

Date of order: 22.12.1999

OA No.353/1994

Baldev Raj Chhabra S/o Shri Bahali Ram Chhabra presently employed as Sr. PA (G) in the office of the G.M.(East) under CGMT Rajasthan Telecom Circle, Sardar Patel Marg, C-Scheme, Jaipur.

.. Applicant

Versus

1. Union of India through the Secretary, Department of Telecommunication, Ministry of Communications, New Delhi.
2. The Chief General Manager, Rajasthan Telecom Circle, Sardar Patel Marg, C-Scheme, Jaipur - 302 008.
3. Shri P.P.Sharma, Sr. PA to GMTD, Jaipur.
4. Shri I.R.Parnami, Sr. PA to General Manager (Development), Office of the CGMT Rajasthan, Sardar Patel Marg, Jaipur.

.. Respondents

Mr. Shiv Kumar, counsel for the applicant

Mr.U.D.Sharma, counsel for the respondents

CORAM:

Hon'ble Mr. S.K.Agarwal, Judicial Member

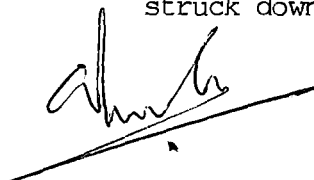
Hon'ble Mr. N.P.Nawani, Administrative Member

ORDER

Per Hon'ble Mr. N.P.Nawani, Administrative Member

In this Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant prays for the following reliefs:

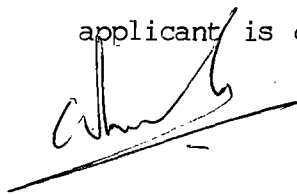
"(i) That the para 3 read with para 2.1.4 of OM dated 4.9.90 (Annexure A-9) regarding average performance may be declared as self contradictory, against the rules of communication of adverse entries, ultravires the Art. 14 of Constitution of India and the same may be struck down.



(ii) That the respondents may be directed to consider the case of promotion to the post of Sr. PA(G) in pay scale 2000-3200 at par with his juniors by reckoning his grade as one grade higher than earned by him on the promotional post and neglecting the uncommunicated adverse entries and allow all consequential benefits. The impugned order annexure A-1 may be modified accordingly.

(iii) That the impugned order dated 21.12.94 annexure A-10 ordering the applicant's reversion from the post of Sr. PA(G) of pay scale 2000-3200 to the post of Steno Grade-I of pay scale Rs. 2000-2900 may be declared illegal and the same may be quashed."

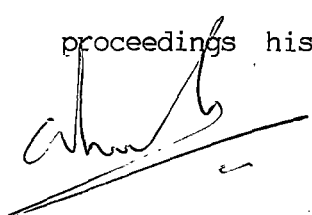
2. Facts, as stated by the applicant, are that he was initially appointed as Time Scale Clerk in 1962, then regularly promoted on the post of Steno Gr.I w.e.f. 17.1.1994 (Ann.A2) although he has already officiated as Sr.PA (G) (for short, SPA) in the scale of Rs. 2000-3200 (Ann.A3) and he is still officiating as SPA. It is also stated that he is senior to respondent No.3 and respondent No.4 (for short, R3 and R4) who are at Sl. No. 5 and 6 whereas he is at Sl.No.3 in the seniority list page No.1, circulated in 1983 (Ann.A4), the position is also reflected in the letter of confirmation (Ann.A4/1). The Recruitment Rules (for short, RRs) for the post of SPA in Rs. 2000-3200 have been notified vide order dated 30.5.1988 (Ann.A5). Vide order dated 15.4.1994 (Ann.A6) the cadre of Sr. PA has been declared as Circle cadre and the post is to be filled up by constituting a DPC with CGM as Chairman and other JAG officers as Members. The applicant was in the zone of consideration for promotion against the vacancy of SPA due to upgradation. The applicant has come to know that his junior R4 has been officiating on temporary basis on SPA vide order dated 10.8.1992 (Ann.A7) and R4 has now been ordered to be promoted to the post of SPA in the scale of Rs. 2000-3200 after the recommendation of the DPC vide impugned order dated 15.7.1994 with no mention about non-consideration or non-promotion of the applicant and he has been superceded. That the applicant is commending a clear record is clear from the fact that he was



