

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH: HYDERABAD**

Original Application No. 1050 of 2013

Date of Order: 14.11.2018

Between:

B.T.S. Babu, S/o. Asirwadam, aged 47 years,
T. No. 11227-T, Occ: Construction Assistant – C,
O/o. The Project Director, Ship Building Centre,
Visakhapatnam.

...Applicant

And

1. Union of India, Rep. by the Secretary and Scientific Advisor to Raksha Manthri, Department of Defence (Research and Development), DRDO Head Quarters, Rajaji Marg, New Delhi – 110 105.
2. The Director General, Head Quarters, Advanced Technology Vessels Programme (ATVP), Akanksha Development Enclave, Opp. Rao Tula Ram Marg, New Delhi – 110 010.
3. The Project Director, Ship Building Centre, Varuna Block, Gadavari Gate, Visakhapatnam – 530 014.
4. Manoj Kumar Nagar, Construction Supervisor, T. No.11291-N, O/o. The Project Director, Ship Building Centre, Visakhapatnam.

...Respondents

Counsel for the Applicant ... Mr.K.R.K.V. Prasad

Counsel for the Respondents ... Mr. M. Braham Reddy, Addl. CGSC

CORAM:

Hon'ble Mr. B.V. Sudhakar ... Member (Admn.)

Hon'ble Mr. Swarup Kumar Mishra ... Member (Judl.)

ORAL ORDER

{As per Hon'ble Mr. B.V. Sudhakar, Member (Admn.)}

The OA is filed for denying promotion to the applicant as Construction Supervisor on the ground that the applicant has not fulfilled the required benchmark in the APAR vide respondents letter dt. 21.05.2013.

2. Brief facts of the case are that the applicant, who is a Scheduled Tribe employee, presently working as Construction Assistant 'C' in the respondent organization i.e. Ship Building Centre, Visakhapatnam. Seniority of an employee in the respondent organization is recognized by the Token number allotted to them. The applicant has been allotted Token No. 11227-T. The 4th respondent who has been allotted token No. 11291-N being obviously junior to the applicant getting promoted as Construction Supervisor while denying the same to the applicant, led to the grievance of the applicant and the present OA.

3. The contention of the applicant is that since he has been working from 30.06.2007 as Construction Assistant 'C' and passed the Departmental Qualifying Examination on 29.01.2013 he is eligible to be promoted to the grade of Construction Supervisor on par with his junior. On not being promoted despite being eligible, the applicant represented on 25.03.2013. The respondents replied vide letter dated 21.05.2013 informing that he was not fulfilling the required Benchmark in the APARs to grant promotion. The applicant intimates that he was not informed of any adverse entries made in the ACRs for the last five years and therefore, without communicating such adverse entries, the DPC cannot reject his promotion.

4. The respondents in the reply statement have intimated that the applicant's performance was below the Benchmark during the period 2008-09 and that the respondents organization deals with advanced technology of national importance which requires personnel with high skills and standards. The respondents also state that the system of communicating the performance below benchmark was

not in vogue till April 2010. Below benchmark performance in 2008-09 was thus not communicated to the applicant. However, remarks/ entries of the APARs for the years 209-10, 2010-11 & 2011-12 were communicated/ shown and the same was acknowledged by the applicant. The applicant was granted MACP based on the average performance of last five years without denying any financial benefit to the applicant. Nevertheless, in regard to promotion from Construction Assistant 'C' to Construction Supervisor since it involves higher responsibilities the other parameters for promotion are to be strictly adhered. As his performance was below benchmark he could not be promoted. The performance of the respondent No.4 has been consistently above benchmark and hence he was promoted. Therefore, no comparison can be drawn by the applicant in regard to the promotion granted to the respondent No.4. DPC followed the laid down procedure and accordingly cleared the employees for promotion placed before it.

