

**CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA**

O.A. 050/00354/2014

**Reserved on- 23.11.2017.
Date of pronouncement 06.12.2017**

CORAM

Hon'ble Shri A.K. Upadhyay, Member [A]
Hon'ble Shri J.V. Bhairavia, Member [J]

1. Devendra Kumar Singh Son of Ram Lagan Singh, Lower Division Clerk (L.D.C.) Jawahar Navodaya Vidyalaya Pacharhi, Darbhanga, Darbhanga (Bihar) Pin-847237, Permanent resident of Village + P.O.- Pachdakiyadu Via-Bairginia, District- Sitamarhi..

.....Applicant

By Advocate : None

Versus

1. The Union of India through Secretary, Ministry of Human Resources Development Department of School Education & Literacy, New Delhi.
2. The Commissioner, Navodaya Vidyalaya Samittee-B-15 Institutional Area Sector 62, NOIDA (UP) Pin -201309.
3. The Joint Commissioner (Administration/Personnel) Navodaya Vidyalaya Samittee-B-15 Institutional Area, Sector -62, NOIDA (UP) PIN-201309.
4. The Deputy Commissioner, Navodaya Vidyalaya Samiti Regional Office Boring Road, Patna-800013.
5. Sri Manas Nanjan Chakraborty Deputy Commissioner, Navodaya Vidyalaya Samiti Regional Office Boring Road, Patna-800013.
6. Sri Amrendra Narayan Yadav, Son of Yadunandan Yadav, Principal I/C/Vice Principal Jawahar Navodaya Vidyalaya, Pacharhi, Darbhanga (Bihar) PIN 847231.

7.Respondents

By Advocate: Shri G.K. Agrawal

ORDER

Per Jayesh V. Bhairavia, M [J]:

In the present O.A, the applicant has

sought the following reliefs:-

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|--------|---|
| "[8.1] | <i>That your lordships may graciously be pleased to quash and set aside the adverse ACR of the year 2009-2010 & 2010-11, which has been fraudulently manufactured by respondent no 5 & 6.</i> |
| [8.2] | <i>That your Lordships may further be please to direct the respondent no.4 to give promotion to the applicant as UDC from 15.12.2012 when his juniors got promotions.</i> |
| [8.3] | <i>That your Lordships may graciously be pleased to direct the respondents to pay the arrear of the enhanced pay with a panel interest.</i> |
| [8.4] | <i>That your Lordships may further be pleased to award the cost of the case.</i> |
| [8.5] | <i>Any other order or orders as your Lordships may deem fit and proper in the interest of justice."</i> |

2. The brief facts of the case, as submitted by the applicant, are as under :-

[i] The applicant had joined Navodaya Vidyayala as Lower Division Clerk (referred to as LDC for brevity) on 01.08.1994.

[ii] The applicant has submitted his Annual Confidential Report (ACR) every year on time.

[iii] After rendering requisite service as LDC, the applicant was in the zone of consideration for the promotion of Upper Division Clerk (UDC).

[iv] The respondent no.4 i.e the Deputy Commissioner, Navodaya Vidyalaya Samiti, Regional Office, Patna vide its letter dated 10.12.2010, informed the Principal that the LDCs/Store Keepers working under his Vidyalaya are under zone of consideration for promotion therefore provide their ACRs for the year 2008-09, 2009-10 by 20th December, 2010, in the said letter name of the applicant was included and his ACRs were also asked to provide. (referred as Annexure A/2).

[v] It is contended by the I/c for applicant that the applicant had worked under Principal Mr. Haji Mohammad A. Ali, Darbhanga, during all required period for which ACR had been asked for. Said Principal Mr. Ali was transferred only on 4th December 2012 to JNV, Muridabad.

[vi] It is further submitted that in response to the letter dated 10.12.2010 (Annexure A/2). On 14.12.2010, the applicant had submitted his ACRs for all the year to the respondent no.4 as well as a copy to the then Principal Mr. A. Ali. The said ACRs were forwarded by the registered AD post and a copy of registered slip is on record. (Annexure A/3 refers).

[vii] It is submitted that the applicant was waiting for his promotion order however, he came to know that his juniors have been promoted to the post of UDC on 15.12.2012. Therefore, he submitted his representation on 17.09.2013.