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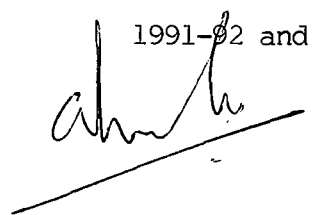
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recently promoted on regular basis to the post of PA Grade-I in the scale Rs. 1640-2900 on the recommendation of DPC on 17.1.1994. There has been no adverse remarks against the applicant since his entry in service till date. Thereafter the applicant submitted a representation dated 25.7.1994 (Ann.A8) and also sought interview with respondent No.2 whereupon he was told to keep quiet, be satisfied and even threatened that he will be immediately reverted and transferred out of Jaipur. While his case was neglected and extended special favour to R4. The applicant is said to have earned average entries during the year under consideration, 1991-92 and 1992-93. During this period, he has been officiating on the promotion post and discharging his duties satisfactorily and as per the decision of the Full Bench of the CAT, Hyderabad reported in (1992) 19 ATC 571, it has been held that when a person is officiating in higher grade, he should be assessed one grade higher than the grade earned by him for considering his promotion. The applicant ought to have, therefore, assessed as 'Good' but this has not been done. It has also been stated that the para 2.1.4 of OM dated 4.5.1990 Ann.A9 (sic DOPT OM dated 10.3.1989 Ann.R1) provides that "average entry may not be taken as adverse." On the other hand, it provides that "it is only performance that is above average and performance that is really noteworthy which shall entitle an officer with recognition and suitable remarks in the matter of promotion." Briefly stated the applicant goes on to say that since average entry has adverse effect, it should be taken as adverse entry and process of communication etc. of the same should be adopted and such average entries have been used against the applicant to declare him "not yet fit". It has also been stated that the applicant has been now, without serving any show-cause notice, reverted vide order dated 21.12.1994 (Ann.A12) (mentioned but not enclosed) from the post of SPA (Rs. 2000-3200) to that of Steno Grade-I (Rs. 1640-2900). The applicant has contended that promotion is a fundamental right and his non-promotion has violated Article 16 of the Constitution; that PA(G) is a non-selection post and in the absence of communication of any adverse remarks/disciplinary proceedings his supersession is illegal and arbitrary; that applicant



having officiated in the post of SPA, the average entry should have been upgraded to Good and that para 3 read with para 2.1.4 of the above referred OM is self contradictory and deserves to be struck down being violative of Article 14 of the Constitution of India.

3. In reply, contesting the case, the respondents have stated that while holding the post of Steno Grade-II, the applicant had been given promotion on purely local officiating and ad hoc basis to the post of SPA till further orders on 9.4.1991 and there were no Steno Grade-I available and the applicant being the seniormost Steno Grade-II with requisite 7 years of service, he was given the aforesaid officiating ad hoc promotion. Subsequently while holding the post of SPA on such officiating ad hoc basis and having become eligible for regular promotion, he was promoted to Steno Grade-I w.e.f. 17.1.1994 and he is still officiating as such against the post reserved for Scheduled Caste community as no eligible SC candidate is available. In the meantime, the promotion of SPA which was on centralised basis was changed to circle cadre basis w.e.f. 15.4.1994 on the basis of representation made by effected officers and the Unions. However, the RRs were required to be suitably modified, it was decided that in the meantime, the post may be filled up on the circle level by the CGM on the recommendations of a DPC. As the applicant was already officiating as SPA w.e.f. 9.4.1991, when another vacancy occurred Shri I.R.Parnami, his next junior, was given similar promotion on 18.8.1992. As regards the meeting of the DPC held on 14.7.1994 for considering promotion of Steno Grade-II (Rs. 1400-2600) to SPA (Gazetted - Rs. 2000-3200), it has been stated that the DPC has duly considered the cases of the applicant and respondents No. 4 and 5 (private respondents Shri P.P.Sharma and Shri I.R.Parnami as per amended OA) who were junior to him, in accordance with the provisions of the RRs as also on the basis of the guidelines issued by the DOPT in their OM dated 10.3.1989 and after considering the overall service records, it was observed that the applicant "has earned average entries during the year 1991-92 and 1992-93 have therefore gone through the complete details of CRs



