

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 948/2013

New Delhi this the 3rd day of November, 2015

Hon'ble Mr. A.K.Bhardwaj, Member (J)
Hon'ble Dr. Birendra Kumar Sinha, Member (A)

Vimal Chandra Srivastava
Son of late R.L.Srivastava,
Resident of 361, Viram Khand-5,
Gomti Nagar, Lucknow.

... Applicant

(By Advocate Shri Piyush Sharma)

VERSUS

1. Union of India through the Secretary,
Department of Personnel & Training,
Ministry of Personnel Public Grievances & Pension,
Government of India, North Block,
New Delhi.
2. Secretary, Union Public Service Commission,
Dholpur House, Shahjahan Road, New Delhi.
3. State of UP through Chief Secretary,
Government of UP, UP Civil Secretariat,
Lucknow.
4. Principal Secretary, Appointment Department,
Government of UP, UP Civil Secretariat,
Lucknow.

... Respondents

(By Advocate Shri R.N.Singh and Mr.Nikhil Majithia)

ORDER

Hon'ble Mr.A.K.Bhardwaj, Member (J):

A Selection Committee defined under Regulation 3 of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 met on 7 and 8th November, 2012 and again on 22nd

November, 2012 to review the select lists of 2001 to 2004, 2004-A and 2005 and to prepare select list for the years 2006 to 2011 for promotion to IAS of UP cadre. The name of applicant herein was considered in the eligibility list for the years 2006 to 2010. Based on the proposal furnished by the State Government and on an overall assessment of his service records, the Selection Committee assessed the applicant as follows:-

Select list Year	Vacancies/ size of the select list	Zone of Consideration	Position of the applicant in the eligibility list	Overall Assessment	Remarks
2006	32	96	65	Unfit	Censure entry dated 26.12.2006. 'Unfit' in overall assessment on first time consideration
2007	24	72	24	Unfit	Censure entry dated 26.12.2006 falls in the Assessment Matrix.
2008	16	48	3	Unfit	Censure entry dated 26.12.2006 falls in the Assessment Matrix.
2009	19	57	2	Unfit	Censure entry dated 26.12.2006 falls in the Assessment Matrix.
2010	37	111	1	Unfit	Censure entry dated 26.12.2006 falls in the Assessment Matrix.

As can be seen from the aforementioned, the Committee assessed the applicant as unfit for the select list of 2006 to 2010. The list was approved by the Commission on 26.11.2012 and was notified by the

Government of India vide Notification dated 27.11.2012. Thus, the applicant filed the present OA, praying therein:-

“8.1 To declare that the action of the respondent authorities not considering the name of the applicant in the meeting of the DPC held on 27.11.2012 is illegal in view of the fact stated herein above.

8.2 To direct the respondent authorities to hold review DPC for giving fair consideration of applicant's candidature for promotion to IAS against the vacancies of 2007-2010.

8.3 To direct the respondents to invoke provisionality clause if so required, as provided in Regulation 5(5) of IAS (Appointment by Promotion) Regulations, 1955 in favour of the applicant, while holding the review DPC.

8.4 To direct the respondent authorities not to fill up at least one vacancy of IAS UP cadre during the pendency of the instant OA for enabling the respondents to fairly consider the applicant's candidature in the review DPC against the said vacancy.

8.5 To direct the Respondent No.2 not to confirm at least one of the provisionally selected candidate against the year 2007 to 2010 under Regulation 7(4) of the IAS (Appointment by Promotion) Regulation, 1955 so as to keep at least one vacancy available for the applicant.

8.6 To pass any other order/orders as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and for the act of kindness, the applicant is duty bound, shal every pray.”

The salient contentions put forth on behalf of the applicant are:

- That the applicant is assessed unfit on account of the punishment of censure imposed upon him vide order dated 28.06.2010 and the adverse entries dated 26.11.2006 and 6.11.2007 communicated to him not by the disciplinary authority but by some other authority.
- The UPSC rebutted the contentions by pleading that no junior to applicant was included in the select list of

year 2006 and on account of stay granted vide order dated 20.08.2010 by State Public Service Tribunal, in respect of order dated 28.06.2010, the penalty order was not held adverse to the applicant.

