

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

O.A.NO. 060/00933/2014 Date of order: ²⁴ ~~15~~ November, 2015.

Coram: **Hon'ble Mr. Sanjeev Kaushik, Member (J)**
Hon'ble Mr. Uday Kumar Varma, Member (A).

P.K.Sarin s/o Shri S.N.Sarin, 234, Sector 4, Mansadevi Complex,
Panchkula, Haryana, Pincode:134114.

.....Applicant.

(Mr. P.K.Sarin, applicant present in person.)

Versus

1. Union of India through its Secretary, Ministry of Urban Development, Nirman Bhawan, New Delhi-110 011.
2. Director General of Works, C.P.W.D., Nirman Bhawan, New Delhi-110011.
3. Union Public Service Commission through its Chairman, Shahjahan Road, New Delhi.

...Respondents

(By Advocate: Mr. Sanjay Goyal, for respondents no.1 & 2
Mr. B.B.Sharma, for respondent no.3).

ORDER

Hon'ble Mr. Uday Kumar Varma, Member (A):

Applicant P.K.Sarin has filed the present Original Application seeking the following reliefs:-

" i) Quash the order dated 9.4.2014 bearing file No.11/11(15)/2013-AP.2 and minutes of meeting held on

7.4.2014 at 12.30 pm in the o/o UPSC for the vacancies 1994-95 to 1996-97 (up to 28.10.96) in case of Er. P.K.Sarin;

ii) Quash the order F.No.08/14/2011-EC- Government of India, Ministry of Urban Development, Directorate General, Central Public Works Department, (EC-1 Section) dated 16.6.2014;

iii) Issue direction to the respondents for the grant of relief to the applicant to declare the petitioner eligible for the promotion to the grade of EE(Civil) for the year 1995-96 and thereafter considering the facts that EB was granted to the petitioner, petitioner was promoted as Assistant Engineer by UPSC and other grounds".

2. Facts as projected by the applicant are that he joined the service of respondent department as Junior Engineer on 2.8.1976 and thereafter promoted as Assistant Engineer in 1984. On 13.3.1991, the applicant along with another JE namely Shri S.K.Awasthi was implicated in a false case for demanding bribe and was arrested. However, both of them were granted bail on 14.3.1991. The applicant was placed under suspension on 29.4.1991, but Shri Awasthi was allowed to earn ACRs. Special Judge, CBI Tis Hazari, Delhi Court vide his order dated 20.8.2002 acquitted the applicant from the charges leveled against him. After his acquittal, the applicant made a representation dated 21.8.2002 to the respondents for releasing consequential benefits on account of his acquittal i.e. reinstatement, treating suspension period on duty, promotion with posting. The said suspension order was revoked by respondent no.2 vide order dated

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29.1.2003 and the applicant joined his duties on 4.2.2003. The applicant has alleged that respondents have not passed any orders regarding fixing his pay, increments, promotion and arrears for more than six months. Feeling aggrieved against the inaction of the respondents, the applicant approached the Tribunal by filing O.A.No.471/2003 which was disposed of vide order dated 3.3.2003 by directing respondent no.2 to pass speaking order on the representation dated 21.8.2002 within four months. However, respondent no.2 vide its order dated 1.9.2003 rejected the representation of the applicant by saying that his case can only be considered after the decision of the appeal pending before the Delhi High Court against his acquittal.

3. Feeling dis-satisfied with the order dated 1.9.2003, the applicant again approached the Principal Bench of the Tribunal by filing O.A.No.2401 of 2003. The said OA was decided on 9.2.2004 by directing the respondents to pass speaking order on his promotion and arrears of pay in accordance with FR-54-B within four months. The respondents again vide order dated 21.10.2004 declined the promotion to the applicant on the ground that the review DPC has not recommended him for inclusion in the panel for the years 1995-1996 and 1996-1997. The applicant was again compelled to file OA No.

