ors. T.A.No.249/86 decided on 12.7.1988 by the Principal Bench that in case of Promotion through selection on merit - if an officer has earned three "Very Good" reports during last five years period, he should earn an overall grading of "Very Good". As per the ACRs available for the period, the officer earned "Very Good" in 1986 as per the reporting officer, "Good" during 1987, "Very Good" in 1988, "Very Good" in 1989 and "Very Good" in 1990. Even if one ignores the toning down for the year 1986 by the Reviewing Officer and admittedly "Good" grading for the officer in 1987, the ACRs do project three "Very Good" reports which should have been taken into account by the DPC for achieving the Bench Mark of "Very Good" for selection purposes. Shri Singhvi said that as a

N. K. S.

19.12.1991 to which he was replied to 24.1.1992 that it was DPC which had not found him fit for promotion. Shri Singhvi on behalf of the applicant pressed the point of Bench Mark of "Very Good" which would have entitled him for promotion. According to him, the officer had earned "Very Good" grading in all the 4 years out of 5 year period. The assessment for the officer during the year 1986 was "very Good" as written by the reporting officer which was accepted as such by his reviewing officer. The reviewing officer had written a general remark saying that "Shri Desai is a good officer whose conduct was satisfactory". This could not be considered as toning down the grade since the reporting officer had not given any remark that he disagreed with the N.G. reporting officer. The DPC, however, graded the applicant as a "Good" officer for the year 1986. According to Shri Singhvi, this down gradation by the DPC is not correct. If there was any dilution grading given by the Reporting Officer at the level of the Reviewing officer, the same required to be communicated to the applicant as per the instructions of the Department of Personal and Training in this regard. At this stage, he requested that the Tribunal should have a look at the DPC proceedings which was agreed to. The DPC proceedings were obtained by the respondents from the Chairman of the UPSC who while forwarding the minutes again claimed privilege for this confidential document and the file thereon. In the minutes of the Departmental Promotion Committee meeting the assessment of the applicant has been shown as "Good" whereas Respondents No. 3 & 4 were shown as "Very Good". On the basis of above assessment, the Committee recommended a panel that "the Respondents

N.L.W.

matter of fact, the ACR for 1986 should be taken as "Very Good" because the reviewing officer has not given reasons why he is disagreed with the assessment of the reporting officer. He also pointed out that as per the instructions of the Department of Personnel and Training, the grading given by the reviewing officer must prevail upon the grading given by the reporting officer. Thus the ACRs for the year 1990 upto March 1991 should have a higher weightage of "Very Good" because in this ACR the reviewing officer had disagreed with the reporting officer and given the applicant a "Very Good" grade. Attention was drawn to the case of R.C.Kohli vs. Union of India & Ors., OA No.947/87 decided on 30.11.1987 by the Principal Bench in which the Supreme Court has been quoted to have observed in Brij Bihari Lal case that :

"while it is no doubt desirable to make an overall assessment of the government servant's record, more than ordinary value should be attached to the confidential reports pertaining to the years immediately preceding such consideration. It is possible that a government servant may possess a somewhat erratic record in the early years of service, but with the passage of time he may have so greatly improved that it would be of advantage to continue him in service upto the statutory age of superannuation. Whatever value the confidential reports of earlier years may possess, those pertaining to the later years are not only of direct relevance, but also of utmost importance."

W.L.W.
In this connection, a case of S.Rama Rao v. Commissioner of Income Tax, Andhra Pradesh & Ors. decided by the Hyderabad Bench of CAT in TA No. 146/86 decided on 12.1.1987 was also cited, wherein the Tribunal has said that :

"It is no doubt true that the Departmental Promotion Committee need not necessarily adhere to the gradation awarded by the reporting and reviewing authorities, but when other considerations are taken into account and when a person far a junior in the seniority list is preferred, there should be reasons for doing so."

Another judgement cited in this respect was of R.B.Tiwari Vs. Union of India & Ors., Jabalpur Bench of the CAT in TA. No.75/86, where the DPC had erred in grading the applicant as "Good" instead of "Very Good". Reliance was also placed on judgement in O.A. No. 125/92 of this very Tribunal delivered on 18.2.1993 wherein it was accepted that if the minimum Bench Mark for consideration for promotion was "Very Good" and the ranking of the officer as "Good" was not enough, the "Good", remark had to be treated as adverse ~~xxx~~ and had to be conveyed to the applicant.