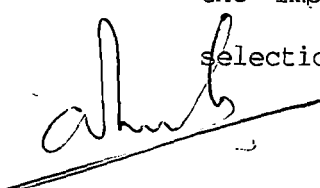
for last 5 years and concluded that the applicant was not yet fit and accordingly declared the name of S/Sri P.P.Sharma and I.R.Parnami fit for promotion to the post of SPA on ad hoc basis till RRs are modified by the Telecom Directorate". It has also been stated that the process of selection for the post of SPA has to be more rigorous than that of Steno Grade-I and simply because somebody has been regularly selected for Steno Grade-I does not mean that he is fit for promotion to the post of SPA also. It cannot also be said that simply because the applicant has no adverse entries, he was fit for promotion notwithstanding the comparative assessment of the eligible candidates made by the DPC on the basis of their overall service record. The official respondents have also stated that they deny false, malicious, concocted and pre-posterous allegations made by the applicant against the official respondents which is also borne out by the fact that the official respondents ^{having ch...} being allowed the applicant to continue to hold the post of SPA against a vacancy for SC candidate. Finally, it has been contended that even for consideration for non-selection post, the cases of eligible officers are considered by the DPC and the official who is not found fit for promotion by the DPC cannot be given promotion.

4. We have heard the learned counsel for the opposite parties and have carefully perused the records.

5. It is proposed to frame following 3 issues in order to decide this Original Application:

i) Whether there is any self contradiction between para 3 and para 2.1.4 in the DOPT OM dated 10.3.1989 meaning thereby whether para 2.1.4 should be excluded from the parameters of para 3.

(ii) Whether a grading of 'average' in the confidential rolls should be treated as 'adverse' and should be communicated. Also what is the impact of a 'average' grading when promotion to a non-selection post is involved.



(iii) Whether an officer who has been officiating for a long time in the higher post to which he is being considered for promotion and who has obtained a grading of 'average' should be entitled to have his grading upgraded to 'good'.

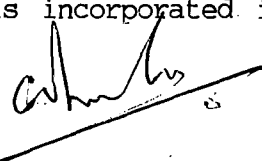
As regards the first issue, it would be useful to extract para 2.1.4 and para 3 from the OM No.F.22011/5/86-Estt (D) dated 10.3.1989 issued by the DOPT in the Ministry of Personnel etc.

"2.1.4 Government also desires to clear the misconception about 'Average' performance. While 'Average' may not be taken as an 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 noteworthy which should entitle an officer to recognition and suitable rewards in the matter of promotion."

"3. Non-Selection Method:

Where the promotions are to be made on 'non-selection' basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as 'fit' or 'not yet fit' for promotion on the basis of assessment of their record of service. While considering an officer 'fit', guidelines in para 2.1.4 should be borne in mind. The officers categorised as 'fit' should be placed in the panel in the order of their seniority in the grade from which promotions are to be made."