According to the Commission, the applicant could not be included in the select list on the basis of overall assessment of his profile and the record made available by the State Government. Para 5.4 of the reply of Commission reads thus:-

“5.4. In respect of the punishment order dated 28.06.2010 regarding penalty of censure etc. imposed on the applicant, it is submitted that because of stay granted, vide order dated 20.08.2010 of State Public Service Tribunal in Claim Petition No. 1345/2010, in respect of the said punishment order dated 28.06.2010, it was treated as if disciplinary proceedings is pending and yet to be finalized. The punishment order dated 28.06.2010 had no effect on the assessment of relevant service records of the applicant for the Select Lists of 2006 to 2010. Had the name of the applicant been included in any Select List on the basis of assessment of his relevant service records, such inclusion in the Select List would have been ‘provisional’ in terms of first proviso to Regulation 5(5) of the Promotion Regulation because of treating the stay on the ‘punishment order’ as pending disciplinary proceedings against him. However, on overall assessment of relevant service records, the applicant could not be included in any of the Select Lists due to the reason that in the Statement of Penalties imposed during last ten years submitted by the State Government with the proposal placed before the Selection Committee Meeting held in November, 2012, it was mentioned that ‘censure entry’ was given to the applicant vide order dated 26.12.2006. This ‘censure entry’ result in assessment of the applicant as ‘Unfit’ for every Select List from 2006 to 2010 as per the guidelines of the Commission.”

Further plea raised by the Commission is that the fact of pendency of representation against the adverse remarks was brought to the notice of the Selection Committee.

2. During the course of argument, learned counsel for applicant submitted that the representation made by the applicant against the adverse entries has been allowed and the remarks have been expunged. The further plea put forth by him is that the penalty of censure has been taken into account by the Selection Committee to reduce his grading for all the years 2006 to 2010, which is not permissible. According to him, once the penalty of censure imposed upon him on 26.12.2006 had been taken into account for his assessment against the vacancy year 2006, the same could not have been taken into account for his assessment for promotion against the vacancy years 2007 to 2010. To buttress his plea, he relied upon the guidelines/procedure for categorization of State Civil/Police/Forest Service Officers and preparation of a list of suitable officers by the Selection Committee for promotion to Indian Administrative Service/Indian Police Service/Indian Forest Service in terms of Regulation 5(4) and 5(5) of the Promotion Regulation by UPSC in terms of F.No. 4/3/2005-AIS dated 27.02.2012.

3. We heard counsels for parties and perused the record. At the outset, we find that the order dated 26.12.2006 is not a penalty order but is only an order of adverse entry. The order reads thus:-

“In connection with National Village Employment Program out of available fund of Rs.2045.789 lacs for District Jalaun (Orai), only Rs.512.63 lacs have been incurred upto 27.10.2006 which is 25% only of total available funds. Like this, out of total demand of 876582 human days by the labourers, only 556577 human days were created, which makes it clear that Sri Vimal Chand Srivastava, Chief Development Officer of the district is not giving proper attention to program implementation., Accordingly following adverse entry is made against Sri Srivastava.

“In implementation of National Village Employment Guarantee Adhiniyam, on account of proper attention is not given by Sri Vimal Chand Srivastava, there has been adverse affect in implementation of program due to which, district financial progress is lowest (25 percent only). Sri.Srivastava is condemned for lack of responsibility and not improving the progress of program.”

In the wake, para 4.6 of the guidelines issued by the UPSC (DoP&T (ibid) could not have been made applicable to the said order. In other words, the said order could not have led to the down-gradation of ACR of the applicant for the year 2006 or any other year. For easy reference, para 4.6 of the guidelines is reproduced hereinbelow:-

“4.6. The Selection Committee while preparing Select Lists, may take into account the effect of ‘Censure’ as under:-

- If the date of imposition of the ‘censure’ falls within any of the years in the Assessment Matrix, the Commission would categorize the officer as “Unfit” for the year in which it is imposed for the first Select List prepared in which he is eligible to be considered. Therefore, the Overall Assessment of the officer may be made as per the procedure given in section B.3 of the Guidelines.
- If the date of imposition of the ‘censure’ is subsequent to the last year in the Assessment Matrix, and upto the date of the SCM, the Committee would categorize the officer as ‘Unfit’ in the overall Assessment for the first Select List prepared in which he is eligible to be considered.

- The penalty of ‘censure’ would be ignored for the subsequent Select Lists for which the officer may be eligible to be considered.”

Even other wise also, in terms of the subsequent guidelines issued by DoP&T vide OM No. 22011/4/2007-Estt (D) dated 28.04.2014, the procedure of ramification evolved by the UPSC has been declared illegal. As has been ruled by Hon’ble Supreme Court in **Shyam Sunder and others Vs. Ram Kumar and another** (2001 (8) SCC 24), a declaratory legislation has retrospective effect. Relevant excerpt of the judgment read thus:-

““39. Lastly, it was contended on behalf of the appellants that the amending Act whereby new Section 15 of the Act has been substituted is declaratory and, therefore, has retroactive operation. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word “declaration” in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective. Conversely where a statute uses the word “declaratory”, the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law.”

