

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD
BENCH, ALLAHABAD

(This the 04th Day of October 2018)

Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Rakesh Sagar Jain, Member (J)

Original Application No.571 of 2009

(U/S 19, Administrative Tribunal Act, 1985)

Ravi Prakash Yadav S/o Om Prakash Yadav R/o Prakash Sadan
Mohalla Turmanpur Ahiran Tola, Geeta Press, Gorakhpur.

..... Applicant

By Advocate: Shri S.K. Om

Versus

1. Union of India through General Manager, N.E. Railway, Gorakhpur.
2. Chief Personnel Officer, N.E. Railway, Gorakhpur.
3. R.S. Mal, Senior Section Engineer, N.E. Railway through Divisional Electrical Engineer, N.E. Railway, Varanasi.

..... Respondents

By Advocate: Shri Amit Kumar Rai/Shri P.N. Rai

ORDER

Delivered by Hon'ble Mr. Rakesh Sagar Jain, Member (Judicial)

1. Case of applicant Ravi Prakash Yadav is that he was appointed as Chargeman 'B' on 16.6.1981 and promoted as Senior Section Engineer (Electrical) on 31.8.1992 and became eligible for promotion to the post of Assistant Electrical Group 'B' against 70% seniority quota and that selection is conducted on the basis of seniority cum merit. On 4.7.2007 respondents issued a notification for 21 posts of

A.E.E. against 70% quota out of which 16 posts were reserved for General 3 posts for S.C. and 2 posts for S.T. candidates and applications were invited from eligible candidates. AS per the selection rules, 5 years A.C.R preceding the date of selection were liable to be considered i.e. from the year 2003-04 to 2007-08.

2. It has been further averred in the O.A. that during the aforesaid period applicant has never been communicated any adverse A.C.Rs. and pursuant to notification dated 4.7.2008 in the list of eligible candidate, his name appeared at Sl. No. 17 and in the written test conducted on 28.9.2008 for selection purpose, he was declared passed and also qualified the medical tests. Thereafter on 16.10.2008 applicant participated in viva voce tests and despite a good performance, his name did not figure in the panel dated 18.11.2008 and pursuant to the list of empanelled candidates, their posting orders were issued on 19.11.2008. It is further case of applicant that some of his juniors whose service record were not above those of applicant were also empanelled and applicant has reasons to believe that the panel dated 18.11.2008 was prepared in a arbitrary manner and his service record was not considered in true perspective.
3. The applicant on a number of occasions and even through RTI sought reasons from the respondents as to why he was not empanelled but was denied the information. Applicant had filed a representation dated 3.2.2009 requesting the respondents for giving reasons as to why he was not empanelled. Hence, the O.A. seeking the following reliefs-

“(i) To issue a writ order or direction in the nature of certiorari quashing the panel dated 18.11.2008 and posting order dated 19.11.2008 (Annexure A-1 & 2)) passed by respondent No.2.

(ii) To issue a writ order or direction in the nature of mandamus commanding the respondents to empanel the applicant on the post of Assistant Electrical Engineer Group ‘B’ in the panel dated 18.11.2008 and assign him the seniority from the date of his immediate juniors empanelled and other consequential benefits for which applicant is entitle.

(iii) to issue any other writ order or direction which this Hon’ble Court may deem fit and proper under the circumstances of the case.

(iv) to award the cost of present O.A. in favour of the applicant”.

4. In the counter affidavit filed by respondent Nos. 1 to 3, it is submitted that along with the notification dated 4.7.2008 and 25.8.2008 a list of candidates were also issued along with the notification. The case set up by the applicant that selection is based on seniority cum merit is incorrect whereas the selection of A.E.E. is conducted on the basis of written examination viva voce and record of service and the panel is made on seniority basis of the candidates who secured 60 or more marks in aggregate in the aforementioned written examination, viva voce which include record of service separate and in aggregate also. It is the further case of respondent that ACR of the applicant from 31.3.2004 to 31.3.2008 were considered by selection committed but since he did not secure the requisite marks, he was not empanelled for the post of A.E.E. Group ‘B’.
5. Respondents have further averred that the accepting authority of ACR did not feel appropriate to communicate some of the entries mentioned in the applicant ACRs and that adverse entries in ACR are communicated to the concerned employee on expressed approval of the

competent authority and the competent authority did not feel appropriate to communicate some of the entries mentioned in the applicant's ACR. Some of the candidates junior to the applicant secured qualifying marks and therefore were empanelled for the post of A.E.E. Group 'B'. The information under RTI sought by applicant was not given for the reasons mentioned in the reply to application of applicant.

