

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 145 of 2011

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

Ramesh Chandra Choudhury, aged about 70 years, S/o Late Lalmohan Choudhury, Retd. Superintendent, Central Excise and customs at present residing at R.K.Nagar, 3rd Lane, Berhampur, dist. – Ganjam.

.....Applicant

VERSUS

1. Union of India, represented through the Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi.
2. Secretary, Central Board of Excise and customs, Ministry of Finance, department of Revenue, New Delhi.
3. Commissioner, Central Excise, Customs and Service Tax, Bhubaneswar-II, C.R.Building, Rajaswa Vihar, Bhubaneswar, Dist. – Khurda.
4. Chief Commissioner, Central Excise, Customs & S. Tax, Bhubaneswar Zone, Bhubaneswar.

.....Respondents.

For the applicant : Mr.N.R.Routray, counsel

For the respondents: Mr.L.Jena, counsel

Heard & reserved on : 16.1.2019

Order on : 24.1.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

This OA has been filed by the applicant Sri Ramesh Chandra Choudhury praying for following reliefs under Section 19 of the Administrative Tribunals Act, 1985:-

"(i) Quash/set aside the order dtd. 10.5.2010 as under Annexure 5.

(ii) Issue a direction to the respondents to give promotion to the applicant to the post of Senior Grade Inspector and Superintendent Group 'B' w.e.f. 27.8.81 and 7.2.83 respectfully.

(iii) Issue a direction to the respondents to award the applicant all the consequential benefits after giving him promotion which were awarded to similarly circumstanced persons who admittedly were juniors to the applicant.

(iv) Issue a direction to the respondents to award interest @ 18% P.A. on the arrear amount."

2. The applicant is aggrieved by the order dated 10.5.2010 by which the respondents have decided that the applicant is not entitled for promotion to the grade of Inspector (SG) w.e.f. 24.9.1983 as against the claim 27.8.1981. The applicant also claims his promotion to the post of Superintendent Group 'B' w.e.f. 7.2.1983 i.e. from the date from which one Bairagi Charan Sahoo and other employees who are junior to him as per the revised seniority list, were given promotion.

3. Initially the applicant had approached this Tribunal in OA No. 239/1993 for similar prayer. Another OA No. 264/1993 was also filed by him and both the OAs were disposed of vide order dated 1.9.1999 (Annexure A/1 to the OA). This order was challenged by the respondents before the Hon'ble High Court and the Tribunal's order was upheld. However, the order was not complied with, for which the applicant filed a contempt petition before the Hon'ble High Court. Thereafter the respondents proceeded to consider the case of the applicant for promotion to the post of Inspector (SG) w.e.f. 27.8.1981 and it was rejected. Thereafter, the applicant filed another OA No. 233/2007 in which the respondents were directed to reconsider the decision by convening the Review DPC, which was held, but the case of the applicant for promotion as claimed was not considered. Hence, he has approached the Tribunal in third round of litigation, by filing this OA.

4. The respondents in their counter have claimed that the review DPC was held on 13.8.2010 to consider the case of the applicant for promotion to the grade of Superintendent Group 'B' w.e.f. 7.2.1983 as per the direction of the Tribunal and vide the copy of the minutes of the review DPC placed at Annexure R/6 to the counter, the DPC did not consider the applicant to be fit for notional promotion (since the applicant had already retired in the meantime) after taking into consideration the entries in the ACR.

5. Heard learned counsels for the applicant. He submitted that the main ground for which the applicant was not considered for promotion to Superintendent Group 'B' in the review DPC dated 13.8.2010 is because of one ACR entry relating to the year 1978 grading the applicant as "just adequate". He argued that as per the instruction of the government the ACR grading/rating should be Average, Good, Very Good, Outstanding or Below Average. There is no entry termed as 'Just Adequate' as per the instruction of the Government. He also argued that 'just adequate' will not necessarily mean that the applicant was unfit for promotion whereas DPC has considered the applicant as unfit because of this assessment as 'just adequate'. Learned

counsel on the other hand argued that 'just adequate' is assessed to be unfit by the DPC which is competent to assess the fitness of a candidate for promotion.

