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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR

Date of order: 10-1-1997

OA No. 9/1995 (OA No.632/92)

Sugan Chandra Jain S/o Shri Nemi Chand Jain, aged about 55 years, resident of P-453, Haldighati Lines, Jaipur at present employed on the post of Additional Chief Engineer, C/o Chief Engineer, Jaipur Zone, Jaipur.

.. Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, South Block, DHQ P.O., New Delhi- 110 011.
2. The Engineer-in Chief, Army Headquarters, New Delhi- 110 011.
3. The Commandant, College of Military Engineering, Dapodi, Pune.
4. The Secretary, Union Public Service Commission, Dhoolpur House, Shahjahan Road, New Delhi- 110 011.
5. Shri P.S.Paryani, C.E., Chief Engineer (P) E&D, Secunderabad (AF).
6. Shri S.S.Gulati, CE, E-in-C's Branch, Army Headquarters, DHQ P.O., New Delhi- 110 011.
7. Shri I.Vishwanathan, ACE, E-in-C's Branch, Army Headquarters, DHQ P.O., New Delhi.
8. Shri R.C.Parate, ACE, E-in-C's Branch, Army Headquarters, DHQ P.O., New Delhi.
9. Shri S.H.Gupta, ACE, Chief Engineer, Udhampur Zone, Udhampur.
10. Shri F.D.Ihadtare, ACE, Chief Engineer (IW), Colaba, Bombay.
11. Shri T.H.Sukumaran, ACE, Chief Engineer, Madras Zone, Island Ground, Madras.
12. Shri Pooran Mal, ACE, E-in-C's Branch, Army Headquarters, DHQ P.O., New Delhi.
13. Shri M.H.Chitkara, ACE. ACE (Liaison), Navy, Vizag, Vishakhapatnam.

.. Respondents

Applicant present in person

Mr. K.N.Shrimal, counsel and

Mr. Sukhjinder Singh, Executive Engineer, Department Representative, for the respondents.

CORAM:

Hon'ble Mr. O.P.Sharma, Administrative Member

Hon'ble Mr. Patan Prakash, Judicial Member

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ORDER

Per Hon'ble Mr. O.P.Sharma, Administrative Member

In this application under Section 19 of the Administrative Tribunals Act, 1985 Shri S.C.Jain has prayed that the panels for promotion of Superintending Engineers to the grade of Additional Chief Engineers dated 30-5-91 and 27-4-92 may be quashed and the respondents may be directed to hold a review DEC meeting for the years 1990 and 1991, after correctly taking into consideration the vacancies of each of these years and to prepare fresh select panels for each of these years, in order to consider the claim of the applicant for promotion in 1990/1991. He has further prayed that he may be granted all consequential benefits including his seniority in the post of Additional Chief Engineer.

2. The facts of the case as stated by the applicant are that at the time of filing the application in June, 92 before the Bombay Bench of the Tribunal, the applicant was working as Superintending Engineer in the office of respondent No.3, the Commandant, College of Military Engineering, Pune. The applicant had initially joined the Military Engineering Services (MES) as Superitendent on 17-11-61 but thereafter he was directly appointed as Assistant Executive Engineer, a Group-A post in MES, against a direct recruit vacancy, w.e.f. 13-3-63, through selection by the Union Public Service Commission (UPSC). The applicant was promoted as Executive Engineer w.e.f. 31-1-77 and as Superitending Engineer (SG) w.e.f. 10-1-86. The next promotion is to the post of Additional Chief Engineer. He has excellent service record and had attended prestigious courses in various institutions. In All India Seniority List of Superintending Engineers issued on 12-4-90, the applicant's name figured at Sl.No. 17. On the basis of the above seniority list, respondents Nos. 1 and 2 had issued a panel for the year 1990 for promotion to the grade of Additional Chief Engineer vide letter dated 30-5-91 (Ann.A1). In this panel officers listed at Sl.Nos. 8,12,13,14,15 and 16 in the seniority list were included. The

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applicant's name being at Sl. No. 17 was not included in the select panel for the year 1990. The panel was formed only for filling up six vacancies of Additional Chief Engineer although there were ten vacancies available in 1990. The applicant submitted a representation dated 27-7-91 (Ann.A4) to respondent No.2, the Engineer-in-Chief, Army Headquarters, New Delhi giving details of ten vacancies which were available according to him for the year 1990 and for which the DPC should have prepared the select panel. Had the DPC prepared a panel for filling up all these ten vacancies, the applicant's name would have figured in the select list. The applicant's representation evoked no response from the respondents despite a reminder sent on 9-3-92 (Ann.A5). His Annual Confidential Reports (ACRs) for the entire period of his service have been without any adverse comments and, on the other hand, he had very good/excellent ACRs due to which he had superseded a few officers in the matter of his promotion as Executive Engineer and Superintending Engineer. He has not been informed about any shortcoming in his work/conduct. He does not understand how the DPC has excluded his name from the panel dated 30-5-91.

