

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NO:529/1995

DATE OF DECISION: 24-6-2004

H.P.Vohra Applicant

Shri S.V.Marne Advocate for
Applicants

V/s.

The Administrator of Dadra & Respondents
Nagar Haveli & ors.

Shri V.S.Masurkar Advocate for
Respondents

CORAM:

Hon'ble Shri V.K.Majotra, Vice Chairman
Hon'ble Shri S.G.Deshmukh, Member(J)

- (1) To be referred to the Reporter or not? ✓
(2) Whether it needs to be circulated to
other Benches of the Tribunal? ✓
(3) Library. ✓


(S.G.DESHMUKH
MEMBER(J)

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

Dated this the *Thursday* day of 24-6-2004

Coram: Hon'ble Mr.V.K.Majotra - Vice Chairman
Hon'ble Mr.S.G.Deshmukh - Member (J)

O.A.529 of 1995

H.P.Vohra,
Deputy Engineer,
P.W.D. Administration of Dadra
& Nagar Haveli at Silvassa.
(By Advocate Shri S.V.Marne) - Applicant

Versus

1. The Administrator of Dadra
& Nagar Haveli
Silvassa, Dadra & Nagar Haveli.
2. Mr.N.M.Parmar,
Executive Engineer,
Irrigation Division,
Silvassa,
Dadra & Nagar Haveli.
3. Mr.D.K.Waghela,
Executive Engineer (Building),
Silvassa, Dadra & Nagar Haveli.
(By Advocate Shri V.S.Masurkar) - Respondents.

O R D E R

(Per: S.G.Deshmukh, Member (J))

The present OA has been filed for quashing and setting aside order dated 24.3.1994 promoting respondent no.2 and 3 as Executive Engineers (Civil) in the Administration of Dadra and Nagar Haveli and for a direction to respondent no.1 to appoint the applicant as Executive Engineer (Civil). In the alternative the applicant has prayed for reconstituting DPC within a period of eight weeks for reviewing the three posts of Executive Engineers in the Administration of Dadra and Nagar Haveli without placing before such DPC for its consideration the ACRs reported by his competitor Mr.D.K.Waghela for the period 5.7.1982 to 31.3.1987; and by his competitor Mr.N.M.Parmar for the period 17.4.1987 to 31.3.1988.

2. The applicant's case is that he joined the Government service on 4.7.1988 as a Craft Supervisor. Thereafter he was appointed as Junior Engineer. In due course, on 4.10.1972, he was promoted as Deputy Engineer, on ad-hoc basis. On 29.12.1972, his promotion was regularised and he was made a permanent Deputy Engineer with retrospective effect from 4.10.1972. It is contended that from 4.10.1972 till today the applicant's service record was found satisfactory. It is contended that his service record was deliberately and malafidely spoiled by persons for the next promotion to the post of Executive Engineers and who were biased against him and were interested in deliberately spoiling his service record. It is also contended that no adverse entry has ever been communicated to the applicant. The applicant states that the period and details for which his ACRs have been communicated are as under -

S.No.	Period of ACR	Date of Communication	Name of R.Officer	Remarks
1.	1.4.75 to 31.3.76	30.12.78	I.R.Pathak	
2.	1.4.76 to 17.4.76	"	"	
3.	18.6.76 to 31.3.77	"	"	
4.	1.4.77 to 6.12.77	"	"	
5.	5.7.82 to 31.3.83	27.9.85	D.K.Waghela	Reported by
6.	1.4.83 to 31.3.84	"	"	his competi
7.	1.4.84 to 31.3.85	"	"	tor when he
8.	1.4.85 to 31.3.86	"	"	was ad-hoc EE.
9.	17.4.87 to 31.3.88	03.1.89	N.M.Parmar	Declared as illegal in OA 897/90 by CAT Bombay.

