

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 2915/2013

Reserved on: 28.04.2016
Pronounced on: 06.05.2016

Hon'ble Mr. P.K. Basu, Member (A)
Hon'ble Dr. Brahm Avtar Agrawal, Member (J)

B.B.Sood
S/o Lt.Sh. P.C. Sood,
Working as Assistant Manager (INFRA)
I.R.T.C/CO/New Delhi
STC Building, Janpath,
New Delhi.

... Applicant

(Through Shri S.N.Kaul for Shri P.S.Khare, Advocate)

Versus

Union of India through

1. The Secretary,
Ministry of Railways,
Rail Bhawan, New Delhi.
2. The General Manager,
Northern Railway, Baroda House,
New Delhi
3. The Additional Divisional Railway Manager
Northern Railway,
Ambala Division,
Ambala (Haryana).

... Respondents

(Through Shri Shailendra Tiwari Advocate)

ORDER

Mr. P.K. Basu, Member (A)

The applicant joined the Railway Department initially on the post of Apprentice Inspector of Works (AIOW). In his career he received several promotions and is presently holding the post

of Senior Section Engineer (SSE). The next promotion of the applicant is to a Group 'B' post of Assistant Engineer (AE).

2. There are two modes to fill the vacancies of AE, namely, 70% by selection in order of seniority in the feeder posts in the scale of Rs.6500-10500 (old scale) and secondly, 30% through Limited Departmental Competitive Examination (LDCE).

3. In the year 2007, the respondents decided to conduct a selection for 57 posts of AE against 70% quota for the period 1.06.2007 to 31.05.2009. The applicant was also within the normal zone of consideration. The department conducted a written test and the applicant qualified the same. After the written test, the respondents conducted an interview for which they assigned 25 marks and balance 25 marks for service record. It is stated that as per rules, out of 25 marks of service record, to be successful, one must obtain 15 marks in the ACRs and similarly he/she must obtain 15 marks in the interview i.e. total 30 marks out of 50 i.e. 60%.

4. It is stated that the applicant secured 112 marks out of 150 in the written examination, 15 marks out of 25 in interview but was granted 14.8 marks in the service records out of 25. Since the marks obtained remained short by 0.2 marks in the service record, the applicant was not included in the panel for the post of AE.

5. It is explained by the learned counsel for the applicant that marks of the service records are dependent only on the ACRs of

last five years and the marks allotted for different gradings are as under:

Gradings	Marks
Outstanding	05
Very Good	04
Good	03
Average	02
Below Average	01

6. It is clear from the above that one must secure 'good' grading in the last five years for the purpose of getting 15 marks in the service record. It is the applicant's assertion that at the relevant time, he had never been communicated by the respondents any adverse entry or below bench mark gradings. He, therefore, filed OA 2044/2009 before this Tribunal which was decided vide order dated 20.10.2010 with the following directions:

"...We dispose of this OA at the admission stage itself, without going into the merits of the case, by directing the respondents to consider the representation of the applicant and decide the same by passing a reasoned and speaking order within a period of 3 months from the date of receipt of a copy of this order under intimation to the applicant."

7. Learned counsel for the applicant states that the applicant made a detailed representation dated 8.11.2010 to the General Manager against the non-communication of adverse ACRs to him and considering of such non-communicated adverse entries by the DPC. He filed a Contempt Petition no.329/2011 before this Tribunal. It is stated that the respondents vide letter dated 12.01.2011, for the first time, communicated adverse remarks in his ACR for the period ending 31.03.2005. This letter was

followed by another letter of the respondents dated 8.02.2011 directing the applicant to submit his representation against the entries in his ACRs for the period 2002 to 2008 within a period of 15 days. It is the applicant's case that since the Contempt Petition was pending before this Tribunal and the Tribunal had already directed the respondents to consider his representation and he had also submitted another representation dated 8.11.2010, initially he did not submit any fresh representation. However, later on he submitted two representations dated 3.05.2011, one against the adverse remarks of the year 2004-05 and the second against the adverse remarks of the year 2005-06.

8. Thereafter, the applicant received a letter dated 2.05.2011 informing him that the matter had been closed as no representation against the adverse entries had been filed by the applicant. Moreover, an order dated 11.05.2011 was passed by the respondents stating that "In the light of the fact that the applicant has failed to make representation against the grading in ACR there has been no change in the grading in ACR."

9. The applicant challenged the order dated 11.05.2011 in OA 2546/2011. Vide order dated 24.04.2012, the Tribunal quashed and set aside order dated 11.05.2011 directing the respondents to consider the appeal dated 3.05.2011, addressed to the General Manager and pass a reasoned and speaking order.

