

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH: MUMBAI

OA No. 639/93

Mumbai this the 15th day of June, 2001.

Hon'ble Mrs. Shanta Shastry, Member (A)
Hon'ble Mr. Shanker Raju, Member (J)

Shiv Dutt,
Working as Assistant
Personnel Officer,
C/o G.S. Walia,
Advocate, High Court,
16, Maharashtra Bhavan,
Bora Masjid Street,
Fort, Mumbai. -Applicant

(By Advocate Shri G.S. Walia)

-Versus-

1. Union of India through
General Manager, Western Railway,
Churchgate, Bombay.
2. Chief Personnel Officer,
Western Railway,
Churchgate,
Bombay.
3. Divisional Railway Manager,
Bombay Division,
Western Railway,
Bombay. -Respondents

(By Advocate Sh. M.S. Ramamurthy)

O R D E R

By Mr. Shanker Raju, Member (J):

The applicant in this OA, who has been working as Assistant Secretary (Complaints), a Group "B" post, having the actual designation of Assistant Personnel Officer (for short, APO) has assailed the adverse remarks recorded in his CR for the year ending 31.3.91. The applicant has also assailed an order passed by the representing authority, rejecting his representation against the adverse remarks by order dated 17.1.92. The applicant has sought expunction of

the adverse remarks and also consideration for higher promotion without taking into consideration the adverse remarks.

2. The applicant was appointed as Welfare Inspector of Sports basis being an outstanding hockey player. It is contended that the applicant had been performing his duties with utmost sincerity and dedication. It is contended that in the year 1988 the applicant appeared for selection for the post of APO and based on his suitability on the basis of written test, viva voce and outstanding ACRs he was placed at serial No.1 of the panel. He contended that even before empanelment he had worked as APO from 20.7.88 and was dealing with the establishment matters of different sports. It is maintained that the performance of the applicant was outstanding without any complaint from subordinate staff and otherwise. He stated that as dealing with the selection/promotion of the subordinate staff the same were held within the schedule. The applicant has stated that he has been posted to different places as APO and while at Mumbai from 1989 he had been shouldering the responsibilities to deal with the cases of half of the total cadre of Mumbai Division pertaining to selection/transfer/increments which could have been dealt with by two officers as there was no other officer available he has shouldered the burden himself. The applicant was not conveyed any adverse ACRs for this period. The applicant has also contended that he has attended the

orientation course for Group 'B' officers and stood first, obtaining distinction. Instead, the reviewing authority communicated adverse remarks to the applicant regarding his knowledge of establishment matters not being up to the mark and over all performance being average. The applicant thereafter made a representation by taking several legal pleas, including that during the period reported upon he has never been informed about the shortcomings nor warned. The adverse remarks have been maintained by the representing authority without recording any reasons. The applicant contends that a Government servant cannot become slack suddenly and has to be apprised of the shortcomings etc. which are provided in paras 1608 and 1609 of the IREC Vol.I. It is contended that the representation made by him has been disposed of by a non-speaking order and the orders have not at all been written in the file. For this the applicant has relied upon the case of Union of India v. E.G. Nambudiri, AIR 1991 SC 1216. Placing reliance on the ratio laid down in P.K. Shastri v. State of M.P., ATJ 1999 (3) SC 394 it is contended that the remarks should be recorded objectively and in the absence of any material to show that the efficiency of the officers was any time slackened, adverse remarks would not be sustained. It is contended that the appraisal of the fact should be based on material and the conclusion as well. It is also pointed out by the learned counsel of the applicant that a DPC was held to consider the APOs for promotion to senior scale on ad hoc basis and one of the junior promoted to the applicant Sh. C.K. Nair had

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4. The respondents have also produced the relevant records regarding adverse remarks and orders passed by the representing authority on the representation of the applicant against the adverse remarks as well as proceedings of the selection committee held on 29.8.81 whereby junior person of the applicant Sh. C.K.Nair was accorded ad hoc promotion to the senior time scale. Further report of the applicant pertaining to the year 1992-93 had been produced to show that the applicant was graded as very good and outstanding respectively. It is contended that as there is no challenge to the order rejecting promotion the same cannot be gone into the present OA and ad hoc promotion cannot bestow upon the applicant any right of seniority or regularisation as the post is Group 'A' the promotion is to be accorded after consultation with the UPSC. On merits, it is also contended that the remarks have been rightly given to the applicant and the reasons have been recorded in the file by the representing authority while maintaining the adverse remarks.

5. We have carefully considered the rival contentions of the parties and perused the material on record and the record produced by the respondents. As regards the objection of limitation is concerned, we find that vide an order dated 24.9.93 this Court after meticulously dealing with the contentions has clearly observed that the present OA is within the stipulated period of limitation and is within the time. As such the contentions of the respondents regarding limitation ~~are~~ devoid of merit. As on merits we

find that the performance of the applicant since he has been appointed had remained excellent and he has been performing his duties with dedication and devotion, on perusal of the remarks recorded in the ACR of the applicant by the reviewing authority we find that the same lacks objectivity. The material facts have not been apprised and the conclusion arrived at is not on the basis of the appraisal of the fact. The applicant has never been apprised about the short comings by any warning oral or in writing. In view of the provisions of paras 1608 and 1609 of IREC it is mandated upon the authorities to apprise a Railway servant about the short comings and with a view to give an opportunity to defend himself. The satisfaction should be on objective basis and based on material. As the provisions of paras 1608 and 1609 are not adhered to the adverse remarks recorded in the ACR of the applicant are not legally sustainable. On perusal of the ACR of the applicant we find that all the remarks attributed to the applicant does not justify remarks communicated to the applicant. The applicant has been accorded the grading of average. Though it has been stated that the applicant is a sportsman and taking interest in his sports but yet his overall performance has been observed average requiring more experience. In absence of any material produced to show that the applicant was afforded an opportunity to improve his short comings by way of issuing any memo etc. and being apprised of the short comings by the concerned authority. We are fortified by the following ratio in the case of P.K. Shastry, supra:

