

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

O.A. No.020/00077/2015

Date of CAV:16.02.2018.

Date of Order :22.03.2018.

Between :

Bhupati Singh, s/o Ramchander,
aged about 40 yrs, Occ:Sr.Divisional
Signal and Telecommunication Engineer/NED,
O/o Sr.DSTE/NED, Nanded Division,
S.C.Railway, Nanded.

... Applicant

And

1. Union of India, M/o Railways,
rep., by its Secretary, New Delhi.

2. The Chairman, M/o Railways,
(Rail Mantralaya), Railway Board,
New Delhi.

3. The General Manager, III Floor,
Rail Nilayam,S C Railway,
Secunderabad.

... Respondents

Counsel for the Applicant ... Mr.K.Sudhakar Reddy

Counsel for the Respondents ... Mr.N.Srinatha Rao, SC for Rlys.

CORAM:

**THE HON'BLE MR.JUSTICE R.KANTHA RAO, MEMBER (JUDL.)
THE HON'BLE MRS.MINNIE MATHEW, MEMBER (ADMN.)**

ORDER

{ As per Hon'ble Mrs.Minnie Mathew, Member (Admn.) }

The applicant is aggrieved by the Annexure.A-1 orders of the 2nd respondent dated 09.09.2014 rejecting his representation for promotion to selection grade along with the 1998 batch of Indian Railway Service of Signal Engineers (IRSSE) on the ground that he lost his seniority as he was found unfit for promotion in the JAG/IRSSE panels approved on 26.09.2008 and 06.07.2009. He prays for setting aside the impugned order with a direction to the respondents to consider him for promotion to Junior Administrative Grade (JAG) in October 2008 with all consequential benefits.

2. The facts of the case, according to the applicant, are that he belongs to 1998 batch of IRSSE. After his initial appointment as Assistant Signal and Telecommunications Engineer at Guwahati, he got promotion to the Senior Scale from Junior Scale on 08.04.2004 and to JAG adhoc from Senior Scale on 26.06.2006 on par with his batchmates of the 1998 UPSC (IES Exam). The applicant earned 15 ACR/APARs in his career. Only three ACRs/APARs between 2006-2009 were adjudged as not up to the mark. For the period from 2009-10 to 2013-14, he has been graded as Outstanding by different officers. The applicant contends that he was always a hard working officer and that only two officers viz., Sri M.S.Sharma, the then DRM/LMG and Sri Ashutosh Swami, the then GM/NFR, have harassed him and spoilt his ACRs and also influenced other authorities connected with the ACRs. He also pointed out inconsistencies and arbitrariness in writing of his ACRs and that the then reporting/reviewing authorities have not shown fairness in their reporting.

3. The applicant submits that according to the impugned letter dated 09.09.2014, he was considered for empanelment for JAG on 26.09.2008 and 06.07.2009, but was not found fit for promotion. No reasons have been furnished as to why he was not

promoted. It is also submitted that on 06.10.2010, a confidential letter was issued to him from DRM/Guntakal, along with his ACRs advising him to make a representation to the GM/NF Railway, Guwahati for the upgradation of his ACRs so that his name will be considered for JAG empanelment. Accordingly, the applicant submitted his representation on 7.10.2010, citing the lapses of some authorities in writing his ACRs in a way which did not reflect the applicant's performance during the said period. In response to this, he received a reply on 14.12.2010 that the competent authority has gone through his representation against the below bench mark gradings for the period ending 31.03.2005 and held that there is no substance in the representation and considering his performance, his grading for the period in question stands good. The applicant points out that the Annexure.A-13 reply of the General Manager, Maligaon, Guwahati, does not speak about his ACRs for the period 2006-07, 2007-08, and 2008-09 and nothing has been communicated to him about his representations against the ACRs in these periods till date. It is submitted by the applicant that he has been representing to the Railway Board since 2008 in connection with his promotion to JAG, but has not received any reply. It is only vide the impugned letter dated 09.09.2014 that he has been informed that he lost his seniority and was considered with the 2003 batch, which is junior to him by 5 years. The non-consideration of his case along with his batch has caused huge financial loss, and to his distress, some officers who worked with the applicant have become seniors to him. The casual and biased approach of a few officers who underrated his performance has damaged his entire career. The GM/NFR has not considered the DoPT instructions regarding the importance of writing ACRs with due care and a positive attitude.