2665/2004 before the Principal Bench. The said OA was dismissed vide order dated 9.9.2005.

4. The applicant approached the jurisdictional Delhi High Court by filing CWP No.802 of 2006 against the order dated 9.9.2005 passed by the Principal Bench and the said writ petition was allowed on 25.2.2009. The operative part of the judgment passed by the Delhi High Court reads as follows:-

"4. In these circumstances, this writ petition is allowed and the impugned order of the Tribunal is set aside. We direct the respondents to communicate the ACRs of the aforesaid years to the petitioner within four weeks. The petitioner shall be entitled to make representation, which shall be made within four weeks thereafter. On making this representation, the same shall be considered and decided by the respondents within two months thereafter. In case the entry/entries for the aforesaid years are upgraded, the petitioner shall be considered for promotion by the Review DPC.

Learned counsel for the petitioner also submits that the petitioner was even allowed to cross his efficiency bar in the year 1991 itself on the basis of same ACRs and, thus, relies upon the judgment of the Supreme Court in the case of BrijNath Pandey vs. State of U.P. & Ors. 2000(5) SLR 76, as per which he would have become entitled for fresh consideration for promotion. It is made clear that while holding Review DPC, this fact shall also be taken into consideration by the Review DPC".

5. The applicant has further stated that after the decision of the Delhi High Court, the respondents filed SLP before the Hon'ble Apex Court, which was dismissed in limine. After the dismissal of the SLP, the respondents provided the copies of ACRs to the applicant on 21.5.2010, but rejected the claim of the applicant for promotion to the

post of Executive Engineer vide order dated 22.7.2010. Against the order dated 22.7.2010, the applicant again approached the Principal Bench by filing OA No.309 of 2011 which was disposed of on 20.1.2012 with direction to the respondents to constitute a review DPC to reconsider the case of the applicant for promotion to the grade of Executive Engineer(Civil) for the years 1995-1996 and thereafter. The respondents again vide order dated 16.6.2014 declined promotion to the applicant on the ground that on the basis of the ACRs available, the review DPC has not recommended for inclusion in the panel for the years 1995-96 & 1996-1997. Hence the present OA.

6. Pursuant to notice, respondents no.1 & 2 have filed their written statement wherein they have stated that the case of the applicant was considered for promotion to the grade of Executive Engineer (Civil) against vacancies for 1995-96 & 1996-97 by the DPC held in September, 1999, but his case was kept in sealed cover as the applicant was facing criminal case under the Prevention of Corruption Act. In the said criminal case, the applicant was acquitted and his suspension was revoked. The period of suspension was treated as period spent on duty. Upon opening of sealed cover, it was noticed that DPC did not make any recommendations in favour of the applicant because his CRs were not available. Even the Review DPC held on 21.9.2004 did not recommend the name of the applicant for inclusion

in the panel against the vacancies of 1995-96 & 1996-1997, which were conveyed, to him. Again on the directions of the Tribunal dated 20.1.2012, review DPC was held and the review DPC again after considering all the relevant facts and record did not recommend the applicant for promotion to the post of Executive Engineer (Civil) against the vacancies for the years 1995-1996 and thereafter. The recommendations of the review DPC were accepted by the competent authority and the same was conveyed to the applicant vide OM dated 16.6.2014. They have thus prayed for dismissal of the OA.

7. Respondent no.3 has filed his separate reply wherein it has been stated that on the basis of the order dated 20.1.2012 passed by the Tribunal, a review DPC was held on 7.4.2014 in the office of the Commission and had not recommended the name of the applicant for promotion to the post of Executive Engineer (Civil) against any vacancy year from 1995-96 to 2002-2003 in the Central Public Works Department.

8. The applicant has filed a rejoinder to the written statement by generally reiterating the averments made in the OA. The applicant has annexed a copy of order dated 9.12.1992 passed by the Jaipur Bench of the Tribunal in the case of **Lakshman Singh versus Union of India & Ors.** (O.A.No.9 of 1990).