[viii] In response to applicant's representation, the respondent vide their letter dated 01.10.2013, had informed that he was not promoted due to shortage of eligibility.

[ix] It is submitted that the applicant had not supplied the copies of ACRs which were submitted by the applicant every year. The applicant had again send the copies of ACRs in response to letter dated 10.12.2010 through registered AD post. Applicant had demanded the copies of his ACRs for the year 2006-07, 2007-08 and 2008-09, 2009-10, 2010-11 and 2011-12 vide his application dated 24.09.2013 under the RTI Act. In response to it the applicant was provided the copies of ACRs only on 01.01.2004.

[x] It is submitted that the respondent no.5 had sent a report dated 24.03.2011 with regard to vigilance clearance of the applicant to the Deputy Commissioner, in which it was observed that the integrity of applicant is doubtful and also forwarded copies of ACR of applicant for the year 2006-07 to 2010-11. (Annexure A/4 series refers).

[xi] It is submitted that with a malafide intention the respondent no.5 did not consider the ACR written by the then competent authority i.e the Principal, Mr. Haji Ali and manufactured a false and fabricated ACRs for year 2009 and 2010 to deprive the applicant from promotion with a view to accommodate to others who were junior to the applicant. It is further submitted that it is evident on records that ACR for the year 2006, 2007 and 2008 had been written by the then Principal Mr. Haji Ali. However, the ACR for the year 2009 and 2010 had been got it prepared through another official who was not competent to write the ACR of the applicant. The said Principal Mr. Haji Ali was on duty till 04.12.2010, therefore, the ACR for the year 2009 and 2010 should be written by the competent authority i.e Principal Mr. Haji ali. However, the respondent no.5 intentionally written the ACR for the year 2009-2010 and 2010-11 other than the Mr. Haji Ali.

[xii] It is further submitted that the respondents have failed to follow order/guidelines issued by the Joint Commissioner, vide order dated 14.11.2002 (Annexure A/5 refers) and also violate the instruction issued vide O.M. dated 14.05.2009 issued by DOPT which clearly states that Annual Performance Assessment Report i.e APAR should be communicated to the concerned employee for giving opportunity to submit his reply. Moreover, as per the circular dated 14.11.2002, the respondents were instructed that confidential report is an objective assessment of work and conduct of a government servant. No employee should be adversely affected by prejudicial report recorded without fullest consideration. Employees graded "average" will never get an opportunity of knowing their shortcomings and improving thereon in the event the same is not informed to the concerned employee, they are not able to achieve the bench mark for promotion. It was also came to the knowledge that the Samiti where employees have been denied promotion on account of average ACRs, it has been decided that grading as "Average" should be avoided as far as possible. However, where inevitable, it should be supported by a reference to atleast three warnings of displeasure, reprimands, memos issued to the employee alongwith a copy thereof annexed to the confidential report. It should be resorted to only if the reporting authority has come to the conclusion that the official reported upon has not improved despite such warnings/d displeasure/reprimand/memo. It was the responsibility of reviewing officer to verify the correctness of the average grading given by the reporting officer after making inquiries as may be considered necessary. Reference of such inquiry shall also be made by the reviewing officer in the ACRs. In spite of the said guidelines, the respondents did not follow the same and without providing any opportunity to reply against the adverse entries in the ACRs recorded by the authorities the applicant had made to suffer and deprived his legitimate right to be considered for promotion. The said action of the respondents is in violation of Article 14 & 16 of the

Constitution of India and also arbitrary and therefore the relief(s) sought by the applicant be allowed.

3. The respondents have filed their reply on 02.09.2014 and submitted that :-

[i] The Navodaya Vidyalaya Society is an autonomous body, registered under the Societies Registration Act. The role of Ministry of Human Resources Department is limited in day to day affairs of the Samiti.

[ii] The applicant has no right to promotion except right to be considered for promotion.

[iii] It is further submitted that the DPC had considered at least two times the case of the applicant for promotion from LDC to UDC cadre, however his case was never recommended on the ground that his grading in ACR were below bench mark although on both occasion. The DPC held on 24.12.2012 and 14.06.2013, copies of minutes of DPC clearly establish the fact that the last five years ACRs of applicant does not have bench mark of "good" , for the year 2009-10 and 2010-11 ACRs of applicant are with grading of "Average" therefore, the DPC had correctly not recommended the case of the applicant for further promotion. (Annexure R/1 & R/2 refer). It is submitted that alongwith the applicant others LDCs whose grading were below the bench mark, they were also not considered for promotion. Therefore, the respondents had considered each employee equally and there is no discrimination caused to any LDCs including the applicant.

