CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

OA 2282/2014

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)

Ajay Prakash Mathur,
S/o Shri Om Prakash Mathur,
Aged about 55 years,
Chief Engineer (Civil),
D-II/A/59, Nanakpura, South Moti Bagh,
New Delhi. ... Applicant

(By Advocate Ms.Rekha Palli)

VERSUS

1. Union of India
Through its Secretary,
Ministry of Urban Development,
Nirman Bhawan, New Delhi.

2. The Central Public Works Department
Through Director General,
Nirman Bhawan, New Delhi.

3. Union Public Service Commission,
Through its Secretary,
Dholpur House, Shahjahan Road,
New Delhi-110069 ... Respondents

(By Advocate Mr.R.V.Sinha)

O R D E R

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

The applicant herein joined Central Public Works Department as Assistant Executive Engineer (Civil) on 10.06.1983 and got promotion as Executive Engineer and Superintending Engineer in the years 1988 and 2000, respectively. In the year 2005, in terms of the order no.13011/8/2001-AV-III dated 13.06.2005, a penalty of

withholding of next increment of pay for a period of three years without cumulative effect was imposed upon him. Thus, when on 31.08.2012 he was considered for promotion against the vacancy of the year 2011-12, his ACR for the period 2005-06 was downgraded by the Selection Committee and as a result he was declared unfit for promotion to the post of Chief Engineer. In the wake, the applicant filed the present Original Application, praying therein:-

> "A. Direct the respondents to convene a Review DPC qua the applicant with reference to the promotion order dated 06.02.2013 and grant him promotion to the grade of Chief Engineer w.e.f. 06.02.2013 instead of 11.12.2013 alongwith all consequential benefits;
>
> B. Pass any other order/direction which this Hon'ble Tribunal may deem fit and proper in the interest of justice."

Ms. Rekha Palli, learned counsel for the applicant submitted that in terms of the Ministry of Personnel, Public Grievances & Pension (Department of Personnel and Training) OM no.22011/4/2007-Estt (D) dated 28.04.2014, the down gradation of ACR from one level in consideration of an employee for his promotion may not be legally sustainable and thus the UPSC was not justified in downgrading the ACR of the applicant for the year 2005-06, while considering him for his promotion to the post of Chief Engineer. Further she relied upon the judgment of Bangalore Bench of this Tribunal in **Sri M.Thangamuthu** Vs. **UOI and Ors** (OA 353/2011).

2. On the other hand, learned counsel for respondents submitted that in terms of the note issued by DOP&T, for all promotions where the DPC meets under the aegis of the Commission, for the penalty awarded before the last assessment year but during the assessment matrix, the grading for the year in which penalty was imposed should be lowered by one level. He further relied upon the judgment of Division Bench of this Tribunal in **Ms. Ranju Prasad** Vs. **Union of India and Ors** (OA 2724/2010).

3. We heard counsels for parties and perused the record. In terms of O.M.No.22011/5/86-Estt (D) dated 10.04.1989 as amended by O.M. No.22011/5/91-Estt (D) dated 27.03.1977, the DoP&T has laid down detailed guidelines on DPC. The DPC notes down the grading in ACRs and is at large to make its own grading with reference to the remarks against various attributes and parameters in CRs. Besides, while considering suitability of a candidate for promotion, the Committee is also expected to take into account the displeasure given to a candidate as well as minor and major penalties imposed upon him. For easy reference, para 6.1.1 to 6.2.3 of the guidelines 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 wh1ch 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…..”

Once the DoP&T had issued consolidated guidelines, laying down the procedure for DPC, it was not open for the Committee to evolve its own procedure disregarding the one laid down by the DOP&T.

4. In **Union of India and Ors** Vs. **N.R.Parmar and Ors** (JT 2012 (12) SC 99), Hon’ble Supreme Court ruled that the clarificatory/ ancillary guidelines cannot blur the substantive guidelines. Relevant excerpt of the judgment read thus:-

> "41. Before examining the merits of the controversy on the basis of the OM dated 3.3.2008, it is necessary to examine one related submission advanced on behalf of the direct recruits. It was the contention of learned counsel, that the OM dated 3.3.2008 being an executive order issued by the Department of Personnel and Training, would apply only prospectively. In this behalf it was pointed out, that the disputed seniority between rival parties before this Court was based on the appointment to the cadre of Income Tax Inspectors, well before the OM dated 3.3.2008 was issued. As such, it was pointed out, that the same would not affect the merits of controversy before this Court. We have considered the instant submission. It is not possible for us to accept the aforesaid contention advanced at the hands of the learned counsel. If the OM dated 3.3.2008 was in the nature of an amendment, there may well have been merit in the submission. The OM dated 3.3.2008 is in the nature of a "clarification". Essentially, a clarification does not introduce anything new, to the already existing position. A clarification, only explains the true purport of an existing instrument. As such, a clarification always relates back to the date of the instrument which is sought to be clarified."