9. We have given our thoughtful consideration to the entire matter and perused the pleadings available on record with the able assistance of the learned counsel for the parties.

10. This case has a long history of litigation. It does not seem necessary for us to go into the details of various stages of litigation and the directions given by the Tribunal/High Courts at different times. At this point of time, we have to see whether the review DPC conducted on 9.4.2014 and the subsequent order of the Government of India, Ministry of Urban Development dated 16.6.2014 are as per the directions given by the Court ^{on 20.01.2012} and if so, are the recommendations/order legally sustainable? In its order dated 20.01.2012, the Principal Bench of the Tribunal had given the following order: -

"13. The ACR gradings are considered by the DPC or review DPC for assessing the concerned official "fit or "unfit" for promotion and available ACRs of five preceding years are required for the purpose. In the present case the applicant was considered for the year 1995-96 and 1996-97. As the applicant was under suspension from 1991 to 2003, ACRs of those years are not available. The DPC and review DPC have considered available ACRs from 1984 to 1991. Even for those years, for some periods, ACRs are not available. As per the extant rules, the review DPC can also refer to his ACRs available prior to October 1984 to meet the period short of full five years. For better assessment of his performances, even the review DPC can take a comprehensive view of his performance; right from the date he joined service in August 1976. This being a specially typical case, such special methods can be adopted.

16. Having considered the totality of facts and circumstances of the case, for the reasons given within, the O.A. is disposed of with the directions to the respondents to constitute a review DPC to reconsider the case of the applicant for promotion to the grade EE(Civil) for the years 1995-96 and thereafter."

11. The applicant has, during the course of arguments, submitted in addition to his oral submission, written arguments also taking a number of grounds. Based on these arguments, it will be helpful if the issues for adjudication are identified and findings on each issue discussed. In our view, the following main issues emerge crucial for adjudication in this matter: -

- a) Can the crossing of efficiency bar (EB) be equated to promotion and if a person in a particular year is considered fit for crossing the EB can he also be automatically considered fit for promotion ?
- b) Whether in the absence of ACRs preceding the year in which the promotion is being considered, subsequent ACRs can be taken into account to adjudge the suitability of the government servant for promotion? (An argument advanced by the applicant)
- c) Whether the ACRs for the suspension period could be waived off while considering the case for promotion for the vacancies arising in 1995-1996 and subsequent years in the light of the observations made by the High Court in WP (C) No.1578 of 2003 titled as Jabir Singh vs. Union of India & Ors. ?
- d) Whether in the instant case, the requirement of communication of adverse ACRs has taken place as per the rules and as per the directions of the courts?

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- e) Whether a delay of more than two decades in providing ACRs to the applicant for making representation can be held valid?
- f) Whether the Courts can sit upon judgment over the evaluation of ACRs while considering the case of a promotion and making recommendations based on this evaluation when this evaluation is done by an expert body like the UPSC?

We will address these issues serially.

12. As regards issue (a) regarding equating crossing the efficiency bar to a regular promotion, in our view, there are clear differences between the objective behind crossing the efficiency bar and promotion. The applicant was allowed to cross EB with effect from 1.10.1990. He was, earlier, promoted as Assistant Engineer in 1984. The applicant was suspended on 29.04.1991 and remained under suspension till 28.1.2003. Crossing of efficiency bar is usually taken recourse for giving the government employee the benefit of further increments in the same scale of pay and the same post. Crossing of efficiency bar does not amount to be placed in a higher pay-scale. The designation of the employee also does not change. The promotion on the other hand, inter-alia, results in the government servant getting the advantage of a higher pay scale. To this extent, crossing of efficiency bar cannot be equated to a regular promotion. The applicant in his support of this issue, has cited the judgment delivered by the Hon'ble Apex Court in the case of **Brij Nath Pandey** versus **State of**

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U.P. & Ors. (2000(5) S.L.R. Page 76). The facts in this case are that the applicant had adverse remarks in his ACRs for the years 1985-86 & 1986-1987. However, he was allowed to cross efficiency bar on 1.1.1992. When his case came up for consideration in 1995, he was denied promotion on the ground that he had adverse entries in the ACRs for the years 1985-86 & 1987-87. The adverse entries in the ACR for the year 1993-1994 were deleted on 6.7.1996. In view of these facts, the Apex Court observed that adverse entries in 1985-86 & 1986-87 cannot come in the way of the appellant for further promotion once he was allowed to cross efficiency bar on 20.5.1992.

