

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A. No.1731/2012

Friday, this the 4th day of September 2015

**Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Mr. K.N. Shrivastava, Member (A)**

Jai Bhagwan Singh
s/o Mr. Gulab Singh
r/o A-83, III Floor, Majlish Park
Azadpur, Delhi-33

Presently posted as
Inspector of Police Interpol
Central Bureau of Investigation
Block No.B-5
New Building,
CGO Complex, Lodhi Road, New Delhi

.. Applicant

(By Advocate: Mrs. Pratima K. Gupta)

Versus

1. Union of India through Director
Central Bureau of Investigation
Block No.B-5, New Building
CGO Complex
Lodhi Road, New Delhi
2. Deputy Director (Admn.)
Central Bureau of Investigation
Block No.B-5, New Building
CGO Complex
Lodhi Road, New Delhi
3. Union Public Service Commission
Through its Chairman
Shahjahan Road
New Delhi

..Respondents

(By Advocates: Mr. Rajinder Nischal for respondent Nos. 1 & 2 –
Mr. D.S. Mahendru for respondent No.3)

O R D E R (ORAL)

Mr. A.K. Bhardwaj:

The prayer made in the present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985 reads thus:

“(i) Direct the respondents to produce the records relating to Applicant’s ACR for the period 2004-2008 before this Hon’ble Tribunal.

(ii) Direct the respondents to produce the service book of the applicant before this Hon’ble Tribunal;

(iii) Direct the respondents to convene a review DPC for DPC held on 14.12.2010 and consider the case of the applicant for promotion, after ignoring the ACR for 2004 and if found fit promote him for the date of his juniors were promoted with all consequential benefits;

(iv) Any other relief, which this Hon’ble Tribunal deems fit, may also be awarded in favour of the applicant.

(v) Cost of this O.A. may also be awarded to the applicant.”

2. Mrs. Pritma K. Gupta, learned counsel for applicant espoused:

- i) Once in the case of one Mr. K Praveen Kumar his Annual Confidential Report (ACR) was not downgraded (no grading lower than the one given in ACR was made by the DPC) on account of currency of penalty of stoppage of increment, in the case of applicant his grading in his ACR for the period 2006 is lowered from ‘Good’ to ‘Average’; and
- ii) When the below ‘bench mark’ ACR for the year 2004 had not been communicated before the meeting of DPC, the ACR should have been ignored by the Committee.

3. To buttress her plea, the learned counsel made reference to paragraph 10 of the reply filed on behalf of respondent No.3 – Union Public Service Commission (UPSC).

4. On the other hand, Mr. Rajinder Nischal, learned counsel for respondent Nos. 1 & 2 and Mr. D.S. Mahendru, learned counsel for respondent No.3 espoused that after issuance of Department of Personnel & Training O.M. 13.4.2010 the ACR for the year 2004 was communicated to the applicant and the representation made by the applicant against it had been rejected, thus the principle laid down by Hon'ble Supreme Court in **Dev Dutt v. Union of India & others**, (2008) 8 SCC 725 was adhered to. Nevertheless, no satisfactory explanation could come that in what circumstances Mr. K Praveen Kumar, who was also undergoing similar penalty of stoppage of increment, was considered fit for promotion.

5. We heard the learned counsels for the parties and perused the record.

6. The Departmental Promotion Committee (DPC) met on 14.12.2010 considered the applicant for his promotion to the post of Deputy Superintendent of Police, CBI. Having made its assessment, the Committee found him unfit for promotion. The representation made by the applicant against the view taken by the DPC could not get any response, thus the applicant filed the present Original Application.

7. As far as the plea regarding down-gradation of the ACR for the period 2006 is concerned, there is no such rule, which enable the Committee to lower the grading given by the authorities associated with reporting, reviewing and accepting the ACR of an employee or to decide

representation/appeal against the grading made thereafter but indubitably the DPC is competent to make its own grading in respect of ACR and performance of an employee during a particular year with reference to his service record and attributes in various columns of the ACR. Provision in this regard has been embodied in paragraphs 6.2.1 to 6.2.3 of the General Instructions issued by the Department of Personnel & Training vide O.M. No. 22011/5/86-Esstt. (D) dated 10.4.1989 and amended by O.M. No.22011/5/91-Estt. (D) dated 27.3.1997. The relevant paragraphs read thus:-

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

(a) to (d) xxx

(e) The DPC 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 sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) xxx

Xxx xxx xxx

6.2.2 Grading of officers.- In case of 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.”

8. As can be seen from the aforementioned, the imposition of major/minor penalty upon an employee during a particular year can be

sufficient ground for the DPC to make its own grading, which may be different from and inferior to the grading given in the ACR. In the circumstances, no infirmity can be found in the view taken by the DPC while assessing the performance/record of the applicant for the year 2006, including the ACRs for the period.

