

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 3389/2013

Reserved on 16.08.2016
Pronounced on 03.11.2016

Hon'ble Mr.Sudhir Kumar, Member (A)
Hon'ble Mr.Raj Vir Sharma, Member (J)

Somnath Bose,
S/o Late Shri D.D.Bose,
R/0 C-66, Tarang Apartments,
19, I.P. Extension, Delhi-110092

... Applicant

(By Advocate: Mr. Bharat Bhushan Bhatia)

VERSUS

Union of India
Through its Secretary,
Department of Electronics &
Information Technology,
MCTT, Govt. of India,
Electronics Niketan, 6, CGO Complex,
New Delhi-110003

... Respondent

(By Advocate: Mr. A.K.Singh)

ORDER

Hon'ble Mr. Sudhir Kumar, Member (A):

The applicant of this case is a Scientist, who is aggrieved by the adverse remarks, and the below benchmark grading awarded to him in his APAR, and communicated to him through the impugned Office Memorandum dated 01.11.2012. He had thereafter given a representation in that regard on 19.11.2012 (pages 74-75 of the paper book), but he is aggrieved that the said adverse remarks were not expunged. He had also given another representation to the Public Grievance Officer of the Department of Electronics and IT on the same subject on 29.11.2012. But due to inaction on the part of the respondent, he filed this Original Application (OA) on 13.09.2013.

2. The facts of the case lie in a very narrow compass. The applicant had joined service with the respondents in the year 1976 as a Lower Division Clerk, and after qualifying various departmental examinations, he was first selected as a Scientific Assistant, and then further promoted as Scientist Group B in the year 1994 and further promoted Scientist Group D. Receipt of the intimation regarding adverse remarks and lower than the Benchmark grading in the ACRs/APARs, came as a shock to him, because he had been graded only as 'Good', but the Benchmark for review/promotion was 'Very Good'. He, therefore, has prayed to expunge the adverse remarks, as recorded, which was alleged by him to have been done against the principles of natural justice, as no warning, advise memo or any office memorandum was issued to him, and no advice was rendered to him, before the recording of the concerned adverse remarks in his APAR for the year 2009-2010.

3. Calling the remarks 'Good' to be adverse, he has said that as per the law laid down in **Sube Singh Vs. State of Haryana** (2002 (2) SLR 435 Punjab & Haryana DB), it was essential that he should have been served with the notices and warning, which has not done, and that ever since he joined the department in 1976, his ACRs have already been graded as 'Very Good' and 'Outstanding'.

4. In filing this OA, the applicant has taken the ground that the adverse remarks, as recorded are not true, and have been recorded with bias, and in an arbitrary manner, without the Reporting Officer and the Reviewing Officer having considered all the facts in totality. He has, therefore, sought shelter behind the

judgment in the case of **Maresh Kumar Vs. State of UP** (1984 (3) SLR 109 DB).

5. He has further alleged that the Reviewing Officer in his case ought to have been the then Joint Secretary or Additional Secretary, but the Reporting Officer had put up his ACR for review to the Secretary, and in this he has not followed the settled procedure, and had not obtained the written consent or unwillingness from the in between Reviewing Officers who were competent to nullify the adverse remarks in his APAR. He had further submitted that because the Secretary as the Reviewing Officer did not have any direct functional contact with the officials, and could have only verified the correctness of the remarks of the Reporting Officer after conducting appropriate/necessary inquiries, the procedure as followed in his case was wrong, and in saying so, he had relied upon the judgment of Hon'ble Apex Court in the case of **State Bank of India, etc. Vs. Kashinath Kher and Others etc.** (AIR 1996 SC 1328).

6. He had further alleged that the adverse remarks were not only recorded without any memo/advise or warning, but have also hampered his promotional avenues, and had sought shelter behind an order passed by a Coordinate Bench at Calcutta Bench of this Tribunal in **Joginder Singh Vs. Union of India** (1989) 3 SLR 199 CAT (Calcutta). He had also submitted that in the case of 1999 (1) SLR 436 P&H), the Hon'ble Punjab & Haryana High Court had also accepted the prayer for expunction of the adverse remarks. He had also submitted that till his

representation is disposed off, the adverse entries cannot be acted upon, as had been held in the case of **Dudh Nath Prasad Vs. Union of India** (1990 (3) SLR 557). In the result, he had prayed for the following reliefs:

- "8 a. Quash the impugned order dated 01.11.2012 issued by the respondent against the applicant/petitioner.
- b. The respondent be directed to accord and opportunity to explain and expunge the adverse remarks from the ACR.
- c. Direct the respondent not to withhold the promotion of the applicant.
- d. Any other relief which this Hon'ble Tribunal deem fit and proper in the circumstances of the case."