7. Shri Singhvi referred to the case of C.K.Gajanan vs. Union of India & Ors., O.A. No.889/88 decided by the Hyderabad Bench of this Tribunal on 26.2.1990. In this case the order referred to the observations of the same Tribunal in K.Ch.Venkata Reddy vs. Union of India had observed:

N.L.W.
"The minutes (of the selection committee) do not disclose the procedure adopted by the committee in grading the confidential reports for each year for each officer, the common standard/test adopted by them for awarding grading to each officer. It is only then that the committee can proceed with the classification of the eligible officers as 'outstanding', 'very good', 'good' or 'unfit' on an overall relative assessment of their service record. Where the reporting/reviewing officer who are officers who have personal knowledge of the work and performance of the officers concerned, do not give the 'grading' in the annual confidential reports, the task of the selection committee indeed becomes onerous and the minutes ought to disclose the procedure/standard/test applied by them. It is only then that its selection can satisfy the test of objectivity as opposed to subjective evaluation."

In the instant case, the DPC proceedings have not indicated how the assessment of "Good" in the case of the applicant was arrived at, when atleast three "Very Good" CRs were available for the period under reference.

8. Shri Sethna on behalf of the respondents very assiduously demolished the contention that the DPC has erred in making the recommendations for the panel of officers to be promoted. The applicant was not as brilliant as has been made out by his self-appraisals and the OA. The self-appraisal system had not been introduced in the department till 1.1.1990 and hence the self-appraisals were not to be taken into account till that time. The C.R. gradings of the officer under review emerges as below :-

<u>Year</u>	<u>Reporting Officer</u>	<u>Reviewing Officer</u>
1986	Very Good	Good
1987	Good	Average
1988	Very Good	Very Good
1989	Very Good	Very Good
1990	Average	Very Good

Apparently, it appears that he earned three "Very Good" at the level of the reviewing officer. The DPC is authorised to evolve its own method, and to evaluate and consider the officer for promotion on selection on merit basis and there could be cases where the grading could be reduced. The DPC in the case of the applicant has reduced to "Good" without divulging the reasons for having done so. However, the wide disparity in the assessment of the officer by the reporting officer and the reviewing officer could lead to conflicting assessment of the performance of the officer. This can

N. N. W.

also be judged against the overall performance of the officer which was not too "Good". The applicant's probation was extended by two years in the present job of Assistant Director while others were confirmed within two years of their initial appointment.

9. In support of his argument, Shri Sethna produced the instructions of Department of Personnel and Training under its O.M. dated 10.4.1989 in which the entire selection method and the guidelines for the DPC is indicated. It is said therein that the DPCs enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them. In order to ensure greater selectivity in matters of promotions and for having uniform procedures for assessment by DPCs, fresh guidelines are being prescribed. In paragraph 6.1.3 it is stated that :-

" " While merit has to be recognised and rewarded, advancement in an officer's career should not be regarded as a matter of course but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports and based on strict and rigorous selection process."

In para 6.1.4, it is stated that :-

N. N.
"Government also desires to clear the misconception about "Average" performance. While "Average" may not be taken as adverse remark in respect of an officer, at the same time, it cannot be regarded as complimentary to the officer, as "Average" performance should be regarded as routine and undistinguished. It is only performance that is above average and performance that is really note-worthy which should entitle an officer to recognition and suitable rewards in the matter of promotion."

In para 6.2.1 (e), it is stated that :-

"The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entities in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes."

"(f) If the Reviewing authority or the Accepting authority as the case may be has over-ruled the Reporting Officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of over-ruling the other, then the remarks should be read together and the final assessment made by the DPC."

In para 6.2.2, it is stated that :-

"In the case of each officer an overall grading should be given. The grading shall be one among (i) Out-standing (ii) Very Good (iii) Good (iv) Average (v) Unfit."

In para 6.2.3, it is stated that :-

"Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity."

N.b/w
In para 6.3.1, the Bench Mark "Good" has been indicated for selection up-to having a pay scale of Rs. 3700-5000. In the same paragraph, it is stated for Rs. 3700-500 and above the Bench Mark should be "Very Good".

10. According to these guidelines, it is abundantly clear that the DPC has to make its own evaluation by reconciling the report made by the reporting officer and the reviewing officer and also toning down/modifying gradings which are not consistent with the assessment on the various parameters indicated in the ACRs forms. Due regard also has to be given to the integrity column of the person who is to be promoted to a selection post which has to carry onerous burden and responsibility.