4. It is also contended by the applicant that the GM/NFR is liable to dispose of his representation dated 07.10.2010 in respect of the entries in his ACRs of 2006-07,

2007-08 and 2008-09 and that these ACRs were taken into account while promoting the applicant to the JAG on 27.3.2014, which is against the rules. The applicant has relied on the judgment of the Hon'ble Delhi High Court in W.P.No.5036/2012 and 5649/2013 of Sri Tarsem Kumar, Commandant, CISF vs. Union of India in support of his contentions.

5. The respondents have filed a reply statement resisting the pleas in the OA. They submit that the applicant has been promoted to JAG with effect from 27.03.2014 along with 2003 batch due to his candidature being unfit for promotion in JAG panels approved on 24.09.2008, 06.07.2009, 29.07.2011, 01.03.2013 and 27.12.2013. Subsequently, he made a representation for upgradation of his grading in APARs/ACRs for the year ending 2007, 2008 and 2009, vide his representation dated 07.10.2010. His representation was disposed of by the General Manager, NF Railway, on 03.03.2011. Thus, the applicant has kept quiet for 6 years and is trying to unsettle the seniority of the officers borne on the select panel. They also point out that the applicant in his representation dated 22.02.2008 requested the respondents for promotion to the JAG along with his batchmates in October 2008. It is only after the lapse of 6 years that he is seeking empanelment for promotion to JAG from October 2008 and that this relief is hopelessly barred by limitation. They also submit that the applicant has been awarded his gradings in his APARs in the years 2005, 2007, 2008 and 2009 on 05.10.2010, and that he has been given a reply on 14.12.2010 and that he has made a false statement that his representation is yet to be disposed of. They also submit that while the relief sought for is for promotion to JAG from October 2008, he has made a representation for promotion to the selection grade in 2014 so as to tide over the lapses that have occurred.

6. It is also submitted that the applicant impleaded Secretary, Railway Board, Chairman, Railway Board and the General Manager, South Central Railway, in the array of respondents and that he has not impleaded the parties against whom allegations of personal bias have been made in the OA. As such, the OA is liable to be dismissed on the ground of non-joinder of necessary parties. They also point out that the reliefs sought are contradictory and not consequential and that the applicant is challenging the impugned order dated 09.09..2014 rejecting his representation for promotion to the selection grade and at the same time seeking promotion to the JAG grade from October 2008. Thus, the reliefs are not consequential.

7. The respondents also submit that keeping in view the DoPT instructions dated 13.04.2010, they have communicated the below bench mark in Annual Performance Appraisal Reports prior to the period 2008-09. Thereafter, the NF Railway vide its letter dated 03.03.2011 informed that the representation of the applicant for the years 2007, 2008 and 2009 were considered and his gradings were retained as "Average" in all the three APARS. Therefore, the applicant was not promoted to the JAG. As per the Annexure.R-2 DoPT instructions dated 3.7.1986, where a person is considered unfit for promotion and is superseded by a junior person, he shall not even if he is subsequently found suitable and promoted, takes seniority in the higher grade over the juniors who had superseded him. In view of this position, the applicant's seniority will be counted with the persons promoted in the 2003 batch. Vide Annexure.R-3 instructions of the Ministry of Railways dated 03.06.2002, the selection committee while evaluating the confidential reports would keep in view the seniority of the officers for promotion on the basis of their service records. Further, the selection committee is not to be guided merely by the entries in the ACRs but would make its own

assessment on the basis of the entries in the ACRs. The benchmark for promotion to JAG is “Good” and the officers who do not meet the said benchmark will not be considered suitable for promotion to JAG. The ACRs of the applicant prior to 2009-10 were below the benchmark. In terms of the Annexure R-4 DOPT letter dated 13.04.2010, if an employee is to be considered for promotion in future DPC and his ACRs prior to the period 2008-09, which would be reckonable for assessment of his fitness, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication before such ACRs are placed before the DPC. All the gradings in the ACR except “Good” is treated as below benchmark for consideration for promotion to the JAG. This was done at the time of forming of JAG /IRSSE panel of 2000 batch.