....3/-

It is contended that the applicant was due for crossing of Efficiency Bar on 1.8.1978 and for a second E.B.Clearance on 1.10.1983. However the administration did not grant the aforesaid clearance till 14.3.1983. The administration had wrongly and illegally promoted the applicant's junior Mr.N.M.parmar as EE on the basis of the recommendations of the DPC, whose constitution was illegal. The administration further illegally regularised the ad-hoc appointments of respondent no.3 and one Shri M.J.Joshi. The Administration also published wrong seniority list, combining Deputy Engineers, Assistant Surveyor of Works and Assistant Engineers. The applicant filed OA 485 of 1987 challenging the non-clearance of EB due on 1.10.1978 and 1.10.1983. The said OA was allowed on 1.10.1984. Against the said order, the respondents moved in SLP before the Hon'ble Supreme Court. Appeal was allowed and the judgment of the CAT was set aside and directions were given to the authorities to consider the applicant's case for crossing of Efficiency Bar in accordance with rules and make appropriate orders within a period of six months. The applicant had also filed OA 534/1987 challenging the promotion of one Shri N.M.Parmar as a regular Executive Engineer vide an order dated 30.4.1987. Another OA No.795 of 1987 was filed by the applicant challenging regularisation of ad-hoc promotions of Shri M.J.Joshi and Shri D.K.Waghela as EEs vide order dated 12.5.1987 w.e.f. 13.4.1982 and 6.8.1982 respectively. Against the order in the said OA, the respondents had moved in SLP before the Hon'ble Supreme Court. Both OAs 534/87 and 795/87 were allowed. The applicant had also

h/v challenged the joint seniority list of Deputy Engineers/Assistant

Engineers and Assistant Surveyor of Works published on 22.6.1989 in OA 558 of 1989. The said OA was allowed vide order dated 10.4.1992. The applicant further challenged the adverse remarks recorded in his ACR for the period 17.4.1987 to 31.3.1988 passed by Shri N.M.Parmar on the ground that they were passed by competitor by filing of OA 897 of 1990. Then again respondents had rejected the prayer for crossing of Efficiency Bar. The applicant challenged the same by filing OA 518 of 1994. Thus it is contended that the promotion of respondent no.2 Shri N.M.Parma and respondent no.3 Shri D.K.Waghela and one Shri M.J.Joshi were set aside by this Tribunal and were confirmed by the Hon'ble Supreme Court by dismissal of SLP. The three vacancies for the post of EEs which were created vide order dated 10.4.1992 passed in OA 534/87. The Administration was required to fill up these three vacancies by considering all the officers including the applicant who fell within the zone of consideration. It is contended that the respondents passed two orders viz. dated 18.8.1992 directing that Shri D.K.Waghela would hold the post of Executive Engineer (Civil) on ad-hoc basis until further orders and dated 23.9.1992 reverting Shri N.M.Parmar to the post of Deputy Engineer. It is contended that these orders were passed by the respondents to show the compliance of the order in OA 795/87 and 534/87, confirmed in SLP. No order was passed in respect of Shri M.J.Joshi who had retired in 1988 and expired prior to the decision in OA 795/87 and 534/87. It is contended

that the two posts occupied by S/Shri Joshi and Waghela were for the year 1982 and the post occupied by Shri Parmar was for the year 1986. The applicant was eligible to be considered for all these three vacancies arising in the years 1982 and 1986. It is contended that no fresh DPC was formulated till 10.8.1992. DPC was formulated only after the judgment of the CAT on 10.9.1002 by way of a notification. The matter of promotion of EEs was not put up for consideration before the DPC so formulated on 10.9.1992. The constitution of DPC was challenged vide order dated 20.5.1993. It is contended that one of the three vacant posts was filled up without putting up the matter before the DPC on 29.9.1993. One Shri Jacob Yohannan who was junior to the applicant and who was not within the zone of consideration either for the the two 1982 posts or 1986 post was declared promoted on the basis of the recommendation of the DPC which had met on 23.10.1990 i.e. three years ago, when OAs 534 and 795 of 1987 were still pending decision before CAT. Promotions of S/Shri Waghela, Joshi and Yohannan were not set aside but vacancy was created due to retirement of Shri Joshi in 1988. The then existing DPC met on 23.10.1990 to consider the filling in of the single vacancy. The said vacancy was carried forward to 1989 as in 1988 the applicant was the only candidate within the zone of consideration. The applicant submits that the assessment was kept in sealed cover. But the assessment of four other officers were considered and the name of Shri Jacob Yohannan was recommended by the then DPC. It is also contended that the names recommended by the DPC for Group 'A' posts can only be valid for

a period of one year and six months as per law governing the rules of service. In the circumstances, the recommendations of the DPC dated 23.10.1990 could not have been acted upon after 23.4.1992 without prejudice to the applicant. It is contended that it was necessary to fill all the three vacant posts in respect of the vacancies created due to the judgment in OAs 534/97 and 795.87. The Tribunal had directed the constitution of fresh selection Committee as soon as possible for consideration of cases for promotion before it in accordance with law. The order promoting Shri Jacob Yohannan is illegal and violative of existing service laws and violative of judgment and order of the Tribunal dated 10.4.1992 passed in OA 534 and OA 795/87 as confirmed by the Hon'ble Apex Court on 6.4.1998. It is contended that the applicant expressly reserves his right to challenge the appointment order of Shri Jacob Yohannan by a separate OA as the same would constitute a separate cause of action.