The contention of the learned counsel for the applicant during the arguments was that in case of non-selection promotion, the method of which is incorporated in para 3, para 2.1.4 should not apply and there should



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have been no application of the guidelines in para 2.1.4 in para 3 and such linkage between these two paragraphs is ultra vires of Article 14 of the Constitution of India and is liable to be struck down. The learned counsel for respondents, on the other hand, vehemently opposed this and stated that this has been a time tested procedure, not declared ultra vires of the provisions of the Constitution of India in any Court/Tribunal and is fully justified to ensure a minimum level of efficiency amongst officers of a higher level post like that of SPA working with the senior officers of the department in the level of Junior Administrative Grade and enjoying the gazetted status, even if the process of promotion is non selection. We have carefully considered the views. According to para 3 of the OM which applies to the non-selection method, DPC is not required to make a comparative assessment of the records of the officers and should categorise the officer as fit or not yet fit for promotion on assessment of their record of service. It goes on to add that while considering an officer fit, guidelines in para 2.1.4 should be borne in mind. Para 2.1.4 seeks to clear the misconception that existed about 'average performance'. It states that whereas average grading may not be taken as adverse remark, at the same time it cannot be regarded as complimentary to the officer as average performance should be regarded as routine and undistinguished (emphasis supplied). Before we proceed further, it is necessary to appreciate that the officers working for the governments and being paid from the public exchequer a decent amount as salary and allowances are in return expected to provide a minimum modicum of service to the people for which a minimum standard of efficiency is a must. When for higher posts the process of comparative assessment is adopted, an officer having average grading(s) may, in a large number of cases may not come into the selected panel because generally in the zone of consideration there will be officers with many 'good', 'very good' and sometimes 'outstanding' gradings. This does not mean that in the case of procedure adopted for promotion in respect of non-selection posts, a minimum level of efficiency should be given^a go-bye. It has to be appreciated that the public in general is not satisfied with the level of efficiency they encounter when they interact with the public



servants. We feel that it must have been against such a background, that Government of India in the Ministry of Personnel etc. and the Department of Personnel and Training must have considered it desirable to add under para 3 the sentence "while considering an officer fit, guidelines in para 2.1.4 should be borne in mind". The fact that these guidelines ^{having been} ~~being~~ stood time tested ^{for} more than a decade and these guidelines have not ~~been~~ struck down as unconstitutional by any Court/Tribunal over all this long period, is also ~~an~~ important factor and we, therefore, hold ~~that~~ there is no self contradiction between para 3 read with para 2.1.4 of the OM dated 10.3.1989 issued by the DOPT.

The second issue ~~which~~ has partly ~~been covered~~ by the analysis in the preceding paragraph. The guidelines in para 2.1.4 itself makes it abundantly clear that 'average' grading should not be taken as adverse remarks, this being a case where there is no necessity for communicating the average grading to the concerned officer. The learned counsel for the applicant cited certain cases in support of his contention. In 1997 SCC (L&S) 909, Swatantae Singh Vs. State of Haryana and Ors., the Apex Court had gone into various aspects of Confidential Reports and had, inter alia, held that the remarks made in the Confidential Reports of the petitioner were not vague without any opportunity. In fact, the Apex Court had an occasion to observe that "the efficiency in public service would improve only when the public servant devotes his sincere and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post" This ruling, therefore, does not help the applicant in any manner. In 1996 SCC (L&S) 519, U.P. Jal Nigam and Ors. Vs. Prabhat Chand Jain and Ors, the Apex Court was looking at the effect on down grading the entry and, therefore, facts and circumstances of this case are distinguishable. In 1996 (34) ATC 43, Girija Shankar Misra Vs. Union of India and Ors., the Cuttack Bench of this Tribunal had examined the question in relation to Indian Postal Service where the benchmark grading of 'very good' is to be considered as adverse. In the present OA there is no benchmark grading and, therefore, the decision made

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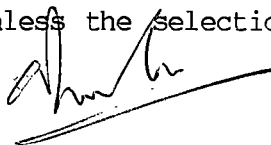
in that case has no relevance to the contentions of the applicant. On the other hand, the learned counsel for the respondents has cited a Full Bench Judgment of this Tribunal in the case of V. Pallamraju Vs. Union of India and Ors. reported in (1995) 31 ATC 361 in which it has been held that entry of 'average' is not an adverse remark, need not be communicated can be looked into by the DPC for determining suitability for promotion to a selection as well as non selection post.