8. Heard the learned counsel on both sides and perused the record.

9. The learned counsel for the Applicant has relied on the judgment of the Hon'ble Supreme Court in ***Dev Dutt vs Union of India & Others*** (2008(8) SCC 725), in which it has been held that “fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, must be communicated to him within a reasonable period so that he can make a representation for its upgradation”. It was also held that whether an entry is adverse or not depends upon its actual impact on the employees career and even a good entry can be considered adverse, if the bench mark for promotion was “Very Good”. The Hon'ble Supreme Court further held that “Good” entry should have been communicated to the appellant therein so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded

from “Good” to “Very Good”. Further, at least an opportunity to make a representation should have been given and that would have been possible only if the appellant had been communicated “Good” entry. Non-communication of “Good” entry is arbitrary and illegal.

10. The learned counsel for the Applicant has also relied on the judgment of the Hon'ble Supreme Court in ***Prabhu Dayal Khandelwal vs. Chairman, UPSC & Others*** (2016 (1) SCC (L&S) 825) and the judgment of the Hon'ble Apex Court in ***S.B.Bhattacharjee vs. S.D.Majumdar and Others*** (2008 (1) SCC (L&S) 21), which gave interpretation as to what would constitute ACRs for the preceding 5 years. The Hon'ble Apex Court had clarified that if a vacancy arises in 2001-02, only the latest record of service of the officers up to the period ending March 2000 viz., 1999-2000 shall be taken into consideration and not the subsequent years. Therefore, the respondents while considering the applicant for empanelment on 13.08.2008 should have considered the ACRs of the applicant only up to 2005-06 and not 2006-07. Thus, for the relevant 5 year period from 2001-02 to 2005-06, the applicant had earned 3 “Good” and 2 “Very Good, which would have satisfied the benchmark for empanelment to the JAG.

11. Per contra, the learned Standing Counsel argued that the applicant has been duly considered in 5 DPCs from 13.08.2008 to 13.12.2013. On the basis of his performance, it was decided that he did not merit inclusion in the panel. As he has been duly considered on each occasion, no injustice has been caused to him. It was only on 10.03.2014 that the applicant was found fit for inclusion in the panel.

12. The respondents have taken a preliminary objection that the relief claimed by the applicant is hopelessly barred by limitation. They pointed out that the applicant in his representation dated 22.12.2008 had requested the respondents for confirmation

of JAG along with his batchmates. Thus, in 2008 itself, he was aware of his non-empanelment to JAG. It is after a lapse of 6 years that he has filed this OA praying for empanelment for promotion to JAG from October 2008. They also submit that the applicant was found unfit for promotion in JAG panels approved on 24.09.2008, 06.07.2009, 29.07.2011, 01.03.2013 and 27.12.2013, and that subsequently he made a representation for upgradation of his grading in APARs/ACRs for the years ending 2007, 2008 and 2009, vide his representation dated 07.10.2010. His representation was disposed of by the GM/NF Railway, vide proceedings dated 03.03.2011. He has kept silent for 7 years and is now unsettling the seniority of officers borne on the select panel. They also submit that the applicant has made a false averment that his representations were not disposed of, whereas the competent authority had issued proceedings dated 14.12.2010 and 03.03.2011 rejecting his representations for upgradation of his ACR gradings. As he has made his claim for promotion after 2200 days, he is not entitled for the relief and the OA is liable to be dismissed limini.

13. At first blush, we were almost persuaded by the aforesaid argument of the respondents that the applicant had kept quiet for more than 6 years even when he was aware that his batch was empanelled for JAG in 2008. However, when we go deeper into the matter, we find that the applicant has been the victim of injustice and has suffered on account of violation of the basic principles of natural justice.

14. From the material on record, it is evident that the applicant had submitted the Annexure.A-16 representation dated 22.12.2008 to the 2nd respondent regarding his non-confirmation to the JAG along with his batchmates. He has also given a reminder on 11.05.2009. There is nothing on record to show that the respondents have responded to these representations and have informed the applicant that he has been found unfit for promotion on the basis of his record of service. He has been informed of the reasons for his non-empanelment only on 09.09.2014. Later, on 29.12.2014, he

learnt from the portal for Public Grievances that his performance did not merit inclusion in the JAG panel and that he was considered unfit for promotion even though he was considered along with 1998, 1999, 2000, 2001 and 2002 exam batches. Thus, after not having responded to the applicant's representations, which were submitted at the relevant time and after informing him only on 09.09.2014 that he was found unfit in the JAG/IRSSE panels approved on 26.09.2008 and 06.07.2009, the respondents are not justified in now taking the plea that the OA is barred by limitation. As he has been informed of the reasons for his non-empanelment only, vide Annexure.A-I impugned order dated 09.09.2014 and as he has filed this OA on 20.01.2015, it is held to be within limitation.