5. In the present case, when the DOP&T gave exhaustive scope to DPC to take into account the penalty imposed upon an employee during the relevant period and its impact on his suitability, the UPSC could not have issued a practice note limiting such powers. Such note issued by the UPSC reads thus:-

> "Current practice for treating the penalties in the DPC meetings held under aegis of the Commission.
>
> (1). Where the penalty is 'Censure'
>
> The cases are decided by the DPCs on case to case basis after taking into consideration the article of charges, etc., against the officer.
>
> (2) Where the penalty is (a) 'withholding of promotion'; or (b) 'recovery from pay'; or (c) 'reduction to lower stage in the time scale of pay by one stage for a period not exceeding 3 years'; or without cumulative effect'; or (d) 'withholding of increments from pay' (all minor penalties; or (e) 'reduction to a lower stage in the time scale of pay for a specified period, or (f) 'reduction to lower time scale of pay, grade, post or service' (major penalties).

- If the penalty is awarded in the last assessment year or thereafter, the officer is made 'Unfit' only once. That penalty is not considered thereafter.
- However, if the penalty is awarded before the last assessment year but within the assessment matrix, the grading for that year is lowered by one level. For example, if the grading is 'Outstanding', it is reduced to "Very Good". Similarly, the 'Very Good' is reduced to 'Good' and 'Good' to 'Average'. This is also given effect only once.

(3) Where the penalty is 'compulsory retirement', or 'removal from service', or 'dismissal from service' (major penalties)

The Officer is treated as 'Unfit' for promotion in view of the penalty."

Even otherwise also, a practice note issued by the Commission could not have an overriding effect on the substantive guidelines. Besides, in **S.K.Mehra** Vs. **MCD** (OA 4427/2014), following the law declared by Hon'ble Supreme Court, this Tribunal viewed that the selection Committee has to held the selection in accordance with the rules and procedure laid down by the competent authority and it is not open for it to evolve its own procedure, contrary to one laid down by the competent authority to do so. 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."

Even the DoP&T itself realized that the Commission was not justified in introducing the procedure of down grading the APAR of a candidate by one level where the penalty is imposed and issued the OM dated 28.04.2014. The relevant excerpt of OM no.22011/4/2007-Estt (D) dated 28.04.2014 issued by DoP&T read thus:-

> "7. The matter has been examined in consultation with the Department of Legal Affairs. It is a settled position that the DPC, within its power to make its own assessment, has to assess every proposal for promotion, on case to case basis. In assessing the suitability, the DPC is to take into account the circumstances leading to the imposition of the penalty and decide, whether in the light of general service record of the officer and the effect of imposition of penalty, he/she should be considered suitable for promotion and therefore, downgradation of APARs by one level in all such cases may not be legally sustainable. Following broad guidelines are laid down in respect of DPC:
>
> a) 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, including those officers on whom penalty has been imposed as provided in DoPT O.M. dated 10.4.89 and O.M. dated 15.12.2004.
>
> b) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the ACRs/APARs but should make its own assessment

on the basis of the entries in the ACRs/APARs as it has been noticed that sometimes the overall grading in a ACR/APAR may be inconsistent with the grading under various parameters or attributes. Before making the overall recommendation after considering the APARs (earlier ACRs) for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty. (Refer para 6.2.1(e) and para 6.2.3 of DoPT OM dated 10.04.89)

c) In case, the disciplinary/criminal prosecution is in the preliminary stage and the officer is not yet covered under any of the three conditions mentioned in para 2 of DoPT O.M. dated 14.09.1992, the DPC will assess the suitability of the officer and if found fit, the officer will be promoted along with other officers. As provided in this Department's O.M. dated 02.11.2012, the onus to ensure that only person with unblemished records are considered for promotion and disciplinary proceedings, if any, against any person coming in the zone of consideration are expedited, is that of the administrative Ministry/Department.

d) If the official under consideration is covered under any of the three condition mentioned in para 2 of O.M. dated 14.09.1992, the DPC will assess the suitability of Government servant along with other eligible candidates without taking into consideration the disciplinary case/criminal prosecution pending. The assessment of the DPC including 'unfit for promotion' and the grading awarded are kept in a sealed cover. (Para 2.1 of DoPT OM dated 14.9.92).

e) Para 7 of DoPT OM dated 14.09.92 provides that a Government servant, who is recommended for promotion by the DPC, but in whose case, any of the three circumstances on denial of vigilance clearance mentioned in para 2 of ibid O.M. arises after the recommendations of the DPC are received but before he/she is Page 3 of 5 j) actually promoted, will be considered as if his/her case had been placed in a sealed cover by the DPC. He/she shall not be promoted until he/she is completely exonerated of the charges against him/her.