[iv] It is further submitted that Shri A.N. Yadav, the then Incharge Principle of JNV, Darbhanga had clarified that Mr. Haji M. Ali, the then Principal was transferred from Vidyalaya on 04.12.2010 and for the year 2010 the ACR of the applicant was written on 21.03.2011 with review and consent of the then senior most teacher Dr. A.K. Thakur, PGT, Math, who also made his initial on ACR format and thus no mala fide and illegal process was adopted.

[v] It is further submitted that for the year 2011 the ACR of the applicant was written as per his performance when Shri A.N. Yadav was the Incharge Principal with effect from 04.12.2010 to 28.01.2012. It is reported that despite several oral as well as written advises, office memorandum the applicant did not give up his casual attitude toward his assigned duty viz . He was not punctual on duty, he was sincere in his routine work and he remained indifferent and unauthorised absent from his duty, therefore the ACR entries were made and written for the year 2010 & 2011 are based on documentary evidence.

[vi] It is further submitted that respondents denied the contention of the applicant that the respondents had violated the guidelines and orders, circular of 2002 and O.M of 2005 issued by the Joint Commissioner and the DOPT respectively.

[vii] The respondents denied applicant's contention made in para 4.11 of the O.A by which it is alleged that applicant was not communicated with the APAR, the said submission of the applicant is not correct in fact the said APAR was communicated by the respondents.

In sum, the respondents denied the claim of applicant and submitted that the grading of the applicant in ACR does not met with the bench mark and he was not found eligible for further promotion to the post of UDC. Therefore, the applicant is not entitled for any relief and the O.A is liable to be dismissed.

4. In response to the reply, the applicant had submitted rejoinder dated 21.07.2016 and submitted that the respondents have attempted to misguide this Tribunal by placing incorrect fact, though the DPC was held on 13.12.2012. However, the respondents stated in their reply that the DPC was held on 14.12.2012. This contradictory statement can be verified from the their own letter dated 15.12.2012 (Annexure A/1 of rejoinder). It is further submitted by the applicant that the Incharge Principal Mr. Yadav was not competent to write ACRs for year 2009-10 and 2010-11 and intentionally grading of "average" had been given by him. The applicant was never served with the any notice of such grading. The

respondents have totally failed to follow the instructions issued in circular dated 14.11.2002. The employee should be informed about the adverse entry to defence himself and only on the basis of the reply of the employee the reporting officer ought to have made final entry in the ACR. Even according to the circular at least three warnings need to be issued in the event if grading is "average". The applicant ACR for the year 2006-07, 2007-08, 2008-09 with grading "good" which was written by Mr. Haji Ali, the then Principal and thereafter rest of the ACR were written by Shri A.N. Yadav Incharge Principal with grading of "Average", the said grading of "Average" was incorrectly given. Not only that ACR for the year 2006-09 were reviewed on 04.04.2011 by one Mr. M.R. Chakraborty, A.C. whereas ACR for 2009 to 2011 by Shri Girish Chandra, A.C. on 05.04.2011. The Reviewing Authority also failed to follow the instruction issued by the competent authority vide circular of 2002. This fact clearly establishes the bad intention of the respondents and five years of the ACR of the applicant were reviewed by the different reviewing officer that too with only keeping difference of one day in reviewing the ACR of the applicant. The applicant had joined the service as LDC on 01.08.1994 whereas his juniors were promoted to the higher grade and deprived the applicant. The respondents had totally ignored the procedure stipulated in the instruction issued by the highest authority of the respondents and acted arbitrarily.

It is also submitted by the learned counsel for applicant that the applicant had issued legal notice and also submitted several representations to the respondents and requested to rectify the irregularity. However, the respondents were adamant to consider the legitimate claim of the applicant and hence deprive the applicant's right for promotion.