3. Further case of the applicant is that respondent No.2 issued another panel for promotion to the post of Additional Chief Engineer vide letter dated 27-4-92 (Ann.A2), wherein nine officers, all junior to the applicant have been included, thereby superseding the applicant. Respondents Nos. 1 and 2 have thus discriminated against the applicant in the matter of his being considered for promotion and being promoted to the post of Additional Chief Engineer.

4. The respondents in their reply have stated that there were only six vacancies for the year 1990-91 and not ten as averred by the applicant. They have given a detailed explanation in paras 6,8 and 14 of their reply how the number of vacancies has been determined at six for the year 1990-91. Regarding the persons junior to the applicant having been promoted by virtue of the panel dated 27-4-92 (Ann.A2), the respondents have contended that the post of Additional Chief Engineer

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is a selection post for which criterion is seniority-cum-merit. Though the applicant was duly considered for promotion, his grading obviously was not as good as that of other who were selected. Promotion has to be granted on the basis of assessment made by the DPC on the basis of ACFs which were the basic input for consideration by the DPC.

5. The applicant has filed a rejoinder to the reply filed by the respondents wherein he has given a detailed calculation of his own, showing that ten vacancies of Additional Chief Engineer has arisen during the year 1990 and therefore panel should have been formed for ten vacancies. Had there been ten vacancies, the applicant would have figured in the select panel and also in the order granting promotion.

6. The case was argued by the applicant himself. He stated that in the reply filed by the respondents they had stated that there were 6 vacancies for the year 1990-91. If vacancies were to be determined on the basis of the financial year and not calendar year the number of vacancies would not be six even according to the respondents but these would be more. He added that it was not clear which of the ACFs of the applicant had been seen by the DPC while preparing the select panel Ann.A2 dated 27-4-92 in which the applicant's name was not included. Further, if there was any down-gradation in the assessment of the performance of the applicant in the ACFs for subsequent year, compared to the assessment made in the earlier years, the authorities were required to communicate to the applicant the deficiencies in his performance, in view of the judgment of the Hon'ble Supreme Court in U.P. Jal Nigam and Ors. Vs. Prabhat Chandra Jain and Ors., JT 1996 (1) SC 641. No such opportunity was, however, given to him. Therefore, formation of the select panel after taking into account the ACFs in which his performance had been down-graded compared to that recorded in earlier ACFs, was not justified. He also draw attention to item No. 2 of the general instructions for filling up the ACF forms in MES which reads as follows:

"2. The objective of this form is to develop the officer and make him/her realise his/her true potential. It is not meant to be a

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fault finding process. Reporting Officer should not shy away from reporting shortcomings in performance, attitudes or overall personality of the officer reported upon."

His contention was that in view of these instructions also, the respondents were required to communicate to the applicant if there was any deterioration in his performance compared to that for an earlier year, even though the remarks may not be adverse in nature. Finally, he argued that while the DPC is required to see ACF of a number of years but the ACF of the last year has particular importance. His understanding was that last ACF was outstanding and therefore he should have been included in the select panel dated 27-4-92 in which persons junior to the applicant were included.

7. The learned counsel for the respondents Shri E.N.Shrimal and the departmental representative Shri Shihjinder Singh stated during their arguments that although in the reply it had been stated that six vacancies were determined for the year 1990-91, in fact the vacancies determined were for the calendar year 1990 because till then the DPC was required to be held on the basis of vacancies determined on the calendar year basis. It was from the subsequent year that the procedure for holding of the DPC was changed and vacancies were required to be determined on the financial year basis. Therefore, the subsequent DPC held which prepared the select panel dated 27-4-92 took into account the vacancies from 1-1-91 to 31-3-92. They produced the original records before us to show that the earlier recruitment year for which vacancies were determined was 1990 and not 1990-91. This was sought to be established on the basis of communication sent to the UPSC on 27-11-89 in which the year of recruitment was described as 1990 and number of vacancies were shown at six. They also explained how the respondents had determined the vacancies at six. They produced before us the DPC proceedings with regard to both the select panels, one dated 30th May, 1991 (Ann.A1) for filling up six vacancies of the calendar year 1990 and the other dated 27-4-92 (Ann.A2) for filling up nine vacancies of the year 1991-92. They also produced the ACFs of the applicant for

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perusal of the Tribunal. They argued that on the basis of the principle of seniority-cum-merit, the applicant's name had not been included in the select panel dated 27.4.92 for filling up vacancies of 1991-92. As regards exclusion of the applicant's name from the select panel dated 30th May, 91 for filling up of vacancies for the year 1990, the applicant's ranking would have justified his inclusion in the panel, had the number of vacancies been more than six, but since the number of vacancies were only six the applicant's name was not included in the said panel. They concluded that since more meritorious candidates had been included in the select panel dated 27-4-92, it could not be said that there was any supersession of the applicant in the matter of his promotion.