If we carefully examine the present case, the facts and circumstances of this case are distinctly and significantly different. The case of the applicant for promotion to the post of Executive Engineer is denied not on the basis of any adverse remarks, but on the ground that his ACRs do not meet the required benchmark. Since the applicant remained under suspension from 29.4.1991 to 29.1.2003, the ACRs for this period could not have been written. The UPSC, therefore, in their review DPC meeting for his promotion to the post of Executive Engineer for the year 1995-96 had to take into consideration the ACRs of financial years prior to 1995-1996 since he was suspended in 1991.

His ACRs for the years 1985-86, 1986-87, 1988-89, 1989-90 and 1990-91, i.e. 5 ACRs between 1984 and 1991 were available. Further, in the absence of any ACRs prior to 1984, the Review DPC took into

account the other co-related documents and material facts and service book of the applicant and came to the conclusion that he could not be considered fit for promotion.

In view of the fact that the judgment passed in the case of Brij Nath Pandey (supra) had different set of facts then the instant case, we are of view that merely crossing of EB in the year 1990 i.e. from 1.10.1990 till the applicant was suspended on 29.4.1991 cannot be taken as a presumption that since he had crossed the efficiency bar in 1990, therefore, the applicant becomes automatically fit for promotion as E.E. in 1995-1996 and subsequently.

13. As regards the issue (b), in our view, the ACRs, which can be considered for promotion to a particular post in a particular year, must pertain to years preceding that particular year for which the promotion is under consideration, and not for the succeeding years. The employee is promoted to a particular post based on his performance in the previous years and not in anticipation of his performance in the subsequent years. The applicant in his written arguments has cited the judgment passed by the Hon'ble Delhi High Court in the case of **Ranjana Kale versus Chief Economic Advisor** decided on 1.7.2010 (CWP No.13488 of 2009) wherein the High Court has held that the petitioners should have been considered on the basis of 4 ACRs prior to 2004-2005 and by taking into consideration the subsequent ACRs instead of directing to make a representation. We

have gone through the said judgment and we find that this is not what the applicant is claiming from this judgment. The High Court has only modified the orders of the Tribunal to the extent that instead of asking the petitioner to submit a representation and then pass orders about his ACRs for the years 2000-01, 2001-02, 2002-03, 2003-04 & 2006-07 by ignoring ACRs of the two years namely 2004-05 & 2005-06. At no point of time, the judgment suggests that ACRs for the subsequent years could be considered for promoting an employee for a particular year.

14. As regards issue (c), again the facts in this case cited by the applicant are quite different from the case of the applicant. In the case of Jasbir Singh (supra), the waiver of Annual Confidential Report was allowed on the ground that the petitioner could not earn the requisite 2nd regimental annual confidential report and the respondents themselves could not execute and enforce their own posting order passed to enable the petitioner to earn such report. No such contingency is applicable in the case of the applicant in this OA. Therefore, the arguments based upon this ruling remain unsubstantiated.

15. As regards the issues (d) & (e), in a normal case, conveying of adverse remarks after a lapse of two decades would not have been permissible. However, in this case, first of all, the issue is not with regard to conveying the adverse remarks, instead it is a

matter of conveying below benchmark remarks. Secondly, this issue has been contested and adjudicated in earlier rounds of litigation and the respondents have communicated to the applicant the ACRs under a direction from the courts and sought his representation which they have subsequently dis-allowed. Therefore, on this count, the applicant does not get much help in support of his claim.