5. In response to the rejoinder filed by the applicant, the respondents had submitted supplementary written statement dated 10.10.2017 and submitted that by memorandum dated 27.11.2015 the applicant was communicated with adverse entries recorded in his ACRs for the year ending 2009-10 and 2010-11 and the applicant was asked to submit representation against the same. (Annexure R/3 & R/4 refer). It is further submitted that by letter dated 12.12.2015 the applicant had submitted his reply before the Principal, JNV, Darbhanga by which the applicant

had submitted that since he has filed the present O.A and till final decision come in the said case he is not in a position to file reply. (Annexure R/6 refers).

Thereafter, the Principal concerned has submitted his response to the ACR's entries of the applicant for the year 2009-10 and 2010-11 vide his letter dated 28.12.2015 with forwarding letter dated 19.12.2015. (Annexure R/7 series refer). Based upon the same, the case was examined by the competent authority and order were passed on 02.03.2016 confirming the adverse entries for the years 2009-10 and 2010-11. (Annexure R/8 refers). The I/c for respondents based on this document argued that due opportunity has been provided to the applicant to file his reply to his adverse entries however he did not co-operate therefore not entitled for any relief.

6. Heard the parties and perused the records and considered the submissions of rival parties.

7. In the present case, it is noted that the applicant has been working since 01.08.1994 as LDC in Jawahar Navodaya Vidyalaya Pacharhi, Darbhanga, Bihar and after rendering requisite period of service, he entered in the zone of consideration for promotion to the post of UDC. When the name of the applicant has not been recommended for promotion on the ground of lack of eligibility due to his grading of ACR being below the bench mark. The eligibility criteria for promotion to the post of UDC has been fixed i.e LDCs with grading of "good" in last five preceding year's ACR. For the purpose of providing just and fair opportunity to the higher grade, the Joint Director (Admin.) of respondents issued an order dated 14.11.2002, by which it was directed that *"confidential report is an objective assessment of work and conduct of a government servant . No employee should be adversely affected by prejudicial report recorded without fullest consideration. Employees graded "average" will never get an opportunity of knowing their shortcomings and improving thereon in the event the same is not informed to the concerned employee, they are not able to achieve the bench mark for promotion. It was also came to the knowledge that the Samiti where employees have been denied promotion on account of average ACRs, it has been decided that grading as "Average" should be avoided as far as possible. However, where inevitable, it should be supported by a reference to at least three warnings of displeasure,*

reprimands, memos issued to the employee alongwith a copy thereof annexed to the confidential report. It should be resorted to only if the reporting authority has come to the conclusion that the official reported upon has not improved despite such warnings/displeasure/reprimand/memo. It was the responsibility of reviewing officer to verify the correctness of the average grading given by the reporting officer after making inquiries as may be considered necessary. Reference of such inquiry shall also be made by the reviewing officer in the ACRs."

The copy of above stated order dated 14.11.2002 (Annexure A/5 refers) was marked and circulated to the Deputy Director, NVS, all regional offices, all officers of NVS Headquarters and Principals, all Jawahar Navodaya Vidyalayas. According to the said guidelines, the competent authority were under the obligation to follow the same. In this context, the issue involved in the present case required to be examined, whether the respondents have followed the directions issued vide order dated 14.11.2002 with regard to consideration of case of applicant.

8. The ACRs of year 2006 to 2009 of the applicant were written with grading of "good" and the ACRs for the year 2010 & 2011 written with grading "Average". It is apt to note that it is a specific contention of the applicant that applicant was never supplied the copy of his ACR by the competent authority. The claim of the applicant for promotion to the post of UDC was considered by the DPC on 13.12.2012 and due to lack of eligibility, his name was not recommended for the promotion. It is seen that the bench mark for promotion from the post of LDC to UDC is grading of "good" for five preceding ACRs. It is also noticed that the applicant's ACR for the year 2010 & 2011 was with the grading of "Average" and therefore he could not meet with the bench mark of "good". The respondents are under the obligation to follow the instruction stated in the orders/circular dated 14.11.2002 as referred hereinabove. It was specifically instructed to all the concerned that grading of "Average" should be avoided as far as possible and if inevitable at least three warning notices required to be issued to the employee alongwith a copy of the confidential report. It is evident on record that the respondents have not followed the same procedure. The copies of confidential report with the adverse entries were never provided to the applicant at least before DPC was held on 13.12.2012 . The sole reason for not recommending the name of

the applicant for promotion was stated to be lack of eligibility i.e ACRs with grading of "Average".