9. One of the arguments put forth by learned counsel for applicant is that while lowering the grading of the applicant from 'Good' to 'Average', reasons were required to be recorded. As has been ruled by Apex Court in **U.P.S.C. v. K. Rajaiah & others**, (2005) 10 SCC 15, the DPC is not required to record any reason for its grading. Relevant excerpt of the aforementioned judgment reads thus:-

"9. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the 1st respondent. The High Court relied on the decision of this Court in *National Institute of Mental Health & Neuro Sciences Vs. Dr. K. Kalyana Raman & Ors.* [AIR 1992 SC 1806]. Far from supporting the view taken by the High Court, the said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed

"even the principles of natural justice do not require an administrative authority or a Selection Committee or an Examiner to record reasons for the selection or non selection of the person in the absence of statutory requirement. This principle has been stated by this Court in *R.S. Das Vs. Union of India* [1986 (Suppl.) SCC 617] at Page 633."

In the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words:

"...we may state at the outset that giving of reasons for decision is different from, and in principle distinct from the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administration action ought

to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary...”

That being the legal position, the Court should not have faulted the so called down gradation of the 1st respondent for one of the years. Legally speaking, the term ‘down gradation’ is an inappropriate expression. The power to classify as ‘outstanding’, ‘very good’, ‘good’ and ‘unfit’ is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-94. **Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government’s decision.”**

(emphasis supplied)

10. As far as the consideration of the ACR for the period of 2004 is concerned, indubitably, in view of the judgment of Hon’ble Supreme Court in **Dev Dutt’s** case (supra), the grading below benchmark need to be communicated to an employee and he should be given an opportunity to make representation against the same and if after consideration of his representation the grading in the ACR is improved, he should be reconsidered for his promotion by convening review DPC. Nevertheless, when in implementation of the judgment the Department of Personnel & Training could issue an O.M. in the year 2009, i.e., O.M. No. 21011/1/2005-Estt. (A) (Pt.II) dated 14.5.2009 wherein it was provided that only the ACRs for the period 2008-09 onwards were required to be communicated in terms of the law declared by the Apex Court, subsequently another O.M.

No.21011/1/2010-Estt. A dated 13.4.2010 was issued and in the said O.M. it was provided that before considering an employee for his promotion, the ACRs for the relevant period, i.e., the ACRs required to be assessed by the DPC, should be communicated to him. The O.Ms. read thus:-

“O.M. dated 14.5.2009

“1. The existing provisions in regard to preparation and maintenance of Annual Confidential Reports inter alia provide that only adverse remarks should be communicated to the officer reported upon for representation, if any. The Supreme Court has held in their judgment, dated 12.05.2008 in the case of Dev Dutt v. Union of India (Civil Appeal No.7631 of 2002) that the object of writing the confidential report and making entries is to give an opportunity to the public servant to improve the performance. The 2nd Administrative Reforms Commission in their 10th Report has also recommended that the performance appraisal system for all services be made more consultative and transparent on the lines of the PAR of the All India Services.

2. Keeping in view the above position, the matter regarding communication of entries in the ACRs in the case of civil services under the Government of India has been further reviewed and the undersigned is directed to convey the following decisions of the Government-

- (i) The existing nomenclature of the Annual Confidential Report will be modified as Annual Performance Assessment Report (APAR).
- (ii) The full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the Report is complete with the remarks of the Reviewing Officer and the Accepting Authority wherever such system is in vogue. Where Government servant has only one supervisory level above him as in the case of personal staff attached to officers, such communication shall be made after the reporting officer has completed the performance assessment,
- (iii) The Section entrusted with the maintenance of APARs after its receipt shall disclose the same to the officer reported upon.

- (iv) The concerned officer shall be given the opportunity to make any representation against the entries and the final grading given in the Report within a period of fifteen days from the date of receipt of the entries in the APAR. The representation shall be restricted to the specific factual observation contained in the report leading to assessment of the officer in terms of attributes work output, etc. While communicating the entries, it shall be made clear that in case no representation is received within the fifteen days, it shall be deemed that he/she has no representation to make. If the concerned APAR Section does not receive any information from the concerned officer on or before fifteen days from the date of disclosure, the APAR will be treated as final.
- (v) The new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the Reporting Period 2008-09 which is to be initiated after 1st April, 2009.
- (vi) The Competent Authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation.
- (vii) The Competent Authority after due consideration may reject the representation or may accept and modify the APAR accordingly. The decision of the Competent Authority and the final grading shall be communicated to the officer reported upon within fifteen days of receipt of the decision of the competent authority by the concerned APAR Section.

3. All Ministries/Departments are requested to bring to the notice of all the offices under them for strict implementation of the above instructions.”