f) If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he/she is found guilty in the criminal prosecution

against him/her, the findings of the sealed cover/covers shall not be acted upon. His/her case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him/her (para 3.1 of DoPT OM dated 14.9.92).

g) In assessing the suitability of the officer on whom a penalty has been imposed, the DPC will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of general service record of the officer and the fact of imposition of penalty, the officer should be considered for promotion. The DPC, after due consideration, has authority to assess the officer as 'unfit' for promotion. However, where the DPC considers that despite the penalty the officer is suitable for promotion, the officer will be actually promoted only after the currency of the penalty is over (para 13 of DoPT OM dated 10.4.89).

h) Any proposal for promotion has to be assessed by the DPC, on case to case basis, and the practice of downgradation of APARs (earlier ACRs) by one level in all cases for one time, where a penalty has been imposed in a year included in the assessment matrix or till the date of DPC should be discontinued immediately, being legally non-sustainable.

i) While there is no illegality in denying promotion during the currency of the penalty, denying promotion in such cases after the period of penalty is over would be in violation of the provisions of Article 20 of the Constitution.

j) The appointing authorities concerned should review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings/criminal prosecution and the further measures to be taken to expedite the completion. (Para 4 of O.M. dated 14.09.1992)

k) In cases where the disciplinary case/criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC which kept

> its findings in respect of the Government servant in a sealed cover then subject to condition mentioned in Para 5 of this Department's O.M. dated 14.09.1992, the appointing authority may consider desirability of giving him ad-hoc promotion (Para 5 of this Department's O.M. dated 14.09.1992).”

One of the argument put forth on behalf of respondents is that the OM dated 28.4.2014 will have prospective application only. Had the OM suggested any new procedure, the argument put forth by the learned counsel could be acceptable. But it is not so, as in terms of the OM, the DoP&T has declared the procedure of down grading the grading in ACR by one level as legally not sustainable. In other words, the OM has not provided any new procedure to be followed prospectively but has declared the procedure lay down in terms of the aforementioned note as illegal. Once a procedure has been declared illegal, the ramification would be that the same is non-existent. Besides, as ruled by Hon’ble Supreme Court in **Shyam Sunder and others** Vs. **Ram Kumar and another** (2001 (8) SCC 24), a declaratory procedure of the statute would always have retrospective operation. Para 39 of the judgment reads 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."

Besides in **Sri. M.Thangamuthu** Vs. **Union of India and Ors**, a Division Bench (Bangalore Bench) of this Tribunal ruled thus:-

> "We shall now illustrate below how the mechanical application of guidelines leads to perverse decisions. Clause (2) (i) & (ii) of the guidelines are 5.6.2008 are reproduced below:-
>
> - If the penalty is awarded in the last assessment year or thereafter the officer is made 'unfit' only once. That penalty is not considered thereafter.
> - However, if the penalty is awarded before the last assessment year but within the assessment matrix, the grading for that year is lowered by one level. For example, if the grading is 'Outstanding', it is reduced to 'Very Good'. Similarly the 'Very Good' is reduced to 'Good' and 'Good' to 'Average'. This is also given effect only once.

Thus, the DPC that makes selection against the vacancies of Chief Engineer for 2010-2011 which considers a person (let us call him 'B') who has been awarded a punishment after 1.4.2008 (even a major penalty), will down grade the grading for the last year i.e. 2008-09 in the ACR only once. Thus, if the grading is "Very Good" for 2008-09 it is down graded as "Good" resulting in the person "B" being made 'unfit' for promotion. However, if the said person B has earned "Very Good" grading throughout, in the next year of assessment i.e. for vacancies of 2011-2012 he will be found fit for promotion. Thus, "B" who has committed even a major irregularity during 2005-2006 or thereafter (presuming it takes 3 years for completion of major disciplinary proceedings) that too while working in the feeder cadre of Superintending Engineer will get promoted against the vacancies of 2011-2012, as may be the case of the applicant, say 'A' who was found responsible for a minor irregularity in 1988-89 (while working in a still lower cadre of Executive Engineer). This result in treating 'A' and 'B' whose cases are not at all similar, in the same manner. Yet again, if the disciplinary action against the applicant which was initiated in 1999 for an offence of 1988 (after a lapse of 11