7. The respondents filed their counter reply on 24.07.2014. They had sought shelter behind the DOP&T instructions issued through Office Memorandum dated 13.04.2010 (Annexure-A) issued after the judgment of Hon'ble Apex Court in the case of **Dev Dutt. Vs. Union of India and Others** : (2008) 7 Scale 403. It was submitted that in view of these instructions of DOP&T, though the remarks recorded in the applicant's APARs were not adverse, but since they contained below benchmark grading, they were communicated to him through OM dated 01.11.2012. They had, thereafter, duly recorded the stand taken by the applicant in his representation against the below benchmark grading on 19.11.2012, and in the representation given to the Grievance Officer on 29.11.2012 (both supra). It was submitted through Para-5 of the counter reply that as per the standing instructions in this regard, the procedure prescribed for disposing off such representations is as follows:-

- "5.i. If it is found that the remarks were justified and that the representation is frivolous, a note may be made in the confidential report of the petitioner that he did not take the correction in good spirit.

ii. If the Competent Authority feels that there is no sufficient ground for interference, the representation should be rejected and the petitioner informed accordingly.

iii. If however, it is felt that the remarks should be toned down, it should make necessary entry separately with proper attestation at the appropriate place of the report; the correct should not be made in the earlier entries themselves.

iv. In the rare event of the Competent Authority coming to the conclusion that the adverse remarks was inspired by malice or was entirely incorrect or unfounded, and therefore deserves expunction, it should order accordingly. Before, however, taking such an action, it should bring it to the notice of the Head of the Circle or other Administrative Office if it does not occupy that position and obtain his concurrence."

8. It was thereafter submitted that as per these instructions, the representation of the applicant had to be decided by an officer higher than the Reviewing Officer, which in this case would be Hon'ble Minister of State (MOS, in short) for Ministry of Communications & IT as the Competent Authority. It was submitted that when this matter was placed before the Hon'ble MOS (C& IT), he desired that, for the sake of equity, justice and fairness, a Committee of three Senior Officers may be constituted to review the instant case of the applicant, and to hear him out, and, accordingly, a Committee comprising of the following three officers was constituted:-

- " a) Shri Rajiv Gauba, Additional Secretary
- b) Dr. Gulshan Rai, DG, I-CERT
- c) Dr. Rajendra Kumar, Joint Secretary"

9. This Committee met on 23.01.2014 and considered all the relevant factors, and had then come to the conclusion that from the year 2000 to 2006, the performance of the applicant had

been normal/above normal, and it also observed that no memos/warning had been issued to him during the year 2009 & 2010 before the below benchmark gradings were recorded. The Committee also heard the applicant in person, and also the recent Reporting Officers, with whom the applicant had worked, and two of such officers stated that the performance of the applicant had been indifferent. It was submitted that the recommendations of this three Members' Committee was then placed before the Hon'ble MOS, who accepted the recommendations, by recording as under:-

"There is no sufficient ground for interference and representation is rejected."

10. It was submitted that this was communicated to the applicant thereafter through Annexure 'H' dated 08.05.2014 delivered to him on 19.05.2014, as per DOP&T guidelines. Respondent had thereafter given their para-wise comments also, and had submitted that the stringent procedure prescribed for review of adverse remarks/below bench mark gradings having already been followed in the case of the applicant, before the matter was finally concluded by the Hon'ble MOS, as the Competent Authority, taking the stand that there is no sufficient ground for any interference by this Tribunal, the Tribunal may be pleased to dismiss the OA with costs against the applicant, and in favour of the replying respondent.

11. The applicant filed his rejoinder on 7.10.2014 more, or less reiterating his contention as already made in this OA. He had placed reliance upon the judgments of Hon'ble Supreme Court in

the case of **State Bank of India & Ors** (supra) and in the case of **State of U.P. Vs. Yamuna Shanker Misra & Anr** (1997 (4) SCC 7) dated 21.02.1997, and the order passed by this Tribunal in the case of **Anil Kumar Vs. Union of India** (2007 (2) SLJ 63 CAT). It was submitted that personal bias and prejudice of the Reporting Officer had not been looked into by the respondent and that the remarks recorded by the Reporting Officer ought to have been reviewed by an officer who at least had a functional contact with the official reported upon, and had supervised his work and conduct for at least three months in the concerned year. He, had, therefore, assailed the orders of the Competent Authority, the Hon'ble MOS, also to be bad in law, as it appeared to have been prepared hastily, and had virtually marred the promotional prospects of the applicant.