"Any adverse remark in the C.Rs. could mar the entire career of that officer. Therefore, it is necessary that in the event of a remark being called for in the Confidential Records the authority directing such remark must first come to the conclusion that the fact situation-situation is such that it is imperative to make such remarks to set right the wrong committed by the Officer concerned. A decision in this regard must be taken objectively after careful consideration of all the materials which are before the authority directing the remarks being entered in the C.Rs. In the instant case, the High Court has rested its opinion in regard to the efficiency of the Officer based on the fact-situation of a single case and that too with reference to the capacity of the Officer concerned to control the proceedings of the court. There was no material before the High Court that this was the case with the concerned Sessions Judge in other cases also nor does the lacuna pointed out by the High Court appear to be such as would undermine the administration of justice."

In the instant case also we find that the decision has not been taken objectively on the basis of material and there has been violation of the rules and instructions on the subject. The performance of the applicant was excellent for a number of years and suddenly the same has been reported as adverse without apprising the applicant in writing about the short comings in performance of his duties is clearly against the existing instructions and is not legally tenable.

6. The adverse remarks are also liable to be expunged on the ground that the applicant has filed his representation against the adverse remarks highlighting that his performance during the period remained excellent but yet he has been given adverse remarks. The representing authority has passed a non-speaking order while maintaining those remarks. As held in N.G. Nambudiri's case (supra) the requirement is that the order may not contain the reasons but if the reasons are recorded on the file that would show

application of mind by the representing authority ⁹in the process of ascertaining whether the reasons have been recorded in the file by the representing authority we have perused the concerned record. We find that no reasons have been recorded on the file to reject the representation of the applicant and to maintain the adverse remarks. In this view of the matter the order passed by the representing authority cannot be sustained. We are fortified in this view of ours by the ratio laid down in N.G. Nambudri's case (supra) and U.P. Jal Nigam & Ors. v. Prabhat Chandra Jain & Others, 1996 (33) ATC 217 (SC).

7. The claim of the applicant regarding his promotion to Senior Personnel Officer is concerned, we find that in the DPC held on 29.8.91 the applicant was within the zone of consideration but on the basis of the overall assessment he has not been found fit for promotion to senior scale on ad hoc basis and the reason for this was that he was having an adverse remark in his ACR pertaining to the year 1991 which was also taken into consideration by the respondents. The applicant was having one good grading and the other very good but was given lesser marks with the result his junior was graded ad hoc promotion. Though the applicant has not specifically assailed the promotion to his junior on ad hoc basis but in one of the prayers he has asked for considering higher promotion without taking into consideration the adverse remarks. In our considered view even though the applicant has not assailed the promotion but yet in his pleadings he has contended that as the adverse remarks have

been taken into consideration the same resulted in his supersession and promotion of two of his juniors. As the applicant was not found fit for promotion on ad hoc basis in the super time scale on the basis of his adverse remarks it has to be construed as consequential relief prayed for by the applicant pertaining the main relief of expunction of adverse remarks. Apart from it, by accord of ad hoc promotion although the applicant has been accorded the promotion on 30.11.93 despite stay of the Tribunal, the plea of the respondents to this regard would hold no water. The promotion of the applicant will not disturb any seniority but would accord him monetary benefits, as he has been prevented from joining the post due to an illegal action of the respondents by illegally recording an adverse entry in the ACR.

8. In the result and having regard to the discussion made above, we are of the confirmed view that the adverse remarks recorded in the A.C.R. of the applicant pertaining to the period ending 31.3.91 are not legally sustainable and as such the same are expunged. The respondents are directed to delete the same from the A.C.R. of the applicant for the aforesaid period. They are further directed to consider the applicant for higher promotion as Senior Personnel Officer with effect from the date his junior Sh. C.K. Nair was considered in the DPC held on 29.8.91 and in that event the applicant would be entitled for monetary benefits and difference of salary with effect from the date of promotion till 30.11.93. The O.A. is allowed in the above terms and

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the direction to the respondents to implement the above directions within two months from the date of receipt of a copy of this order. No costs.

S. Raju
(Shanker Raju)
Member(J)

Shanta P
(Smt. Shanta Shastry)
Member(A)

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH: MUMBAI

BP No.58/2001 in
DA No.639/93
MA-755/2001

Mumbai this the 19th day of September, 2001.

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

Hon'ble Mr. Shanker Raju, Member (J)

Shiv Dutt

-Applicant

Vs.

Union of India & Others

-Respondents

ORDER BY CIRCULATION

HON'BLE MR. SHANKER RAJU, MEMBER (J):

By way of this R.P. the review applicant seeks review of our order dated 15.6.2001. The applicant has also filed an MP-755/2001 for condonation of delay in filing the present R.P. We have perused the reasons given for delay. We are not satisfied that the reasons are good enough to justify the delay. The MP is therefore, rejected.

We have also perused the review petition. We do not find any error apparent on the face of record or discovery of new material which was not available to the review applicant even after exercise of due diligence. The review applicant under the guise of the present R.P. is trying to re-argue the matter which is not permissible as held by the Apex Court in K.Ajit Babu & Ors. v. U.O.I. & Ors., JT 1997 (7) SC 24. The RP is dismissed, by circulation

S. Raju

(Shanker Raju)
Member (J)

Shanta Shastri

(Shanta Shastri)
Member (A)

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