9. The respondents have filed their supplementary written statement dated 10.10.2017 and produced the copy of memorandum dated 27.11.2015 (Annexure R/3 refers) by which for the first time the applicant has been asked to submit his reply to the adverse entries recorded in his ACRs for the year 2009-10 and 2010-11 that too, without providing any copy of warning notice or any other correspondence to that effect. Not only that, when the case was pending for adjudication before this Tribunal, the applicant was compelled to submit his reply which he had correctly denied, and thereafter, the respondents have confirmed the adverse entries without having any defence or reply of the applicant. This conduct of the respondents itself is a proof of arbitrary action.

10. Further, contradictory submissions were advanced by the respondents in this regard. It is noticed that in the first written statement filed by the respondents on 02.09.2014, it was stated in para 16 & 17 of the said reply that the respondents had not violated the terms of circular (reference 14.11.2002, Annexure A/5), and further, it was stated that the applicant was communicated with APR. The material on record reveals that the respondents had not provided copies of APAR before his claim for promotion has been forwarded for further consideration to the DPC in the year 2012. This action of not providing copies of APAR and depriving the present applicant of submitting his reply to it is in violation of their own orders/instructions. Not only that, the said action is contrary to the law laid down by the Hon'ble Apex Court in the case reported in 2008 (2) SCC (L&S) 771 = 2008 (8) SCC 725 Devdutt Vs Union of India & Ors. The Hon'ble Apex Court Held that "All gradings **"very good"** , **"good"**, **"Average"** or **"Poor"** are required to be communicated to employee working in government offices, statutory bodies, Public Sector undertakings, or other State instrumentalities where constitutional obligations and principle of natural justice and fairness apply. Below bench mark Grading should be communicated within a reasonable period, so that employee concerned might get an opportunity of making representation for improvement of his grading. Representation so filed are also required to be decided fairly and

within a reasonable period of time by an authority higher than the one which made the entries. It is **Further held** that *"Appellant's promotion directed to be reconsidered after giving him opportunity of representation against entries of confidential report."*

11. The Hon'ble Apex Court after considering the above stated case (Devdutt Vs Union of India) in the case of Abhijit Ghosh Dastidar Vs Union of India and others reported in 2009 (16) SCC 146 Held that : *".....in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, Judicial, Police or any other service (other than the Armed forces), it has civil consequences because it may affect chance of promotion or get other benefits. Hence; such non-communication would be arbitrary and as such violative of Article 14 of Constitution. The same view has been reiterated in the above referred decision relied on by the appellant (Devdutt Vs Union of India, (supra)). Therefore, the entries "good" if at all granted to the appellant the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondents have no case that the appellant had ever been informed of the nature of the grading given to him."*

12. In view of what is stated hereinabove and the law laid down by the Hon'ble Apex Court, we are of the opinion that in the present case, by not providing the copies of APAR for the year 2009 to 2011 to the applicant which contained grading of "Average" and the same grading is below the bench mark for further promotion to the post of UDC, the said action of the respondents is arbitrary and in violation of Article 14 of Constitution of India and contrary to the circular dated 14.11.2002 and had also deprived the applicant of his legitimate right to respond to his confidential report. In the circumstances, we remit the matter to the respondents with a direction to give a fresh opportunity to the applicant to submit his defence reply to the adverse entries recorded in the APARs/ACRs for the year 2009-10 and 2010-11 with additional permission to consider the grounds stated in this O.A by the applicant. The respondents are directed to consider the same without any influence of their decisions stated in memorandum dated 27.11.2015, 12.12.2015, 29.12.2015 and 28.12.2015 (Annexure R/3, R/4, R/7 series of

supplementary written statement dated 10.10.2017). It is further directed that if after considering the representation of the applicant, the grading of APAR of the year 2009-10 & 2010-11 are upgraded, in that case, the respondents will expeditiously forward the case of applicant to the Review DPC for consideration of the same. The applicant shall submit his representation or reply alongwith copy of O.A within two week from the receipt of this order and thereafter the respondents shall consider the same as per foregoing observations within two months thereafter.

13. Accordingly, this O.A is partly allowed. No order as to costs.

(J.V. Bhairavia) M [J]

(A.K.Upadhyay] Member [A]

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