O.M. dated 13.4.2010

“Below bench-mark gradings in ACRs prior to the reporting period 2008-2009 and objective consideration of representation by the Competent Authority against remarks in the APAR or for upgradation of the final grading.- Prior to the reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any, to be considered by the Competent Authority. The question of treating the grading in the ACR

which is below the bench-mark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are the below the bench-mark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below bench-mark ACR below bench-mark ACRs of other year.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the Competent Authority in consultation, if necessary, with the Reporting and the Reviewing Officer, if any. While considering the representation, the Competent Authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the Competent Authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the views of the Reporting and Reviewing Officer if they are still in service on the points raised in the representation vis-à-vis the remarks/gradings given by the in the APAR. The UPSC has informed this Department that the Commission has observed that while deciding such representations, the competent authorities sometimes do not take into account the views of Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the Competent Authority does not give specific reasons for upgrading the below bench-mark ACR/APAR grading at par with the bench-mark for next promotion.”

11. In view of the provisions of the O.Ms., the respondents communicated the below benchmark grading to the applicant and he was given an opportunity to make representation against the same. Once the representation remained unsuccessful and there was no improvement in the grading for the year 2004, in view of the recent judgment of Hon’ble Supreme Court in **Saroj Kumar v. Union of India & others** (Civil Appeal No. 6081/2005) decided on 18.08.2015, no direction can be given to the respondents to reconsider the applicant for his promotion, disregarding

the ACR for the year 2004. Relevant excerpt of the judgment in **Saroj**

Kumar's case (supra) reads thus:-

“The controversy in the present case relates to the downgrading ACRs of the appellant without giving him any opportunity, which were later communicated and representation made by the appellant was also considered and rejected.....subsequent to the first order of the Hon’ble Tribunal, the uncommunicated entries were made available to the petitioner and he made a representation against the entries; this representation was rejected, leading to the filing of another OA 490/2010 by the petitioner, wherein the Hon’ble Tribunal held that the order on representation was not a reasoned order and directed reconsideration of the representation in the light of law laid down by this Hon’ble Court in *Dev Dutt vs. Union of India & Ors.* (2008) 8 SCC 725; W.P. 8357/2011 filed thereafter was dismissed by the Hon’ble High Court by order dated 21.2.2011 holding that the complaints which led to the downgrading of the ACRs of the petitioner and the reasons for relying on the complaints have not been recorded in the order rejecting the representation; if the petitioner wanted his claim for promotion considered ignoring the uncommunicated ACRs, he should have challenged the order of the Hon’ble Tribunal dated 27.4.2010 in O.A. 490/2010 and that of the Hon’ble High Court dated 21.2.2011 in W.P. 8357/2011; the Hon’ble Tribunal, by order dated 16.1.2012 in O.A. 658/2011 has not recorded any reasons for disagreeing with the conclusions drawn by the competent authority in its detailed order supported by reasons. The Hon’ble High Court thus remanded the matter back to the Hon’ble Tribunal to examine the merits of the order rejecting the representation of the petitioner.

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“9. It is strongly denied that the adverse entries remained uncommunicated because of active concealment by the respondents resulting in violation of fundamental rights of the petitioner and the principles of natural justice. It is submitted that as per DOPT OM dated 11.5.1990, communication was mandatory only in cases where adverse entry was made in the ACR... It is also clear from the record that the representation of the appellant was rejected vide order dated 22.1.2010. Consequent to subsequent direction of the Tribunal in second round of litigation, as affirmed by the High Court in Civil Miscellaneous Writ Petition No. 8357 of 2011, the matter has been reconsidered and rejected. **In the above circumstances, after communication of the entries made to the appellant and subsequent rejection of the representation, now, the law laid down in the cases of *Dev Dutt v. Union of India* (supra), *Abhijit Ghosh Dastidar v. Union of India and others* (supra), and *Sukhdev Singh v. Union of India*[3], is of little help to the present appellant for the reason that in the present case not only the ACRs have been**

communicated to the appellant, his representation too has been rejected.”

(emphasis supplied)

In any case, once in the case of Mr. K. Praveen Kumar despite currency of penalty against him he was considered fit for promotion, the respondents need to clarify the doubt of the applicant that how the penalty against him could result in the grading by the DPC different from the one in the ACR for the year 2006.

12. *Ergo*, the Original Application is disposed of with liberty to the applicant to espouse his grievance regarding the different treatment given to him before the concerned authority. He may also raise the grievance, if any, regarding non-disposal of his earlier representation made against the grading in the ACR for the year 2004, if any. The representation, if made within two weeks from the date of receipt of a copy of this Order, would be decided by the respondents within eight weeks thereafter. No costs.

(K.N. Shrivastava)
Member (A)

(A.K. Bhardwaj)
Member (J)

September 4, 2015
/sunil/