6. We have considered the pleadings as well as submissions of learned counsels for both the parties. The controversy in this case is whether the applicant is fit for promotion as to the rank of Inspector (Senior Grade) w.e.f. 27.8.1981 and as Superintendent Group 'B' w.e.f. 7.2.1983 and if he is not fit is he entitled for any other relief.

7. Perusal of the direction of the Tribunal in first OA filed by the applicant vide order dated 1.9.1999 (Annexure A/1) states as under:-

"In view of the above, this prayer of the applicant is disposed of with a direction to the respondents that a review DPC should consider the case of the applicant for his promotion to the rank of Inspector (Senior Grade) with effect from 27.8.1981, the date when his three juniors got such promotion. This exercise should be done within a period of 120 (one hundred twenty) days from the date of receipt of copy of this order. In case the applicant is so promoted then he will naturally get the consequential financial benefits moreso because of the reason that the work of Inspector (Senior Grade) and Inspector (Ordinary Grade) is the same.

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We have gone through the order dated 26.10.1994 in OA No. 249/93. In view of the fact that the punishment imposed on the applicant withholding his promotion upto 30.4.1985 has been quashed, the prayer of the applicant for promotion to the rank of Superintendent, Group-B with effect from 7.2.1983, the date from which Y.Raghu Sankar and K.P.Patra were given notional promotion in order dated 2.3.1993, is disposed of with a direction to the respondents that the case of the applicant should be considered afresh by a review DPC for his promotion to the rank of Superintendent, Group B with effect from 7.2.1983. This exercise should be completed within a period of 120 (one hundred twenty) days from the date of receipt of copy of this order."

8. Hence as per the direction of the Tribunal as above the case of the applicant was to be considered for promotion to the post of Inspector (SG) w.e.f. 27.8.1981 and to the rank of Superintendent (Group-B) w.e.f 7.2.1983. The respondents have considered the case and rejected the same through a cryptic order which was not acceptable and vide order dated 28.1.2010 (Annexure A/4) of the Tribunal the respondents were directed to reconsider the matter. Accordingly the review DPC was held on 13.8.2010. Copy of the minutes is annexed at Annexure R/6.

9. We have considered the matter. On perusal of the review DPC held on 13.8.2010 it is found that DPC held as under:-

"In view of the above observations of Hon'ble High court, the DPC meeting held on 18.9.2006, reviewed the findings of the DPC meeting held on 14.8.81, to consider notional promotion of Sri R.C.Choudhury to the grade of Inspector (SG) w.e.f. 27.8.1981. In the review DP{C it was observed that Shri R.C.Choudhury had got adverse remark in his ACR of 1977-78, against which he had represented but the same had not been expunged by the then Collector.

In view of the said adverse remarks in his ACR for the year 1977-78, notwithstanding his exoneration in the disciplinary proceeding, the review DPC did not find any reason to interfere with the findings of the DPC meeting held on 14.8.1981 and therefore, did not find Shri R.C.Choudhury 'fit' for notional promotion to the grade of Inspector (SG) w.e.f. 27.8.1981. The said review DPC, however, did not review the findings of the intervening DPC meetings held between 14.8.1981 and 23.3.1985, i.e. the date on which the DPC had eventually recommended the case of Shri R.C.Choudhury, for promotion to the grade of Inspector (SG), w.e.f. 28.5.1985.

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Further, the DPC in overall examination of the entries in the ACR descriptive as well as overall grading given by the Reporting Officer concluded that the ACR be treated as 'Just adequate' for the year 1978 (1.4.78 to 31.12.78)

Thus, the overall position for 5 years that emerges is as under:

1978	-	Just adequate
1979	-	Good
1980	-	Good
1981	-	Good
1982	-	Good

In view of the ACR gradings arrived at by the DPC as above, Shri R.C.Choudhury having 'Just adequate' graded for the year 1978 (1.4.78 to 31.12.78) does not meet the bench mark for promotion by selection as was applied to others (including his juniors) equally placed at the relevant time. Accordingly, he is not fit to be promoted to the grade of Superintendent (Group B) with effect from 7.2.83 notionally, the date his juniors were promoted notionally."