16. Coming to the crucial issue (f) that deals with the validity of the courts to sit in judgment over the evaluation of ACRs by expert bodies, it has been held in numerous judgments of the Apex Court as well as many High Courts that evaluation made by the Expert Committee should not be easily interfered with by the Courts which do not have necessary expertise to undertake the exercise that is necessary for such purpose. This view has been held by the Hon'ble Apex Court in the case of Union of India & Another Vs. S.K. Goel & Others (Appeal (Civil) 689 of 2007 decided on 12.02.2007). This judgment in turn has relied upon a judgment delivered by the Hon'ble Apex Court in the case of U.P.S.C. Vs. K. Rajaiah and Others reported in (2005) 10 SCC 15.

17. In the instant case, the review DPC held in UPSC has deliberated over the grading of applicant not once but more than once and in the meeting held on 07.04.2014, the evaluation of the existing

ACRs (numbering 5) once again led to the same conclusion. We need to remember that in none of the earlier direction/judgments of the Tribunal/High Court the evaluation done by the Review Committee was questioned. Based on this evaluation, the applicant was not recommended for promotion to the post of Executive Engineer (Civil). In the light of this settled position, no worthwhile purpose will be served by finding fault with the evaluation done by the Review DPC held in the UPSC.

18. We have carefully read through the proceedings of the review DPC held at UPSC on 07.04.2014 that the applicant claims is in contravention of the directions of the Principal Bench given in order dated 20.01.2012. We have, as has been explained above, found that for his claim of promotion for the year 1995-96 up to the year 2002-03, the Review DPC had in front of them five ACRs required for evaluation grading him "Average" and, therefore, it found the applicant un-fit for promotion. If the directions of the Tribunal dated 20.01.2012 are read carefully, it will not be difficult to make out the fact that the direction of the Tribunal for considering the ACRs before 1984 were given under the impression that the requisite number of ACRs i.e. 5 ACRs prior to 95-96, were not available on record. It so turns out from the proceedings of dated 07.04.2014 that 5 ACRs namely 85-86, 86-87, 88-89, 89-90, and 90-91, preceding the year of consideration i.e. 1995-96 were indeed available on record. However, in compliance

of the directions of the Principal Bench in order dated 20.01.2012, the DPC also took account the service record and other service related documents and discussed those in length in the proceedings. The minutes of the meeting traces the history of this dispute- the various court's directions and compliance thereof by the respondents and eventually after taking into consideration all the factors recommended that the applicant is not fit for promotion to the post of Executive Engineer (Civil) against the vacancy years from 1995 to 2003. The orders are speaking, well reasoned and factually correct. Given the fact that they have faithfully carried out the directions of the Principal Bench and considered all the relevant factors into consideration for promotion of an employee and taken into account the fact that the Department had made efforts to locate the ACRs before 1984 but remained unsuccessful, we do not think that any injustice has been done to the applicant by denying him this promotion. The fact remains that he remained under suspension from the year 1991 to 2002 and has been reinstated because he was acquitted from the charges. The fact also remains that the evaluation of his available ACRs during the period 1985-86 to 1991-92 was 'average' and thus not up to the mark. In fact the requirement of considering the ACRs before 1984 was not mandatory because the five ACRs for consideration were, in any case, available before the Review DPC.

19. In view of above discussion and our findings on each of these issues which reflect all the arguments that the applicant had posed before us, we have come to this clear conclusion that the applicant has not been able to provide any ground that justifies our interference in the matter and for setting aside the recommendations/ACRs as well as the order of the Ministry of Urban Development in denying him promotion to the post of Executive Engineer. The OA is accordingly dismissed. No costs.

(UDAY KUMAR VARMA)
MEMBER (A).

(SANJEEV KAUSHIK)
MEMBER (J)

Dated: - November 24 , 2015.

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