10. It is the case of the applicant that in his representation dated 3.05.2011, it was requested by him to ignore the un-

communicated ACRs and that the DPC should not take into consideration those ACRs. The respondents passed a detailed order dated 17.08.2012 rejecting his representation as follows:

"In the light of the facts stated above and merits of the case, contentions raised by you against the grading of your ACRs for the year 2004-05 and 2005-06, are without any force and reasoning, and stand negated. The grading of the above ACRs already given, holds good, which warrants no change."

Being aggrieved by this order, the applicant has filed this OA seeking the following reliefs:

- (i) That the Hon'ble Tribunal may further graciously be pleased to pass an order of quashing the impugned order dated 17.08.2012 declaring to the effect that the same is illegal, arbitrary and without considering the correct facts and consequently pass an order directing the respondents to re-assess the marks of the applicant in respect of the Record of service after ignoring the ACR of the year 2004-05 for his promotion to the post of AEN (Group 'B') under 70% quota imitated vide letter dt. 10.10.2007, with all the consequential benefits including the arrears of difference of pay and allowances.
- (ii) That the Hon'ble Tribunal may further graciously be pleased to pass an order of quashing the impugned adverse and down graded ACR of the applicant for the years 2004-05 and for all purpose by ignoring the same for consideration for promotion of next higher post.

- (iii) Any other relief which the Hon'ble Tribunal deem fit and proper may also be granted to the applicant along with the costs of litigation.

11. In his representation dated 3.05.2011, the prayer is clear from para 2 where the applicant has prayed that his case may be considered sympathetically ignoring the ACRs which were adverse in nature but were not communicated for his remarks and yet those adverse ACRs were taken into consideration by the DPC in violation of the law laid down by the Hon'ble Supreme Court to the effect that the DPC should not take into consideration un-communicated adverse confidential reports. In the body of the representation, the applicant has tried to explain the good work done by him and in the end, has prayed that the adverse remarks be expunged in his ACR for the years 2004 and 2005 and his ACR be upgraded by a step or two in the light of extraordinary improvement made by him, which fact may be ascertained from the last ACR communicated where he has been adjudged as "Very Good".

12. The order dated 17.08.2012 passed in compliance of the order of this Tribunal dated 24.04.2012 in OA 2546/2011 is a detailed order for two separate years 2004-05 and 2005-06, where the respondents have considered both the issues of whether or not to upgrade his ACRs as well as his complaint that relevant ACRs were not communicated to him.

13. Regarding the question of upgradation, detailed reasons have been given why there is no ground to upgrade his ACRs. In fact, it seems that in the year 2004-05, the applicant was issued show cause notice for serious lack of supervision. Similarly, it is seen that he had been reprimanded for careless and callous attitude from time to time by his superiors. Given these facts, the department took the view that upgradation of ACRs was not called for and his representation was rejected.

14. Regarding non-communication of ACRs, order dated 17.08.2012 states that the ACRs for the period 2002-03 to 2006-07 were communicated to the applicant in July 2009 to which he failed to represent despite repeated opportunities afforded to him through letters/ reminders dated 8.02.2011, 28.02.2011 and 5.04.2011.

15. The learned counsel for the applicant has drawn our attention to the judgments in **Dev Dutt Vs. Union of India**, (2008) 8 SCC 725 and **Abhijit Ghosh Dastidar Vs. Union of India and others**, (2009) 16 SCC 146 where the Hon'ble Supreme Court has held as follows:

"Held: The position that emerges is that the decision in Abhijit Ghosh Dastidar (supra) holds the field. Now, what is it that Abhijit Ghosh Dastidar (supra) decides? It has, in the first instance, while affirming Dev Dutt (supra) concluded that 'non-communication of an ACR is violative of the constitutional rights of a government servant/employee. In the second instance, it has stated that such below benchmark ACRs ought not to be into consideration while the question of promotion of a particular government servant is in contemplation. Now, that leaves us with the further question as to what is to be done after we ignore/do not consider the below benchmark

ACRs. In this regard, we have clear guidelines contained in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices, which have been issued by the Government of India for DPCs (G.I., Dept.of Per.& Trg., OM No.22011/5/86-Estt. (d), dated the 10th April, 1989 as amended/substituted vide Dept. of Per. & Trg., OM No. 22011/5/98-Estt. (d), dated the 6th October, 2000).