11. Shri Sethna cited a recent judgement of the Supreme Court in the case of Indian Airlines Corporation vs. Capt. K.C. Shukla & Ors. (1993) 1, S.C.C., 17. In that case the apex court held that "the Court cannot substitute its opinion and devise its own method of evaluating fitness of a candidate for a particular post. Not that it is powerless to do so and in a case where after removing the illegal part it is found that the officer was not promoted or selected contrary to law, it can issue necessary direction. For instance a candidate denied selection because of certain entries in his character roll which either could not be taken into account or had been illegally considered because they had been expunged, the Court would be within jurisdiction to issue necessary direction. But it would be going too far if the Court itself evaluates fitness or otherwise of a candidate, as in this case." The Departmental Promotion Committee was chaired by the Member of the UPSC which is not a subordinate department of the Government and is a constitutional body for recommending select list etc. for appointment to higher post in the Government. Rules giving the procedure and the guidelines

N. K. S.

for DPC empowered the DPC to make its own overall assessment of each candidate to be recommended for selection. The ACRs of the applicant was a border line case where according to prima-facie assessment it could be said that he had three "Very Good" which the DPC ~~MR~~ had not accepted as such within the competence given to it. The applicant at no point of time had impleaded the ~~MR~~ UPSC as one of the respondents in the case and the Chairman of the UPSC was not obliged to divulge the reasons for giving a lower grading of "Good" to the applicant. The Chairman of the UPSC who was directed to produce the documents relating to the DPC proceedings claimed privilege as these were unpublished official records. However, a copy of the minutes was sent for production before the court. Shri Sethna concluded his argument with this that the recommendations of the DPC were accepted by the Secretary Finance and the Finance Minister on 8.1.1991 and subsequently on 11.11.1991 before the orders of promotion of Respondents No. 3 & 4 were issued. The fact that applicant was apprehensive of being left out can also be supported by the letter written by one of his friends who is M.P. to the Finance Minister would also indicate that he was himself aware that his ACRs ~~in~~ were not as eloquent as others to let him have a smooth promotion.

11. We have given careful consideration to the arguments advanced by both the sides assiduously. The learned counsel for the applicant Shri Singhvi dwelt vigorously on the fact that the applicant had

obtained four "Very Good" CRs, if the CR for 1986 reviewed by Director of Enforcement ~~Shri Gurudas~~ is also considered to be " ~~MAX~~ Very Good". However, after having a close look at the annual confidential report for that year, one cannot but have the inescapable conclusion that the reviewing officer had very little to say about the applicant and he recorded a perfunctory and cryptic observation that Shri Desai is a good officer whose conduct was satisfactory. He neither agreed or disagreed with the assessment of the reporting officer. The Reviewing Officer was actually being generous in this assessment in view of the O.M. dated 6th June, 1986 under which the applicant was warned with a direction that a copy of this warning shall be placed in his CCR folder (R-5 filed with the Respondent reply). He could have reiterated that in his review remarks but he chose to overlook the warning. In view of the Deptt. of Personnel & Training's instructions on the subject, remarks of the reviewing officer would decidedly carry more weight than the reporting officer. The CR for the year 1987 is clearly having only "Good" grading both at the level of the reporting officer and the reviewing officer. In 1988 both the reporting officer and the reviewing officer had given him a "Very Good" report. In the year 1989, unfortunately the officer had earned a "Good" grading from his reporting officer who also made a note against the Item No.8 Integrity—"please see sealed cover." The reviewing officer generally agreed with the remarks of the reporting officer saying, however, that assessment is of lower side. He & noted the contents of the Sealed

Cover that the integrity of the officer had to be certified after the enquiry is over. The reviewing officer also improved the grading to "Very Good". In the Sealed Note, it was indicated that the integrity of the officer cannot be certified because of certain corruption charges being enquired into by the C.B.I. The reporting officer also stated that his general behaviour is also not good. ^{report in Sealed Note} The adverse ~~etc.~~, however, was not communicated to the officer and perhaps he was not aware that this ~~note~~ note may work against him in the overall assessment at the hands of DPC. The subsequent ACR of 1990 is a controversial one. The reporting officer has found his resume having nothing special to mention and has given him an "XXXXX" "Average" assessment against all the parameters. As regards the integrity, instead of giving him a clearance against the note in the Sealed Cover, he has simply said that nothing adverse has come to his notice during the period under reference. That would indicate that the stigma on the note of integrity continued even during the year 1990 and when the ACRs were sent to DPC for their evaluation of the overall performance. The review officer has made the grading on 31.3.1991 by making it "Very Good". But since the reports are not complementary, it leaves an area of divergence to be reconciled by the Departmental Promotion Committee. The DPC made the overall assessment of the officer as "Good" which eliminated him from the select list, when two other officers were available to be brought into panel on account of overall assessment as "Very Good". ¹² According to the number of judgements cited by the learned counsel