10. From the above it is seen that the DPC has come to the conclusion about the suitability of the applicant on the basis of the ACR entry in 1978 which was assessed to be 'just adequate'. The applicant was promoted to the grade of Inspector (SG) w.e.f. 28.5.1985 which the applicant has claimed that date of promotion as Inspector (SG) should be w.e.f. 27.8.1981. The review DPC reiterated the decision of the DPC which was earlier held recommending the applicant for promotion to the post of Inspector (SG) w.e.f. 28.5.1985. It is seen that the review DPC held on 13.8.2010 did not consider the suitability of the applicant for promotion to the post of Inspector (SG) w.e.f. 27.8.1981 as directed by the Tribunal vide order dated 1.9.1999 in OA 239/1993 and 264/1993. The said review DPC has only acted upon the second direction of the Tribunal in the said order i.e. to consider the case of the applicant for notional promotion to the grade4 of Supervisor Group 'B' w.e.f. 7.2.1983, which was duly considered and the DPC found him unsuitable on the ground that in

the year 1978 the applicant's assessment was decided to be 'just adequate' which does not confirm to the benchmark.

11. The reason for not considering the case of the applicant for promotion to Inspector (SG) w.e.f. 27.8.1981 (instead of 28.5.1885), has not been mentioned in the minutes of the review DPC meeting dated 13.8.2010, nor it is clarified by the respondents in their counter. In view of the specific order of the Tribunal dated 1.9.1999, it was necessary on the part of the respondents to have considered the case of the applicant for promotion to the post of Inspector (SG) w.e.f. 27.8.1981. It is noted that similar direction was reiterated in the order dated 28.1.2010 (Annexure A/4) of the Tribunal, directing the respondents to reconsider the case of the applicant in the light of the discussion in the order.

12. Learned counsel for the applicant had argued that the entry 'just adequate' should not be taken as an adverse entry, since it is not a grading of the ACR as per the Government instruction and the review DPC should not have treated the same as below benchmark. Regarding this contention, it is noticed that in the matter of promotion the DPC is the authority to assess the ACR entries as well as other records of service and come to a conclusion as to whether a candidate will be fit for promotion or not fit after duly assessing the ACR entries and service records of the candidates. As explained in the minutes dated 13.8.2010, the review DPC has not found the applicant fit to be promoted notionally to the grade of Superintendent Group 'B' w.e.f. 7.2.1983. We are of the view that it is not for the Tribunal to go into the matter as to whether the assessment of the DPC that 'just adequate' would be below the benchmark, is correct. There is no other rule or guideline or case laws furnished by the applicant's to support his stand that assessment 'just adequate' should not have been there or it is not to be treated as below benchmark.

13. We take note of the judgment of Hon'ble Apex Court that in the matter of promotion, generally the DPC's recommendation would be final. In the case of **Union of India & Ors. Vs. S.P. Nayyar in Civil Appeal No. 5852 of 2014 [2015(7) SLR 711(SC)]**, it was held as under:-

"12. It is settled that High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other employee.

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14. The bias and malafide acts can be adjudged only on the basis of evidence. The assessment of Character Roll by one or the other officer, giving a general grade such as 'Good' cannot be the sole ground to hold that the officer was biased against the person whose Character Roll is assessed. In the instant case, there is nothing on record to suggest that the appellant no. 3 -E.N. Ram Mohan was biased against the respondent. Merely because he assessed the ACR of the respondent as 'Good' as against assessment of 'Very Good' made by I.O. it cannot be said that he was biased against the respondent.

15. The Departmental Promotion Committee consists of a Chairman and the members. Even if bias is alleged against the Chair-person, it cannot be presumed that all the members of the Committee were biased. No ground has been made out by the respondent to show as to why the assessment made by the DPC is not to be accepted. The High Court failed to notice the aforesaid fact and wrongly discarded the assessment made by the D.P.C.