3. The respondents appeared and resisted the claim by filing counter affidavit. The respondents contended that confidential report for the period 1972 to 1982 were written by a person other than his competitor and reviewed by Colleter who is the Head of the Department. the post of EE is a selection post and promotion is to be considered on selection basis after assessment of service records of the officers within the zone of consideration. It is contended that the two posts of EEs fell vacant and the applicant was within the zone of consideration for selection

against these two vacancies. He was assessed "Not yet Fit" by the review DPC held on 18.1.1994. It is contended that the adverse remarks for the period 1.4.1975 to 31.3.1986 in the ACRs of the applicant were communicated to him. Representations made against these adverse remarks were considered by the appropriate authorities and rejected and the same have been communicated to him. It is contended that in accordance with the orders passed by the Hon'ble Supreme Court upholding the judgment of the Tribunal dated 10.4.1992 a review DPC was constituted vide Notification dated 20.5.1993 and DPC was convened on 18.1.1994 for consideration of promotions to the post of EEs. There were two vacancies for the year 1982 and one vacancy for the year 1986. It is contended that ad-hoc promotions were issued in compliance of the Tribunal's order dated 10.4.1992. All these posts were filled up in the year 1982 and 1986 upto the year 1992. The applicant was considered for promotion to the post of EE in the years 1982 and 1986, however, he has been assessed as "Not yet Fit" by the DPC. The DPC constituted vide notification dated 10.9.1992 was for ad-hoc recruitment and promotion to Group 'A' and 'B' posts and not regular promotion. Thus it is contended that the DPC constituted vide notification dated 10.9.1992 was not competent to consider his promotion. The DPC which met on 20.5.1992 was constituted in accordance with the instructions of the Central Government. The promotion of Shri Jacob Yohannan was against the vacancy for the year 1988. The applicant was considered for the vacancy of 1988 but his

assessment had been kept in sealed cover as departmental enquiry was pending against him. Vacancy was filled up by officiating promotion to Shri Jacob Yohannan. The departmental proceedings against the applicant are still pending. On conclusion of the enquiry, sealed cover will be opened. The applicant did not implead Shri Jacob Yohannan as party to the OA. Thus the OA is to be dismissed on ground of non-joinder of necessary party. It is contended that the DPC which met on 18.1.1994, considered the officials for promotion of two vacancies for the year 1982 and one vacancy for the year 1986 and recommended one Shri M.J.Joshi and Shri D.K.Waghela for regular promotion against the two vacancies and Shri N.M.Parmar against the vacancy for the year 1986. Shri M.J.Joshi retired on superannuation in the year 1988 and died thereafter. Thus it was meaningless to issue his promotion order in the year 1995. The vacancy due to retirement of Shri Joshi was filled up by subsequent DPC which is not challenged so far. It is contended that the promotion to the post of EE in respect of Shri Waghela and Shri Parmar are in accordance with the recommendations of the DPC. It is also contended that already promotion to the post of EE has been made in the year 1982 by an appropriate DPC and therefore Shri D.K.Waghela is senior to the applicant. The contention of the applicant that Shri Waghela is his competitor is not tenable. The applicant is not entitled to any relief and the OA deserves to be dismissed.

h/v

4. The Tribunal after hearing the parties had allowed the OA and its order dated 13.1.2002. The order dated 24.3.1994 passed by respondent no.1 promoting respondent nos.1 & 2 are quashed and respondent no.1 was directed to hold a review DPC in accordance with law, rules and the instructions considering the fact that the applicant be considered ignoring his ACRs for the period 17.4.1987 to 31.3.1988. It was also observed that the respondent no.1 was free to take into consideration the ACr for the said period, if subsequently recorded and if adverse, communicated to the applicant, the representation if any is decided. The exercise was to be completed within a period of three months from the date of receipt of a copy of the order.