In any case, though the penalty imposed upon Member of the State Civil Service needs to be taken into account in terms of the Guidelines issued by DoP&T OM No. 22011/5/86-Estt (D) dated 10.04.1989, but it cannot have ramification of reduction in rating the

ACR of any particular year or declaring a person straightway unfit. The selection Committee has to take it's own decision. For easy reference, the relevant excerpt of the DoP&T guidelines dated 10.04.1989 are reproduced hereinbelow:-

“6.1.1 Where promotions are to be made by selection method as prescribed in the recruitment rules. the DPC shall, for the purpose of determining the number of officers who will be considered from out of those eligible officers in the feeder grade(s), restrict the field of choice as under with reference to the number of clear regular vacancies proposed to be filled in the year:

No. of vacancies	No. of officers to be considered
1	5
2	8
3	10
4	3 times the number of vacancies.

6.1.2 At present DPCs enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them. In order to ensure greater selectivity in matters of promotions and for having uniform procedures for assessment by DPCs, fresh guidelines are being prescribed. The matter has been examined and the following broad guidelines are laid down to regulate the assessment of suitability of candidates by DPCs.

6.1.3 While merit has to be recognized and rewarded, advancement in an officer's career should not be regarded as a matter of course but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports and based on strict and rigorous selection process.

6.1.4. 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.

Evaluation of Confidential Reports.

6.2.1. Confidential Rolls are the basic inputs of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence-

(a) The OPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for **five preceding years** irrespective of the qualifying service prescribed in the Service/Recruitment Rules. The 'preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T, O.M.No.22011/9/98-Estt.(D), dated 8-9-1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16-6-2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year).

(If two alternative eligibility conditions are prescribed and the officers satisfying these conditions are considered simultaneously instead of under a "failing which" clause, the DPC may consider the service record of all officers with particular reference to the ACRs (including ACRs in respect of service in the lower grade, if necessary) for the lesser number of years as between the two alternative periods of eligibility service or five years, whichever is longer. To cite an instance, if for promotion to a post in the scale of Rs.5900-6700, it is prescribed in the Recruitment Rules that officers with 8 years' service in the scale of Rs.3700-5000 or those with 17 years service in Group 'A' including four years service in the scale of Rs.3700-5000 are eligible, the DPC may consider the service record of all officers with particular reference to the ACRs for 8 years (including Annual Confidential Report for service in the lower grade, if necessary).

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

(d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the OPC in order to assess his work, conduct and performance but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

(e) The DPe should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs because, it has been noticed that some times the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing Authority or the Accepting authority, as the case may be, has overruled the Reporting Officer or the Reviewing authority, as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of over-ruling the other, then the remarks should be read together and the final assessment made by the DPC.

6.2.2. Grading of officers.-In the case of each officer, an overall grading should be given. The grading shall be one among (i) Outstanding, (ii) Very Good, (iii) Good, (iv) Average (v) Unfit excepting cases covered under para 6.3.1 (iii).

6.2.3. Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.....”

Even otherwise also, in the case of **Union of India and Ors Vs. N.R.Parmar and Ors** (JT 2012 (12) SC 99), Hon'ble Supreme Court ruled that the clarificatory guidelines cannot change the substantive nature of the guidelines. Moreover the guidelines issued by the UPSC cannot have overriding effect over the guidelines issued by the DoP&T. It is for the user department to lay down the methodology for recruitment/promotion. The law declared in this regard has been noted by us in **S.K.Mehra Vs. Government of NCTD of Delhi and Ors** (OA 4427/2014). Relevant excerpt of the judgment read thus:-

“14. Insofar as the first of the issues is concerned, it is an admitted fact that the applicant had approached this Tribunal by way of OA No.2839/2012 and other connected OAs for amelioration of his grievance, which were disposed of by a common order dated 26.08.2013 directing that meeting of the departmental Screening Committee be conducted to make regular promotions in respect of three posts of CTP. For the sake of better clarity, we extract para nos. 21 & 22 of the order as under-

“21. It is settled position of law that the selection process or method of recruitment is prescribed in the Recruitment Rules and cannot be evolved by the recruiting agency. In *Dr. Krushan Chandra Sahu & others Vs State of Orissa & others* (JT 1995 (7) SC 137), it has been held thus:

“33. Now, power to make rules regulating the conditions of service of persons appointed on Govt. posts is available to the Governor of the State under the Proviso to Art. 309 and it was in exercise of this power that the present Rules were made. If the statutory Rules, in a given case, have not been made, either by the Parliament or the State Legislative, or, for that matter by the Governor of the State, it would be open to the appropriate Government (the Central Government under Art. 73 and the State Government under Art. 73 and the State

Government under Art. 162) to issue executive instructions. However, if the Rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions. [See Sant Ram v. State of Rajasthan, (AIR 1967 SC 1910)].

