

**Central Administrative Tribunal
Principal Bench
New Delhi**

OA No.1754/2012

Reserved on : 25.04.2016

Pronounced on : 30.05.2016

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. Sudhir Kumar, Member (A)**

Mrs. Amrita Raj, Dir (Arch)
Directorate of Arch (E-6)
Engineer-in-Chief's Branch
Integrated HQ of MOD (Army)
Kashmir House, Rajaji Marg
New Delhi-110011.

... Applicant

(By Advocate : Shri O. P. Kalshian)

Versus

1. Union of India through
Secretary, Ministry of Defence,
South Block, New Delhi-110011.
2. Secretary, Ministry of Personnel, Public
Grievances and Pension, Department of
Personnel & Training, North Block,
New Delhi-110001.
3. Engineer-in-Chief,
E-in-C's Branch,
Integrated Headquarters of MoD (Army),
Kashmir House, Rajaji Marg,
New Delhi-110011.
4. Secretary, Union Public Service Commission,
Shahjahan Road, DHQ, P.O.
New Delhi-110011.
5. Smt. Upinder Kaur, Chief Arch,
Jt DG (Arch), CE Eastern Comd,
Kolkata.

... Respondents

(By Advocate : Shri S. N. Verma, for Respondents 1, 2 & 3; Shri Ravinder Aggarwal, for Respondent No.4; and Shri Gyan Prakash for Respondent No.5)

O R D E R

Justice Permod Kohli, Chairman :

The applicant has approached this Tribunal in the present OA seeking a direction for quashment of the Departmental Promotion Committee (DPC) proceedings dated 17.11.2003 whereby respondent No.5 has been promoted to the grade of Senior Architect and further brought on the panel for promotion to the post of Chief Architect, with the further prayer to hold review DPC on year to year basis and not to take into account the uncommunicated downgraded entries in the ACRs considered by the DPC. The applicant has further prayed for restoration of seniority in the grade of Senior Architect for her further consideration for promotion to the post of Chief Architect.

2. The facts relevant for the purpose of the present OA are being noted. The applicant, possessing Degree in Architecture and M. Arch., joined the Military Engineering Service (MES) as a direct recruit on the post of Deputy Architect (Group-A) through selection by UPSC on 30.11.1991. She came to be promoted as Architect on regular basis. On the basis of her seniority and eligibility she was required to be considered for promotion to the post of Senior Architect. As per the recruitment rules, namely, the Military Engineering Services, Architect Cadre (Group 'A' Posts) Recruitment Rules, 2006, as notified vide SRO 66 dated 16.05.2006, for promotion to the post of Senior Architect, minimum nine years' regular service as Architect is required, apart from possessing Degree in Architecture from a recognised University, or equivalent. The applicant

was qualified and eligible for the said post. It is not disputed that the benchmark prescribed for promotion to the post of Senior Architect is 'very good' grading in the last five years preceding the date an officer is due for promotion. DPC considered the eligible candidates for promotion to the grade of Senior Architect in the pay scale of Rs.12000-16500 for the vacancy year 2004-05. On the basis of the assessment, DPC promoted as many as 12 Architects, including respondent No.5 Smt. Upinder Kaur. The applicant was not recommended for promotion being found 'unfit', as is evident from the impugned DPC minutes dated 17.11.2003 (Annexure A-1). Since the applicant was not promoted to the post of Senior Architect, as a natural corollary, she was not to be considered for empanelment as Chief Architect against the vacancies for the years 2008-09 and 2009-10. Respondent No.5 was considered for empanelment to the grade of Chief Architect and was accordingly included in the panel approved for promotion notified on 08.02.2010 (Annexure A-2). The applicant made a representation dated 17.10.2011 (Annexure A-3) against her non promotion as Senior Architect. As averred in paras 4.16 and 4.17 of the OA, the applicant has been ignored for such promotion on the basis of below benchmark gradings in her ACRs. Representation of the applicant has been rejected vide communication dated 21.12.2011 relying upon DOP&T OM No.21011/2010-Estt-A dated 13.04.2010, whereunder prior to the reporting period 2008-09 only adverse remarks in the ACRs were required to be communicated, and there was no need to communicate below benchmark gradings.