5. The respondents and applicant had filed review petitions bearing nos.8/2002 and 44/02 for reviewing the order. The Review Petitions were allowed and the order in the OA was set aside. The OA was listed for hearing.

6. Heard Shri S.V. Marne, learned counsel for the applicant and Shri V.S.Masurkar learned counsel for the respondents. The learned counsel for the applicant submitted that the constitution of the DPC formulated vide order dated 28.5.1993 was itself illegal and thuse the recommendation made by the Committee cannot be acted upon. The learned counsel also submitted that the ACRs

WV for the concerned period were written by Shri D.K.Waghela who was

.....10/-

the competitor of the applicant and thus those ACRs ought not to have been taken into consideration by the DPC. The learned counsel relied on the decision in the cases of **Dr.S.P.Kapoor Vs. State of Himachal Pradesh and others**, AIR 1981 SC 2191 and **Shri Kishore Chandra Pattanayak Vs. Shri R.N.Das, I.A.S.** 1987 (4) AISLJ 414.

7. On the other hand learned counsel Shri V.S.Masurkar submitted that the DPC was constituted as per rules and there is no illegality in the constitution of DPC in question. he also submitted that Shri D.K.Waghela who had written the ACRs of the applicant was already promoted to the post of Executive Engineer. Thus he was well competent to write the ACRs of the applicant.

8. A statement showing the names of Reporting Officer and Reviewing Officer in respect of the confidential report of the applicant is brought on record at paged 125. It is apparent from Exhibit R-1 at page 125 that confidential report for the year 5.7.1982 to 31.3.1983, 1.4.1983 to 30.3.1984, 1984 -1985, 1985 1986 and 1986-1987 were written by Shri Waghela, EE and the confidential report for the year 1987-1988 was written by Shri N.M.Parmar, EE. The Reviewing Officers were different Collectors. It is apparent from the record that the applicant had challenged the order dated 12.5.1987 regularising the ad-hoc promotion of one Shri M.J.Joshi, EE, PWD Division-II and of Shri

.....11/-

:: 11 ::

D.K.Waghela, EE, PWD Division - I by filing OA 795/87. Till 12.5.1987, Shri Waghela was working as EE on ad-hoc basis from 6.8.1982. His promotion was regularised as EE by order dated 12.5.1987. Thus it is apparent that from 1982 to 1987 Shri Waghela was working as EE on ad-hoc basis. It is true that his promotion was regularised since the date 6.8.1982 vide order dated 12.5.1987 but fact remains that till the order dated 12.5.1987, Shri Waghela was working as EE on ad-hoc basis from 6.8.1982. The CRs from 1982 to 1987 were written by Shri Waghela when he was working as EE on ad-hoc basis. His promotion was regularised vide order dated 12.5.1987. Thus when he wrote the confidential report of the applicant he was working as ad-hoc EE only. That means he was holding the regular post of Deputy Engineer when he wrote the ACR of the applicant. The applicant was also working as Deputy Engineer at that time. Shri Waghela was an aspirant for promotion to the higher post of EE. He was promoted to the post of EE on regular basis on 12.5.1987 only. The present applicant was also within the zone of consideration for promotion to the post of EE at that time. Shri Waghela was regularised as EE for the vacancy of 1982 when the applicant was also one of the aspirants and competitors of Shri Waghela.

9. In S.P.Kapoor's case (supra) their Lordships of the Apex Court have held that the DPC taking into consideration the confidential report written by one who is himself a candidate was

.....12/-

not fair. In the instant case Shri Waghela who wrote the confidential report of the applicant was himself a candidate for promotion to the post of EE in the year 1982. Thus the consideration of confidential report written by Shri D.K.Waghela will be unfair. As the confidential report was written by Shri Waghela who was an aspirant along with the applicant, those ACRs ought not to have been taken into consideration for fresh promotion. Shri Waghela was one of the competitor with the applicant at the relevant time for the post of EE and therefore it would not have been fair for the DPC to take into account the annual confidential report made by Shri Waghela and also by Shri Parmar who was also one of the competitors, though the confidential report might have been reviewed by higher authorities. It will be pertinent to mention here that the adverse remarks recorded by Shri N.M.Parma for the year 1987-88 have been expunged vide order in OA 897/90. In the case of Kishore Chandra Pattanayak (supra) their Lordships of the Apex Court held that the adverse remarks recorded in the ACRs by an officer of the same rank cannot be taken into consideration as officer of the same rank is incompetent.