As regard the third issue the learned counsel for the applicant cited the Full Bench decision of this Tribunal in S.S. Sambhus Vs. Union of India and Ors. reported in (1992) 19 ATC 571. In this case, the Full Bench was looking at whether applicants were officiating in Class-I post of Assistant Surveyor Grade, for some technical problems for one or two days. The grading of 'good' for applicant was taken as lower than grading of 'very good/outstanding' by the respondents. It was held that if a person is discharging higher responsibilities satisfactorily and is also allowed to cross EB in the higher post, it is unjust to ignore that fact as it clearly furnishes of the evidence of the merit and the suitability of that person to discharge higher duties in comparison to those who have yet to show their performance. This ruling is not applicable to the present case because that case related to promotion by selection with the modality of comparative assessment and the question discussed was comparative valuation between 'good' in respect of an officer already working in the higher post and having already crossed the Efficiency Bar in the higher post and 'very good' in respect of officers who had yet to show their performance. On the other hand, the respondents clarified that such an upgradation is limited to only 'good' and 'very good' gradings obtained by an officer who has been officiating in the higher (promotion) post and is not applicable in cases where an officer obtained 'average' grading. We notice from para 2.2.1 (d) of the OM of 10.3.1989 that "where an officer is officiating in the next higher grade and has earned CR in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance

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but no extra weightage may be given merely on the ground that he has been officiating in the higher grade". The item (d) is included under the heading GUIDELINES FOR DPCs-CONFIDENTIAL REPORTS. It is numbered 2.2.1 whereas the guidelines for selection method are under paragraph numbers as 2.1.1. It appears quite clear to us that the guidelines under Confidential Rolls are to be followed by each DPC and there are no separate guidelines on Confidential Reports for promotion to posts carrying different pay scales or promotion to selection/non-selection posts. In view of this, we feel that no extra weightage can be given merely on the ground that the applicant was officiating in the higher grade and his 'average' grading could not be upgraded to that of 'good'.

6. In any case, we find from the minutes of the DPC dated 14.7.1994 that it has recommended the name of S/Shri P.P.Sharma and I.R.Parnami for promotion to the post of SPA purely on ad hoc basis till the RRs are modified by the Telecom Directorate. The respondents have stated that the applicant continues to remain in the post of SPA on ad hoc officiating basis by adjusting him against the vacancy of a reserved post for SC community and even though the applicant has averred that the respondents have now passed an order of reversion dated 21.12.1994 ordering the applicant's reversion from the post of SPA to that of Steno Grade-I and has also mentioned that a copy of the order is annexed at Ann.A12, We do not find any Ann.A12 with the Original or the amended application. We, therefore, have no option but to believe the submission of the respondents that the applicant has not been reverted and continues to hold the post of SPA on ad hoc officiating basis and since the DPC dated 14.7.1994 has also recommended S/Shri P.P.Sharma and I.R.Parnami for promotion purely on ad hoc basis, even on that count, the applicant does not seem to have suffered any injury. The learned counsel for the respondents have drawn our attention to the case of Mrs. Anil Katiyar Vs. Union of India and Ors. reported in 1997 (1) SLR 153 wherein Hon'ble the Supreme Court of India had held that court cannot sit in judgment over the selection made by the DPC unless the selection is vitiated by malafide or is arbitrary. There is no



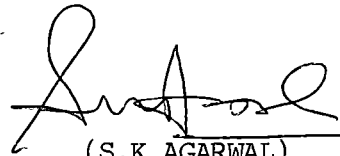
averment in the present OA that the DPC had acted in a malafide or in arbitrary way. We, therefore do not propose to go into the recommendations made by the DPC in this regard.

7. In view of above discussions, we find no justification to interfere with the proceedings of the Departmental Promotion Committee dated 14.7.1994 chaired by the Chief General Manager, Rajasthan Telecom Circle, Jaipur and the Original Application is accordingly dismissed with no order as to costs.



(N.P.NAWANI)

Adm. Member



(S.K.AGARWAL)

Judl.Member