years-which is impermissible as per the law laid down by the Hon'ble Apex Court in P.V. Mahadevan Vs. M.D.T.N.Housing Board, 2005 SCC (L&S) 861, M.V. Bijlani Vs. Union of India & Others, 2006 SCC (L&S) 919 and Sate of Madhya Pradesh Vs. Bani Singh & Another, 1991 SCC (L&S) 638, but we are stopping short here as we do not know whether the delay could be explained was completed by 2002, as per the guidelines issued by CVC, he would have been awarded the punishment during the year 2002-2003 and it would not have had any impact on the gradings for the assessment years of 2004-2005 onwards. Even a major penalty of reduction to the lower post for one year would not have resulted in finding him unfit for promotion by the same DPC. In short, what we are trying to explain is that the applicant who has been awarded punishment for the irregularities committed in the year 1988 is denied promotion to the post of SAG only because the punishment was awarded during the year 2004-2005 after a lapse of 16 years. For the same offence even if the same penalty was awarded before 2003, it would have expired before the year 2005-05 and the said penalty would not have come in the way of down grading the ACR of the applicant. By chance it was awarded on 1.11.2004. From a perusal of the copies of the ACRs of the applicant (produced along with a memo dated 24.10.2011), we find that his grading for 2007-2008 was "Outstanding". Hence, if the imposition of the penalty was further delayed and orders were issued after 1.4.2007, his grading for the year would have been made "Very Good" by the DPC and he would have been fit for promotion as per the DOP&T's revised Bench mark prescription dated 18.2.2008. Let us fictionalize yet another situation. The same applicant, while working as Superintending Engineer is proceeded against for a major irregularity and awarded a major penalty of reduction to a lower post for one year in the year 2002 or before, or even during 2007-2008, he would still have been found fit for promotion by the same DPC. We have illustrated that the same person can therefore be treated differently by strict adherence to the guidelines under different fortuitous circumstances. Thus, there is no logical basis to conclude that the applicant's performance during the year 2004-05 was only 'Good' and not 'Very Good'. As already stated, the DPC has mechanically applied the guidelines without taking into account the various factors which had led in the punishment order, like the date of commitment of irregularity, the nature of irregularity, the short tenure of the applicant as Executive Engineer in Pondicherry etc. In short, the guidelines dated 5.6.2008 are irrational when applied without proper application of mind. In any case, as the said guidelines have no force of law, they cannot be stated to be binding on the DPC. By stating so we are not precluding the DPC from applying the guidelines. While applying the guidelines the DPC has to exercise the discretionary powers vested on it by virtue of the instructions contained in DOP&T OM dated 10.04.1989 specially by clauses 6.1.3, 6.2.1 (b) and 6.2. 31(e) which have been quoted elsewhere.

> 38. In the result, we allow the reliefs prayed for in the OA. The respondents are directed to review the case of the applicant for promotion from the grade of Superintending Engineer to the grade of Chief Engineer for the vacancies of 2010-2011 in the light of the discussions and findings as stated above. If the applicant is selected, in accordance with his seniority position in the cadre of Superintending Engineer he will retain his seniority in the cadre of Chief Engineer and will be entitled to all other consequential benefits also. The review DPC as ordered above shall conclude the review proceedings within a period for 3 months from the date of receipt of a copy of this order. The OA is disposed of as above. No order as to costs."

As far as judgment in OA 2724/2010 is concerned, though in the said case a Division Bench of this Tribunal could view that in terms of the procedure introduced by DoPT in terms of note dated 5.06.2008, on account of imposition of penalty on a candidate, the UPSC could down grade his ACR for the year during which penalty is imposed by one level, but in the said judgment, the OM dated 28.04.2014 whereby the procedure has been declared illegal was not noted, thus the judgment needs to be ignored as sub silentio.

6. In **Municipal Corporation of Delhi** Vs. **Gurnam Kaur** (1989 (1) SCC 101), Hon'ble Supreme Court viewed that the pronouncement of law, which are not part of the ratio deci dendi, are classed as obiter dicta and are not authoritative. In the said case, it has also been ruled that a decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. Quoting Professor P.J.Fitzgerald, editor of the Salmond on Jurisdiction, 12th Edn., explaining the concept of sub silentio at page 153, their Lordships viewed that

precedents sub silentio and without argument are of no moment.

Paras 11 and 12 of the said judgment read as under:-

> “11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das' case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P. J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn., explains the concept of sub silentio at p. 153 in these words :
>
> > "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."
> >
> > 12. In Gerard v. Worth of Paris Ltd. (K), (1936) 2 All ER 905 the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London)

> Ltd. v. Bremith, Ltd., (1941) 1 KB 675, the Court held itself not bound by its previous decision. Sir Wilfrid Greene, M. R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

7. In view of the aforementioned, the OA is disposed of with direction to respondents to reconsider the applicant for his promotion to the post of Chief Engineer against the vacancy of the year 2011-12, without lowering the grading in his ACR for the year 2005-06. Nevertheless, it is made clear that in terms of the guidelines laid down by the DoP&T in terms of OM dated 28.4.2014, reproduced herein above as well as the OM dated 10.04.1989, the DPC would take into account the ramification of the penalty imposed upon the applicant on his suitability. No costs.

(Dr.Birendra Kumar Sinha)
Member (A)

(A.K.Bhardwaj)
Member (J)

'sk'
..