15. The applicant has raised allegations of bias against his Reporting and Reviewing Officers without impleading them. In view of this, the allegations of personal bias raised by the applicant are not tenable and are accordingly rejected. Likewise, the respondents have pointed out that the reliefs sought are not consequential. However, since the applicant's promotion to Selection Grade is dependent on the date of his empanelment in JAG, we are inclined to hold that the reliefs sought for in the OA is consequential in nature.

16. We now come to the question as to whether the Average Gradings recorded in the applicant's ACRs for the years ending 31.03.2007, 31.03.2008 and 31.03.2009 were communicated to the applicant so as to enable him to make a representation, before the DPC took cognizance of the same for declaring him as UNFIT.

17. From the material on record, it is seen that the respondents have, for the first time, vide Annexure.A11 letter dated 05.10.2010 informed to the applicant that he has

earned below benchmark grading for the years 2005, 2007, 2008 & 2009. Vide this letter, he has also been given a photocopy of his ACRs for the aforesaid period and has been advised to make a representation to the General Manager, N.F.Railway, against the remarks or for upgradation of the final grading. From this, it is very clear that the adverse remarks in the ACRs of the applicant for the years 2005, 2007, 2008 & 2009 have not been communicated to the applicant earlier than October 2010.

18. From the very fact that the below benchmark gradings earned by the applicant have been communicated to him only on 05.10.2010, which is after the DPC meetings held on 13.08.2008 and 20.05.2009, it would mean that he has been found unfit based on an uncommunicated adverse entry. As held by the Hon'ble Apex Court, such action would be arbitrary in terms of the ratio laid down in ***Prabhu Dayal Khandelwal vs. Chairman, UPSC***, and denial of promotion on the basis of uncommunicated entries is impermissible. In the said case, while holding that the claim of the appellant's promotion could not have been denied by taking into consideration uncommunicated ACRs, the Hon'ble Apex Court also directed the respondent-department to consider his claim for promotion on the basis of communicated entries only. The applicant herein would be squarely covered by the aforesaid judgment. We accordingly hold that the decision of the DPC that the applicant did not merit inclusion in the panel based on his performance/assessment statement is unsustainable and warrants interference.

19. The applicant has also raised a relevant point that the DPC, which met on 13.8.2008 should have considered only the ACRs for the 5 years preceding 2005-06 and that in terms of the judgment of the Hon'ble Supreme Court in ***S.B.Bhattacharee vs. S.D.Majumar*** (2008 (1) SCC (L&S) 21, the DPC should not have considered his

ACRs for the year 2006-07 while considering him for empanelment on 13.08.2008. In terms of the aforesaid judgment, the DPC which met on 13.08.2008 should only have considered the ACRs for the period from 31.03.2002 to 2005-06 during which period the applicant has earned 3 “Good” gradings in 2001-02, 2002-03 and 2004-05 and two “Very Good” gradings in 2003-04 and 2005-06. From the DPC proceedings, it is seen that the Benchmark for promotion to JAG is Good as defined in Railway Board's letter No.2002/SCC/3/1 dated 30.09.2002. On the basis of the applicant's gradings and his overall performance during the years 2001-02 to 2005-06, as evidenced from the ACRs, which have been placed before us, there is nothing to suggest that he should be denied empanelment in JAG.

20. Having regard to the aforestated facts and circumstances, the OA succeeds. The respondents are directed to convene a Review DPC and re-consider the case of the applicant for empanelment in JAG on par with the other officers considered for empanelment to JAG on 13.08.2008 after ignoring all uncommunicated Below Benchmark gradings. If the applicant is empanelled, he shall be entitled to the consequential benefit of seniority and notional pay fixation from the date of the empanelment of his immediate junior. This exercise shall be completed within a period of three months from the date of receipt of a copy of this order.

21. The OA is accordingly allowed. There shall be no order as to costs.

(MINNIE MATHEW)
MEMBER (ADMN.)

(JUSTICE R. KANTHA RAO)
MEMBER (JUDL.)

Dated: this the 22nd day of March, 2018

Dsn.