10. The DPC was reconstituted as per Notification dated 20.5.1993 which is brought on record at page 83 of the Paper Book. The Superintending Engineer, PWD, Daman was the fifth Member of the DPC for making recommendation for promotion to Group "A" posts under the Administration of Dadra and Nagar

Haveli, Silvassa. DPC meeting was held on 18.1.1994. The minutes of the DPC held on 18.1.1994 are on record with the R.P.8/2002 at page 18. One Shri J.G.Rana, Superintending Engineer, PWD, Daman was one of the Members of the said DPC who took part in the meeting in question. The learned counsel for the applicant brought to our notice that Shri Rana who was one of the Members of the DPC in question was regularised as EE vide order dated 17.8.1994. The order in question is brought on record at page 114 of the Paper Book. On perusal of the order it reveals that Shri Rana was regularised as EE on 17.1.1994 w.e.f. 17.9.1985. That shows that before the order dated 17.1.1994, Shri Rana was working as EE on ad-hoc basis. He was regularised as EE vide order dated 17.1.1994 w.e.f. 17.9.1985. In judgment of OAs 795/1987 and 534/1987 dated 10.4.1992, at page 49 of the Paper Book, it is referred that the persons who are one step over the post in which promotion was to be made as required under Rule 4 of the Government of India, Cabinet Secretariat Memo No.22011/6/75-Estt dated 30.12.1976 of even No.dated 11.1.1972 are required to be appointed as Members of the DPC. Thus DPC was required to be constituted by persons who were one step above the post as required under Rule 4 of Government of India, Cabinet Secretariate Memo dated 30.12.1976. One of the Members viz. Shri Rana was promoted as EE on 17.1.1994 w.e.f. 17.9.1985. Thus he was working as EE on ad-hoc basis before his promotion order dated 17.1.1994. He was not Superintending Engineer. The DPC meeting was held on 18.1.1994 for selection of officers for

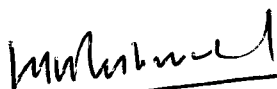
officiating promotion to the Grade of EE (Civil) in Dadra and Nagar Haveli. When Shri Rana acted as one of the members of the DPC he was EE and DPC was to consider the selection for the post of EE only. We have mentioned that the Members included in the DPC for Group 'A' posts should be officers, one step above the post of promotion or confirmation has to be made as Shri Rana who was working as EE on 18.1.1994. The DPC cannot be said to have been constituted illegally when the DPC was not duly constituted. It included Members like Shri Rana who legally could not have been included for selection to the post of EEs. Shri Rana being EE was in the same scale of pay. As such he could not have been appointed as Member of the DPC. If the DPC not duly constituted included one of the Members who is not qualified as Member, the constitution becomes illegal and the recommendation made by such DPC also becomes illegal. As the constitution of the Committee itself is illegal, the recommendation made by the DPC cannot be acted upon. The constitution of the Committee is illegal. It goes to the very root of the matter and consequently the selection made by such a DPC cannot stand.

11. In the result the OA is allowed. The orders dated 24.3.1994 passed by respondent no.1 promoting respondent no.2 and 3 as Executive Engineers (Civil) are hereby quashed. The Respondent no.1 is directed to constitute a fresh DPC which will consider the case of promotion and regularisation of the

....15/-

:: 15 ::

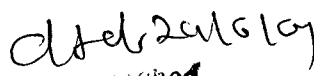
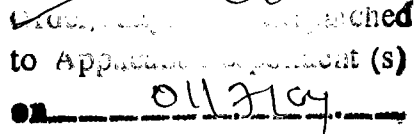
candidates before it in accordance with rules and law ignoring the ACRs of the applicant for the period 1982 to 1987 and 1987-88. The Respondent no.1 is free to take into consideration the ACR for the said period, if subsequently recorded and if adverse, communicated to the applicant and representation if any is decided. The said exercise is to be completed within a period of four months from the date of receipt of a copy of this order. No order as to costs.


(S.G. Deshmukh)
Member (J)


(V.K. Majotra)
Vice Chairman

24-6-04.

mf


✓  to Appellate Tribunal (s)
on 01/7/04