5. Heard learned counsel and perused the documents placed on record.
6. The main grievance of the applicant is that the below benchmark performance in the year 2008-09 was not communicated to him. Whenever an employee underperforms it is the duty of the employer to communicate to him so that he can improve himself and perform well in the interest of the organization he is serving. The very purpose of APAR is to allow the employees to know as to where they stand in regard to their performance on different parameters prescribed in the APARs. APAR is an instrument which has to be used in a positive context to help the employee to contribute to the organization and also improve his career. In the context of these twin advantages that the APAR has to

be looked into. Unless an employee is made known about his poor performance, he would have no opportunity to improve. It is possible that such observations could be subjective and not based on verifiable facts. By not informing him the respondents have denied him opportunity to improve himself. Such an approach would also lead to demoralization of the employee. Obviously, this would not be the motive of any forward looking organization, in particular a State organization like the respondents organization. Principles of natural justice dictate that no person should be condemned unless he is heard. In the present case, the applicant should have been given a reasonable opportunity to explain about his performance so that the respondents had the scope to review and decide as to whether the applicant is genuinely looking forward to work and improve himself. Denying such an opportunity to the applicant is unreasonable to say the least. APARs form the basis for climbing the ladder of the career of an employee. That being the importance of APAR, the respondents cannot afford to deny opportunity and such action will fringe on arbitrariness. In fact, Hon'ble Supreme Court in catena of judgments has held that the adverse entries in the APAR/ACR have to be necessarily communicated, otherwise, the said APARs need not be considered at all.

7. In *Dev Dutt Vs. Union of India & ors, 2008 (2) SCC (L&S) 771*, Hon'ble Supreme Court has held as under:

*"19. 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) that arbitrariness violates Article 14 of the Constitution.

20. 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. “

The respondents claimed that the provision of communication of below benchmark performance commenced from April 2010. However, the Hon'ble Supreme Court in Dev Dutt's case (supra) way back in 2008 has held that even the entry of 'Good' for 1993-94 should have been communicated to the appellant therein. In other words, whenever any adverse observation is made in the case of an employee, then it necessarily has to be communicated in compliance with the principles of natural justice. The principles of natural justice come into play whenever there are civil consequences. Whenever there are civil consequences effecting the rights of a person, Hon'ble Supreme Court in Dev Dutt's case has held as under:

"44. In State of Maharashtra vs. Public Concern for Governance Trust & Ors. 2007 (3) SCC 587, it was observed (vide para 39):

"In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play".

45. 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."

8. The respondents have violated the principles of natural justice and the law is well settled in regard to communication of APARs as stated in paras supra.

Therefore, the stance of the respondents that the system of communicating adverse remarks came into vogue from April 2010 does not stand to reason. It is also evident that a junior to the applicant has been promoted and therefore, the applicant being senior would obviously like to know as to why he was not promoted. Without letting him know the reason nor the scope to represent, denying him promotion is open discrimination. In a similar case, this Tribunal in OA No. 1011/2013, vide order dt.12.10.2018 has held as under:

“5. On account of non production of ACRs by the respondents adverse inference can be drawn against the respondents to the effect that had they produced the ACRs for the relevant period they would have revealed that his performance was not below bench mark. We are further of the view that basing on the uncommunicated remarks, if any, in the ACRs for the relevant period the applicant’s promotion should not have been withheld. Though the applicant was promoted subsequently he is entitled to be promoted with effect from 23.03.2013 i.e. on par with his juniors.

6. The OA succeeds and the same is allowed. Respondents are directed to promote the applicant as Chief Construction Supervisor w.e.f. 23.03.2013 and pay him all consequential benefits on the said basis.”

Thus, based on the merits of the case and the observations of the Hon’ble Supreme Court as well as this Tribunal referred supra, the OA has to be necessarily allowed.

9. The respondents are therefore directed

i) to consider constituting a review DPC for considering the case of the applicant for promotion to the grade of Construction Supervisor by ignoring the APARs for the year 2008-09 for which the adverse below benchmark remarks were not communicated. The review DPC may consider the applicant based on other eligible parameters prescribed by the respondents organization.

ii) If found fit by the DPC based on point No.(i), the applicant shall be promoted as Construction Supervisor and placed in the select list dt. 22.03.2013 w.e.f. 16.03.2013 on which date others were promoted as per his eligible seniority, along with consequential benefits.

iii) Time calendared to implement the order is three months from the date of receipt of this order.

10. The OA is allowed with no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (JUDL.)

(B.V. SUDHAKAR)
MEMBER (ADMN.)

Dated, the 14th day of November, 2018

evr