16. It is also settled that the High Court under Article 226 can remit the matter for reconsideration if a person was not properly considered for a promotion for which he was eligible. But it cannot direct to promote a person to the higher post, without giving a plausible ground."

14. Applying the ratio of the judgment cited above, there is nothing on record to show that the findings of the DPC are perverse or are not based on record. Hence there is no scope for this Tribunal for interfering with the recommendation of the DPC in respect of suitability of the applicant for promotion to the rank of Superintendent Group 'B' w.e.f. 7.2.1983 as discussed in para 12 above. But if the applicant was not found fit for promotion to the rank of Superintendent Group 'B' w.e.f. 7.2.1983, the reason for not considering him for promotion for subsequent years depending on the dates when DPC was held for those years when the applicant was in service, if any of the junior of the applicant was considered for promotion to the rank of Superintendent Group 'B' have not been explained by the respondents. There is nothing on record to show that it was done. Admittedly, the applicant was in service during that period and his juniors would have been considered for promotion to Superintendent Group 'B' in the DPCs held after 7.2.1983. The reason for not considering the applicant for promotion after 7.2.1983 if he was not found fit for promotion w.e.f. 7.2.1983, has not been explained by the respondents in the pleadings. If the applicant was not found fit for promotion to the rank of Superintendent Group 'B' w.e.f. 7.2.1983, then his case should have been considered for subsequent DPC held after 7.2.1983 till the applicant was eligible for being considered for promotion, if any of the applicant's junior was considered in the said DPC.

15. Learned counsel for the respondents filed copy of the documents/citations relied upon by the respondents. These documents include the circular dated 20.5.1972 on maintenance of confidential reports, confidential report format for Superintendent under the respondents, where the grading of "Just Adequate" is available below the grading of "Good" and the judgment dated 14.11.2013 of CAT, Bombay Bench in OA No. 135/2013. The

format for confidential reports for the Superintendent Group 'B' specifies a grading of "Just Adequate" which is below "Good". In this case, the entry was in the report of the applicant as Inspector and it is not known whether "Just Adequate" grading was available for the Inspectors. In the cited judgment of Bombay Bench of CAT, the entry of "Just Adequate" was treated by the DPC to be an adverse entry and the Tribunal did not interfere with the decision. As discussed earlier in this order, we have accepted the Review DPC's finding that "Just Adequate" grading for the applicant was below the Benchmark for which he was not found 'fit' for promotion as Superintendent Group 'B' w.e.f. 7.2.1983.

16. In view of the above discussions, the OA deserves to be allowed in part, since the order dated 1.9.1999 of this Tribunal has not been fully complied by the respondents. Accordingly, the respondents are directed to hold the Review DPC to reconsider the applicant for promotion as Inspector (Senior Grade) w.e.f. 27.8.1981 and if he will be found unfit for such promotion w.e.f. 27.8.1981, then his case shall be considered for promotion w.e.f. a date subsequent to 27.8.1991 till his actual promotion from 28.5.1985, as and when any of the applicant's junior was promoted to the rank of Inspector (SG) and if the applicant is found fit for promotion w.e.f. a date prior to 28.5.1985, then he will be entitled to all service benefits as per the rules, including differential arrear salary from date of promotion to Inspector (SG), in accordance with the order dated 1.9.1999 of this Tribunal (Annexure A/1).

17. After being considered for promotion as above, the case of the applicant for notional promotion to the rank of Superintendent Group 'B' w.e.f any date subsequent to 7.2.1983, till the applicant was in service, as and when any of the applicant's junior was considered for promotion to the rank of Superintendent Group 'B', shall be reconsidered by the respondents by holding the Review DPC as per the rules. If the applicant is found fit for notional promotion to the rank of Superintendent Group 'B' as above, then he will be entitled for all consequential retirement benefits, that will be payable to the applicant as per the rules. But differential arrear salary would not be payable. The respondents are further directed to comply with this order within four months from the date of receipt of a copy of this order.

18. The OA is allowed in part in terms of directions in para 16 and 17 above. There will be no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