for the applicant, which are mostly given by the Division Benches of this Tribunal, one is inclined to feel that perhaps the Departmental Promotion Committee has not done its job thoroughly and has erroneously come to the conclusion to down grade him to the level of "Good". However, on ~~close~~ scrutiny, the judgements cited by the learned counsel for the applicant can be distinguished. In the case of S.D. Sachdeva v. D.G. Employees State Insurance Corporation & Others, the judgement was based on the premise that according to the normal practice the overall grading of an officer would be based on the same grading for three out of five years. For instance, if an officer has been graded as "Very Good" in three out of five reports, his overall grading will be "Very Good". These observations made in the judgement are based on the perception that "this is the practice followed by the DPCs with which the U.P.S.C. is associated". In that case there was a difference in grading the same official on the basis of same ACRs by a DPC and ~~xxx~~ a review DPC. It was in this ^{context} ~~aspect~~ that an order was passed for holding a review DPC. While the judgement referred to the practice following ^{ed} by the DPCs with which UPSC is associated, in the instant case we are having a DPC in which the UPSC is mandatorily associated and the proceedings are held under the chairmanship of a Member of the UPSC. On the basis of five years ACRs of the applicant, he was assessed as "Good" whereas two other respondents who were ^{immediate} juniors to him were assessed "Very Good". One of the Members of the ^{DPC} ~~base~~ N. B.
N. B.
N. B.

was the Director of Enforcement who had given a "Very Good" grading to the applicant in the ACR for the year January, 1990- March, 1991. The fact that the applicant had not been cleared of the sealed note regarding integrity in the ACR and ~~also that he was cautioned on 26.2.1990 by the Director of Enforcement~~ Respondent No. 20 coupled with his delayed termination of probation must not have been lost from consideration while the overall grading was arrived at. The case ~~in~~ cited regarding S. Rama Rao vs. C.I.T, Hyderabad is not relevant as in that matter a far junior person was preferred without giving reasons and the DPC had committed technical irregularity in expanding the field of consideration to a very large number than required. The judgement in OA No. 125/92 delivered by this very Bench of the Tribunal on 18.2.1993 can also be distinguished in as much the gradings given by the Reviewing Officer for the year 1988, 1989 and 1990, were "Very Good" and there was no toning down, warranting communication to the applicant. The overall assessment made by the DPS has toned down the grading to "Good" which did not require to be communicated as ~~an~~ "adverse remark". The case in regard to R.B.Tiwari v. Union of India is no more relevant in view of Hon'ble Supreme Courts verdict in Indian Airlines v. Capt. K.C.Shukla's case.

13. Learned counsel for the applicant relied very heavily on the judgement of Hyderabad Bench of the Tribunal in C.K.Gajanan's case decided on 26.2.90. That case again can be distinguished as the judgement is based on the fact that the CR form did not contain any column for

indicating grading of the officer reported upon, though there was a column to assess an officer as either fit or not yet fit or unfit. In some years, this column was left blank in cases of officers within the zone of consideration. It was therefore held in these cases, the DPC should have indicated as to how it determined relative assessment of merit. No such infirmity or inadequacy was noticed in the ACRs of the applicant on which the DPC based its overall assessment. There was no uncommunicated adverse remarks in the ACRs. The DPC was duly constituted by the Government and it was given a charter of duties as per the guidelines of 1989. Once a DPC has come to the conclusion by following the due procedure, we, in the Tribunal cannot substitute our views in the matter solely on the basis of claims made by the applicant in his self-assessment. The Departmental Promotion Committee comprised of two very senior Departmental Officers besides the Member UPSC who would have known the potentials of the officer in relation to the post to which the applicant was to be promoted. They must have been aware of his plus points and his minus points so as to assess him fit for promotion or in a higher responsibility or not. Since their views are based on objective assessment, which have not been alleged to be borne out of any malice and malafide, we would be very much disinclined to substitute our views in the matter. In coming to this conclusion, we draw full support from the judgement delivered by Hon'ble Supreme Court in case of Indian Air Lines v. Capt. K.C. Shukla which has dispelled all doubts (1993 1 S.C.C. 17).

N.K. Singh

14. In the circumstances, the application fails and is dismissed without costs.

Lakshmi Swaminathan
(LAKSHMI SWAMINATHAN)

MEMBER (J)

N. K. Verma
(N. K. VERMA)

MEMBER (A)