6. In the rejoinder affidavit, applicant avers that the panel of A.E.E Group 'B' is to be prepared as per para 219 of Indian Railway Establishment Manual Volume II and that while evaluating his service record, applicants uncommunicated adverse ACR have been also considered by the respondents and it is incumbent upon the respondents to communicate adverse ACR to him and his belief that uncommunicated adverse ACRs were taken into consideration while preparing the panel is further strengthened by the fact that information as requested under RTI Act was not furnished to him in the first instance and also in the appeal under RTI Act. It has been averred that since the applicant's representation dated 3.9.2009 is not available in the office of respondents, no comments can be offered in this regard.
7. Supplementary counter affidavit was filed by the respondents wherein it has been averred that the panel of A.E.E group 'B' is prepared as per para 201.1 to para 209 of IREM Vol.II. That the marks for ACR have been awarded by selection committee in terms of instruction of Railway Board contained in Railway Board letter No. E (GP)/2000/2/95 dated 16.1.2001.
8. It be mentioned that vide order dated 9.9.2015, the Tribunal directed the respondents "to submit a chart showing the

grading obtained by the applicant from the year 2003-2004 to 2007-2008 which were taken into account for calculating the points for the purpose of promotion. It should also be mentioned as to whether the grading obtained by the applicant below bench mark has been communicated to the applicant". Therefore, in compliance to the order dated 9.9.2015, respondents placed on record the chart showing the grading obtained by the applicant on the basis of his ACRs from the year 2003-04 to 2007-08. It has been further stated that as per the Railway Board letter No. E(NG)/II/76/CP/1 dated 15.10.1976, the remarks of average in the ACRs is not to be treated as adverse. It has been further averred in the affidavit that in the assessment of attributes, only in one case i.e. the attributes for his "ability to inspire confidence, guide, motivate and obtain the best out of the staff", assessment as 'Below Average' has been recorded. And the grading for all other attributes for the relevant years is either "Average or above" and hence are not "Average' at all, so not required for communicating the same. Therefore, looking to the fact that OA lacks merit, it deserves to be dismissed.

9. Before proceeding further, it would be necessary to refer to law laid down by the Hon'ble Apex Court in Dev Dutt v/s Union of India, (2008) 8 SCC 725 which be a complete answer to all the pleas of respondents and documents relied upon by them which they have put forth to seek dismissal of applicant's case. We quote extensively from the judgment as reminder to the respondents-department since the department seems oblivious to the law passed by the Hon'ble Apex Court and Article 142 of the Constitution of India.
10. In the said case Dev Dut (supra) while answering the case in favour of the government servant laid down even an entry

of 'Good' in ACR is required to be communicated to the concerned Government official. It was held that:

"On the strength of the above decisions learned counsel for the respondent submitted that only an adverse entry needs to be communicated to an employee. We do not agree. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved.

9. *In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.*

10. *Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have*

been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

15. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect

the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.

26. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the 'good' entry to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of

non-arbitrariness in State action as envisaged by [Article 14](#) of the Constitution in our opinion requires such communication. [Article 14](#) will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

11. We are of the view, in view of the judgment of the Hon'ble Supreme Court rendered in the case of Dev Dutt Vs. Union of India and others (2008) 8 SCC 725, that when a Government Officer having had worked for a whole year

earns a 'below average' even by the standard set by respondents in its communication dated 15.10.1976 (Annexure-2) to the affidavit would tantamount to an adverse remark, for his performance during the year, for his future progress, the same is nothing but adverse requiring him to be told accordingly so, as to enable him to improve in future. In the event, such adverse remarks are not communicated, but the same are considered for the purpose of considering future prospect of the Government employee, the same would be doing things, which are not permissible in law.

12. In these circumstances, a direction is given to the respondents that they will communicate the entries in ACR of the years relevant for the selection of applicant to the post of AEE within a period of one month from the date of receipt of the copy of this judgment and he should be permitted to make a representation against the same praying for upgradation within one month thereafter which shall be decided by respondents within one months thereafter. If the upgradation is allowed, the applicant should be considered forthwith for promotion as AEE retrospectively and granted notional promotion from 19.11.2008 for the purposes of post retiral benefits and higher scale of pay from the date he is actually promoted.
13. The O.A. is accordingly disposed of, in terms of above directions. No order as to costs.

(RAKESH SAGAR JAIN)
Member (J)

(GOKUL CHANDRA PATI)
Member (A)

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