8. We have heard the applicant, the learned counsel for the respondents and the departmental representative and have perused the material on record as also the original records produced before us during the hearing.

9. Basically, there are two issues in this OA. One is regarding determination of vacancies for the year 1990 and the related question is whether the vacancies were determined for the calendar year 1990 or for the year 1990-91. The second issue is regarding the applicant's not being included in the select panel dated 27-4-92 and inclusion of his juniors in the said select panel.

10. As regards the first issue, it is no doubt true that in their reply the respondents have themselves mentioned that the number of vacancies determined was six for the year 1990-91. However, the original record produced before us being the communication sent to the UPSC shows that recruitment year was 1990 and the vacancies determined for this recruitment year were on the basis of calendar year 1990. In his rejoinder the applicant has also himself worked out the vacancies on the basis of calendar year 1990. In his OA also the applicant has repeatedly stated that determination of vacancies at 6 was for the year 1990. Thus we are of the view that the question we have to consider is

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whether there were six vacancies for the calendar year 1990 or whether the number was larger as contended by the applicant. The applicant has given a list of names of ten persons at pages 3-4 of the rejoinder who, according to him, retired during 1990. The respondents have disputed the factual position about these cases. They stated that the date of birth of the person at Sl.No.1 had not been correctly shown by the applicant and this person did not retire during 1990. Service book of this person was brought to the Tribunal to substantiate this contention. With regard to the person at Sl.No.3 he has been shown as retiring on 31-12-90 but this vacancy was not taken as arising during 1990 but during 1991 because the incumbent was in position upto the end of 1990. Two persons who were to retire during 1990 and whose names have not been included in the list of ten persons mentioned by the applicant as retiring during 1990 were granted extension beyond 31st December, 90 and therefore two of the vacancies of other persons retiring during 1990 were taken up by these persons. Thus in all there were only six vacancies available for the recruitment year 1990. The applicant's contention that there were more than six vacancies available is, therefore, not sustainable. Since only 6 vacancies were filled up in the recruitment year 1990 and the applicant's name in the seniority list was next below the person last included in the select panel for the year 1990 (Ann.A1 dated 30th May, 91), the applicant could not be granted promotion by virtue of this panel. Regarding omission of the name of the applicant from the select panel Ann.A2 dated 27th April, 92 for filling up vacancies of 1991-92, we find from the DFC proceedings produced before us that the applicant has been graded as merely good by the DFC whereas those included in the select panel have been graded as 'very good'. On a perusal of the relevant ACRs of the applicant, we do not find that there has been actually any down-gradation of the performance of the applicant in the sense that he may have been given better gradation in one year and lower gradation in the subsequent year. In their judgment in the case of U.P. Jal Nigam relied upon by the applicant, the Hon'ble Supreme Court had held that

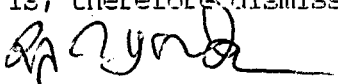
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if an employee earned a higher grading in the ACP in one year and a lower grading in a subsequent year, reasons for such lower grading should be recorded in the file and the change should be communicated to him in the form of advise. This judgment will, therefore, have no applicability to the present case on facts. The instructions regarding filling up of the ACPs relied upon by the applicant have also no applicability in this case, as seen from a bare reading thereof. The respondents explained before us that ACP of 5 years were considered by the DFC and we have no reason to doubt the statement of the respondents in this regard. It is for the DFC to make an assessment of the performance of the applicant and it is for the DFC to consider what value should be attached to the ACP of the last year, if it happens to be better than that of the preceding year or years. It is not for the Tribunal to sit in judgment over the finding of the DFC unless of course it can be shown that the finding of the DFC were perverse or based on no material at all. That is not the position here. In a number of judgments the Hon'ble Supreme Court has affirmed the principle that a Court or a Tribunal cannot sit over the finding of the DFC as if it were the appellate authority. One of the latest judgments in this regard is Nutan Arvind Vs Union of India and Ors., (1996) 33 ATC 228, in which the Hon'ble Supreme Court held as follows in para 6 thereof:

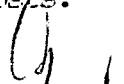
"..... When a high level committee had considered the respective merits of the candidates, assessed the grading and considered their cases for promotion, this Court cannot sit over the assessment made by the DFC as an appellate authority....."

When the Hon'ble Supreme Court cannot sit over the assessment made by the DFC, a fortiori, this Tribunal cannot do so. The DFC in the applicant's case consisted of a Member of UPSC and certain senior officers of the Department. Therefore, we cannot interfere with the finding of the DFC with regard to suitability of the applicant for promotion on the basis of seniority-cum-merit. The applicant himself does not dispute that promotion to the post of Additional Chief Engineer is on the basis of selection.

12. For all the above reasons, we find no merit in this application. It is, therefore, dismissed with no order as to costs.

  
(Ratan Prakash)

Judicial Member

  
(O.P. Sharma)

Administrative Member