34. In the instant case, the Government did neither issue any administrative instruction nor did it supply the omission with regard to the criteria on the basis of which suitability of the candidates was to be determined. The members of the Selection Board, of their own, decided to adopt the confidential character rolls of the candidates who were already employed as Homeopathic Medical Officers, as the basis of determining their suitability.

35. The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Art. 309. It is basically the function of the rule making authority to provide the basis for selection. This Court in State of Andhra Pradesh v. V. Sadanandam, AIR 1989 SC 2060 observed as under (para 16, at pp. 2065-66 of AIR):-

"We are now only left with the reasoning of the Tribunal that there is no justification for the continuance of the old Rule and for personnel belonging to either zones being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive".

(Emphasis supplied)

36. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In *Ramachandra Iyer v. Union of India*, (1984) 2 SCR 200 : (AIR 1984 SC 541), it was observed (para 44, at p.562 of AIR):-

"By necessary inference, there was no such power in the ASRB to add to the required qualifications. If, such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm".

37. Similarly, in *Umesh Chandra Shukla v. Union of India*, 1985 Suppl (2) SCR 367 : (AIR 1985 SC 1351), it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in *Sh. Durgacharan Misra v. State of Orissa*, (1987) 2 UJ (SC) 657 : (AIR 1987 SC 2267) and the limitations of the Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce test.

38. It may be pointed out that rule making function under Art. 309 is legislative and not executive as was laid down by this Court in *B.S. Yadav v. State of Haryana*, AIR 1981 SC 561. For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection.

39. If it were a mere matter of transition from one service to another service of similar nature as, for example, from Provincial Forest Service to All India Forest Administrative Service, the confidential character rolls could have constituted a valid basis for selection either on merit or suitability as was laid down by this Court in *Pervez Qadir v. Union of India*, 1975(2) SCR 432 : AIR 1975 SC 446 : (1975) 4 SCC 318 which has since been followed in *R.S. Dass v. Union of India*, AIR 1987 SC 593. But in the instant case, appointments are being made on posts in an entirely new service, though the educational qualifications required to be possessed by the candidates are the same as were required to be possessed in their earlier service.

40. A candidate in order to be suitable for appointment on a teaching post must have at least three qualities; he should have thorough knowledge of the subject concerned; he should be organised in his thoughts and he should possess the art of presentation of his thoughts to the students. These qualities cannot possibly be indicated or reflected in the confidential character rolls relating to another service, namely, the service in the Health Department as Homoeopathic Medical Officers where the character rolls would only reflect their integrity, their punctuality, their industry and their evaluation by the Reporting or the Accepting Officer recorded in the annual entries. True it is that the candidates being already serving officers, their character rolls have to be looked into before inducting them in the new service but this can be done only for the limited purpose of assessing their integrity etc. These character rolls, however, cannot form the SOLE basis for determination of their suitability for the posts of junior teachers in the Medical Colleges. Then, what formula or method should be adopted to assess these qualities is the question which next arises. This Court in *Liladhar v. State of Rajasthan* (1981) 4 SCC 159 : AIR 1981 SC 1777 pointed out (at p.1778 of AIR) :-

"The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services". (emphasis supplied)

22. In view of the aforementioned, respondents are directed to give due regard to the recruitment regulations for the three posts of Chief Town Planners while making regular promotion to the same in trifurcated Corporation. OA stands disposed of. No costs."

4. In view of the aforementioned, we have no hesitation in arriving at a conclusion that the aforementioned administrative order recording adverse entry against the applicant could not have been

taken into account to declare the applicant unfit at least in the assessment for the year after the year 2006. Nevertheless, the review DPC could always take into account the same while making overall assessment of the applicant, as the same is not a penalty order. In the reply filed by it, the UPSC has made an effort to explain that in the wake of stay of the punishment order dated 28.06.2010, the proceedings were deemed as pending against him and were not taken into account to assess the suitability of the applicant. According to the Commission, had the applicant been found fit for promotion, in view of the pendency of disciplinary proceedings against him, his selection could be treated as provisional which is not the case here. The stand taken by the Commission is quite nebulous. It is not clear in what manner the order of censure was held against the applicant. In para 5.4 of the reply, even the date of censure order dated 26.12.2006 is mentioned as 28.06.2010. In the wake, the OA is disposed of with direction to UPSC to examine, whether the censure order dated 26.12.2006 has been taken into account to down grade the ACR of applicant of any particular assessment year or to declare him unfit for any of the year subsequent to the year 2006. If so, it should review the case of applicant for promotion by holding a review DPC and if the censure order dated 26.12.2006 is not taken into

account as a penalty order to reduce the grading in ACR or to declare the applicant unfit for the years after 2006, it would communicate its findings/decision to applicant by way of detailed, reasoned and speaking order.

OA stands disposed of.

(Dr. Birendra Kumar Sinha)
Member (A)

(A.K.Bhardwaj)
Member (J)

—skø