3. Respondents No.1 to 3 have filed a joint counter affidavit, whereas respondent No.5 has filed separate counter affidavit. The official respondents 1 to 3 have reiterated their stand in the counter affidavit as earlier indicated while rejecting the representation of the applicant. It is accordingly stated that below benchmark ACRs were not required to be communicated prior to the year 2008-09. They have also placed on record copy of index card in respect of MES civilian gazetted officers (Annexure R-2) to indicate that the applicant's performance was not up to the mark. It is further stated in the counter affidavit that except for the period from 01.04.2003 to 11.07.2003, the performance of the applicant was quite ordinary, and it was only during this period that she was graded as 'outstanding'.

4. Respondent No.5 has also opposed the claim of the applicant, firstly on the ground of limitation, and secondly for non-joining of necessary parties. It is stated that not only the respondent No.5, but as many as four other officers named in para (a) of the preliminary submissions, who are said to be juniors to the applicant, have also not been impleaded as party respondents. On the question of limitation, it is stated that the impugned promotion was made in the year 2003, whereas representation was made by the applicant only on 17.10.2011, i.e., after eight years of the promotion, without explaining any valid reason for such delay.

5. Respondent No.4, UPSC, has filed an affidavit dated 14.03.2016, wherein it is stated that the applicant could not attain the

prescribed benchmark of 'very good' in the requisite four out of five ACRs under the assessment matrix, and accordingly she was found unfit for promotion to the grade of Senior Architect.

6. Insofar as the question of limitation is concerned, right of an employee to be considered according to law has been denied to the applicant on two occasions, firstly for promotion to the post of Senior Architect, and thereafter to the post of Chief Architect. Denial of consideration, according to law, is a serious issue, which may have continued impact on the career of the applicant. As for non-joinder of the parties, the applicant is not seeking any relief for quashment of the promotion of respondent No.5 who was/is admittedly junior to the applicant as Architect. The applicant is seeking her promotion from the date respondent No.5 was considered and she was denied without following the due process of law.

7. Vide order 20.10.2015, respondent No.4 was directed to ensure that the records are made available for perusal of the court. Similar directions were issued on subsequent occasions. It was, however, reported by the said respondent on 14.03.2016 that the relevant file could not be traced, and the DPC file has been obtained from the Ministry and the same is being submitted with the affidavit. It is under these circumstances that respondent No.4 has submitted the DPC record.

8. We have heard the learned counsel for parties and carefully examined the record. Admittedly, the applicant is senior to respondent No.5, as is evident from the seniority list dated 12.10.2009 (Annexure A-6)

in the grade of Architects. The position is also not disputed by the respondents in their pleadings. Respondent No.4, UPSC, in its affidavit has categorically stated that four out of five ACRs for the reckoning period were below benchmark. Respondents 1 to 3 have taken the stand that during the period prior to 2008-09 only adverse ACRs were required to be communicated and not the ACRs below benchmark. Annexure R-2, i.e., the index card produced by the respondents 1 to 3 with the counter affidavit is not readable except for the period 2007-08 to 2011-12. This period is totally irrelevant insofar as promotion for the year 2003-04 is concerned. Other entries are totally blackened and are not legible. The record produced by UPSC includes a sealed envelope containing the assessment sheet. The said envelope was opened in the presence of Shri Ravinder Aggarwal, Advocate. We have perused the assessment sheet. The applicant has secured two 'good' gradings for the years 1998-99 and 1999-2000, and for the remaining three years, i.e., 2000-2001 to 2002-2003, she was graded 'very good'.

9. Learned counsel appearing for the applicant has referred to and relied upon the judgment of the Hon'ble Supreme Court in *Dev Dutt v Union of India & others* [(2008) 8 SCC 725]. In the said judgment, the Hon'ble Supreme Court has held as under:

"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.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor.

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

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).

16. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit. For example, if the bench-mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to

do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

“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) [(1978) 1 SCC 248] that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench-mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.”

“22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.”

“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.”

Dev Dutt's judgment (supra) was endorsed by a three-Judge Bench in *Sukhdev Singh v Union of India & others* [(2013) 9 SCC 566] with the following observations:

“6. We are in complete agreement with the view in *Dev Dutt* [(2009) 16 SCC 146] particularly paragraphs 17, 18, 22, 37 & 41 as quoted above. We approve the same.”

Even prior to that, a similar view was expressed by another three-Judge Bench judgment in *Abhijit Ghosh Dastidar v Union of India & others* [(2009) 16 SCC 146]. The view expressed in the above judgments has been reiterated by a later judgment in *Prabhu Dayal Khandelwal v Chairman, UPSC & others* [AIR 2015 SC 3057]. The applicant has also referred to various other judgments of the Hon'ble

Supreme Court, High Court of Delhi and that of this Tribunal in para 5.9 of the OA.

10. The sum and substance of the aforesaid judgments can be culled out as under:

- (1) All gradings whether 'very good', 'good', 'average' or 'poor' are required to be communicated to the government employee working in government offices, statutory bodies, PSUs or other State instrumentalities, where constitutional obligation and principles of natural justice and fairness apply.
- (2) Every entry must be communicated to the employee within a reasonable period irrespective of the fact whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry would adversely affect the employee's chances of promotion or getting some other benefit because promotion is made on comparative merit of the eligible employees.
- (3) Even a 'good' entry, if downgraded from the earlier 'outstanding' or 'very good' entry, needs to be communicated, the same having its impact on the service career of the concerned employee, particularly his/her promotional chances, to enable the employee to make representation for upgradation of such grading.

- (4) Non-communication of an entry in the ACR of a public servant is arbitrary because it deprives the concerned employee of making representation against it and praying for its upgradation. Such a recourse is thus violative of Article 14 of the Constitution of India.
- (5) The object of writing the confidential reports and making entries is to give an opportunity to a public servant to improve his performance.
- (6) Communication of even 'outstanding', 'very good' or 'good' entry may encourage the employee to further improve, and similarly an adverse entry will provide an opportunity to the employee to work hard to improve his grading.

11. Even though the DOP&T issued office memorandum dated 13.04.2010 for communication of the ACRs for the reporting period 2008-09 onwards, however, from the dictum of the judgments of the Apex Court and of this Tribunal noticed by us hereinabove, we are of the considered opinion that non-communication of the ACRs has adversely affected the claim of the applicant for her consideration for promotion to the post of Senior Architect. The applicant had secured three 'very good' ACRs and only for two years her grading was 'good'. She required at least four 'very good' gradings to earn promotion to the post of Senior Architect. Non-communication of

below benchmark ACRs violates the right of the applicant for her consideration for promotion. If out of the two below benchmark ACRs, even if the ACR for one year is upgraded, the applicant would earn the promotion.

12. In the light of the mandate of law laid down by the Hon'ble Supreme Court and other judgments referred to hereinabove, we allow this OA with the following directions:

- (1) The respondents shall communicate the below benchmark ACRs to the applicant, i.e., for the years 1998-99 and 1999-2000 within a period of one month providing opportunity of fifteen days to the applicant to represent against the below benchmark gradings.
- (2) On receipt of representation from the applicant, the competent authority would take a decision on the question of upgradation or otherwise of the ACR gradings within one month.
- (3) In the event the below benchmark ACRs are upgraded, the applicant shall be considered for promotion by the review DPC within one month thereafter.
- (4) If the applicant earns promotion to the grade of Senior Architect, she would be entitled to all consequential benefits, viz., promotion from the date respondent No.5 was promoted,

and all service benefits including further consideration for promotion to the post of Chief Architect with effect from the date respondent No.5 was empanelled/promoted.

Let the entire exercise be completed in terms of the aforesaid directions and outcome communicated to the applicant.

(Sudhir Kumar)
Member (A)

(Permod Kohli)
Chairman

/as/