12. He had further alleged *malafide*, and had submitted that the findings arrived at by the three Members' Committee were not speaking for themselves, and those findings were merely accepted by the Hon'ble MOS in a mechanical manner, who was also directly not at all in touch with the applicant in any manner. He had, therefore, reiterated his contention that this APAR ought to have been reviewed by the Joint Secretary, who was immediately superior to the reporting officer (Senior Director), but was reviewed by the Secretary, three ranks above him, who had no functional contact with the applicant. In view of this, it was submitted that counter affidavit may be rejected, and the OA be allowed.

13. Heard. Learned counsel for the applicant relied upon the judgments as cited above, and produced copies of judgments relied upon by him. In particular, reliance has been placed upon para 8 of the Hon'ble Apex Court's judgment in **State of UP Vs Yamuna Shanker Misra and another** (supra), in which the Hon'ble Supreme Court had held as follows:-

"8. It is seen from the record that the respondent maintained constantly good record earlier to the adverse remarks made for the aforesaid period. It would appear that subsequently also he had good confidential reports on the basis of which the clouds over his conduct were cleared and he was given further promotion. Mr. Rakesh Dwivedi, learned Advocate General, in fairness, therefore, has stated that since the respondent has been regularised after the subsequent good reports, the dispute does not survive for adjudication on merits. But the counter-comments made against him by the Secretary were warranted in view of the material on record. He brought to our notice that as on the date when the entries were made, the vigilance enquiry was pending against the respondent and, therefore, the adverse remarks came to be made. The findings recorded by the Tribunal of malice and arbitrariness on the part of Secretary as affirmed by the High Court are not warranted for two reasons. Firstly, since the Secretary was not eo nomine to the proceedings and had no opportunity to explain the position, it would be violative of the principle of natural justice. Secondly, since the vigilance enquiry was pending, unless the officer was exonerated and cleared from the cloud, necessarily, the Secretary could not clear the conduct and integrity of the officer. Therefore, the adverse remarks cannot be said to be to smack of arbitrariness."

14. Further reliance had been placed upon para 8 of the Hon'ble Punjab & Haryana High Court (D.B) judgment in the case of **Sube Singh Vs. State of Haryana** (supra), in which it was held by the Hon'ble High Court as follows:-

"8. However, it is not shown if before down grading the annual assessment of the petitioner, he was informed and as such the down grading of the annual assessment reports without any notice or show cause notice to the petitioner being violative or principles of

natural justice cannot be accepted as legally correct and cannot be used as material against the petitioner for refusing to allow his crossing of efficiency bar. The down grading chart, otherwise also, does not support the action of the respondents. Admittedly, the ACRs of the petitioner for the years 1985-86, 1988-89 and 1992-93 were not available as shown in the earlier chart and these could not have been down graded even in the absence of availability. These have been shown to be 'C-below average' without any reason and is not justifiable. These reports being not available cannot be used against the petitioner. Leaving aside these three ACRs, the rest of the ACRs would indicate that more than 70% of the reports are in favour of the petitioner being 'good' 'very good' and 'average'. Taking from any angle i.e both the charts that the actual grading shown earlier and the ACR with down grading on resumption of certain instructions, on the basis of service record of the petitioner, he could not have been denied his crossing of efficiency bar."

15. In his reply arguments, learned counsel for the respondent submitted that they had taken absolute due care, and had submitted that all actions were taken only by the authorities competent to apprise and review the APARs of the applicant, who had reached the level of Scientist-D. Learned counsel had also explained that Hon'ble MOS had taken the aspect of natural justice very seriously, and had, therefore, constituted a three Members' Committee, and had directed the Committee to even give an opportunity of being heard to the applicant, which opportunity was also given to the applicant by the Committee, and then the Minister had, after having got the comments verified through the Committee, arrived at the conclusion of the Competent Authority. He had pointed out relevant portions of the detailed report of the three Members' Committee produced by the respondent as Annexure-G, pages 102-103 of the paper book of the OA.

16. We have given our anxious consideration to the facts of the case and have seen that utmost care had been taken by the superior authorities before confirming the below benchmark grading of the applicant for the relevant period. It was not as if the applicant's grading was adverse, since his over all assessment was still 'Good', but since it was below the benchmark for the purpose of future promotions, the respondent had followed the due procedure, as well as the further procedure of constituting a Committee, even beyond the instructions, for giving the applicant even a personal hearing before confirming the remarks. The applicant has only made bald allegation of *malafide*, without giving/providing any specific instances, and proof in respect of those, in the absence of which such allegations of *malafide* cannot be sustained at all.

17. Therefore, in the result, we do not find any merit in the OA, and the OA is, therefore, rejected, but there shall be no order as to costs.

(RAJ VIR SHARMA)
MEMBER (J)

(SUDHIR KUMAR)
MEMBR (A)

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