From the guidelines, it is clear that the DPC should consider the confidential reports for equal number of years in respect of all the employees considered for promotion subject to (c) mentioned above. The latter sub-paragraph (c) makes it clear that when one or more confidential reports 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 sub-paragraph (b) above. If this is also not possible, all the available CRs should be taken into account. We are of the view that the same would apply in the case of non-communicated below benchmark ACRs. Such ACRs would be in the same position as those CRs which have not been written or which are not available for any reason. Thus, it is clear that below benchmark ACRs, which have not been communicated cannot be considered by the DPC and the DPC is then to follow the same procedure as prescribed in paragraph 6.2.1 (c), as indicated above".

16. It is stated that since the ACRs were not communicated to him and DPC had considered his case based on those non-communicated ACRs, in the light of the above judgments, the course available to the respondents was to ignore those ACRs and consider the ACRs of preceding years. This the respondents had not done and, therefore, the action of the respondents is violative of the law laid down by the Hon'ble Supreme Court. In this regard, he further contended that the law laid down by the Hon'ble Supreme Court would have retrospective effect unless

otherwise specified by the Hon'ble Court itself. Therefore, the ratio of the judgments in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra) would be applicable in this case. In the regard, the learned counsel for the applicant also referred to the decision of the Tribunal dated 31.03.2015 in OA 4391/2012, **Payal Batra Vs. India Tourism Development Corporation and others** in which the Tribunal has held that non-communicated below benchmark entries should not be considered.

17. It is, therefore, contended that the only legal issue before the Tribunal is that whether the DPC could have considered the case of the applicant based on ACRs, which were held to be below benchmark and not communicated. Learned counsel for the applicant states that in view of the judgments of the Hon'ble Supreme Court cited above, the answer is clearly in the 'negative' and, therefore, the respondents should be directed to hold a review DPC ignoring those ACRs and following the procedure as laid down by the Hon'ble Supreme Court alluded above.

18. Learned counsel for the respondents argued that the applicant had approached this Tribunal in OA 2546/2011 (supra) with the same grievance and, therefore, this OA is barred by the principle of res judicata. It is argued that the Tribunal passed order in OA 2546/2011 and in compliance thereof, the respondents have considered the representation of the applicant dated 3.05.2011 by passing a detailed order dated 17.08.2012 rejecting his representation for upgrading his adverse ACRs. It

has been stated that once his ACRs have not been upgraded, there is no question of applicant being promoted.

19. It is also clarified by the learned counsel for the respondents that the applicant is wrongly trying to adopt the ground of non-communication of adverse ACRs as it will be clear from the order dated 17.08.2012 that the ACRs for the period 2002-03 to 2006-07 had already been communicated in July 2009 but the applicant failed to represent against those ACRs at the relevant time and is now taking the plea that since his matter was pending before the Tribunal he did not think it necessary to file a representation. According to the learned counsel for the respondents, this is not a valid argument as the OA No.2546/2011 was filed two years after the ACRs were communicated to him. So he cannot take the plea that because of the proceedings before the Tribunal he did not file a representation. According to the learned counsel for the respondents, therefore, the ground of non-communication of adverse ACRs goes and the applicability of the judgments of the Hon'ble Supreme Court in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra) does not arise.

20. In reply, the learned counsel for the applicant states that this OA is not hit by the principle of res judicata as the Tribunal had given a specific direction to the respondents to pass a speaking and reasoned order on the applicant's representation dated 3.05.2011 and it is in compliance of that that order dated

17.08.2012 has been passed, which is now being challenged in the present OA.

21. We have heard the learned counsel for the parties and gone through the pleadings as well as judgments cited.

22. The fact is that the applicant approached this Tribunal in OA 2546/2011 with the same grievance and the Tribunal vide order dated 24.04.2012 directed the respondents to consider his representation dated 3.05.2011 and pass a speaking and reasoned order. The respondents passed a speaking and reasoned order. The sole argument of the learned counsel for the applicant is that in this order dated 17.08.2012, the respondents have not considered the plea taken by the applicant in his representation dated 3.05.2011 that by considering uncommunicated adverse ACRs the respondents were in violation of the settled law declared by the Hon'ble Supreme Court. We find from the order dated 17.08.2012 that this is not factually correct. The respondents have, in fact, stated in their order that ACRs were indeed communicated to the applicant in July 2009. However, the applicant chose to ignore it and did not file any representation. Instead, he approached the Tribunal. Therefore, we cannot fault the respondents on this count as well.

23. In view of the above, since the ACRs had been communicated to the applicant, the ratio of Dev Dutt (supra) and

Abhijit Ghosh Dastidar (supra) would not apply in the present case. The OA, therefore, lacks merit and is dismissed. No costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

(P.K. Basu)
Member (A)

/dkm/