

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH
JABALPUR

(1) ORIGINAL APPLICATION NO.200/00552/2018

(2) ORIGINAL APPLICATION NO.200/01156/2017

Jabalpur, this Thursday, the 31st day of January, 2019

HON'BLE MR.NAVIN TANDON, ADMINISTRATIVE MEMBER
HON'BLE MR.RAMESH SINGH THAKUR, JUDICIAL MEMBER

(1) ORIGINAL APPLICATION NO.200/00552/2018

(arising out of OA No.021/00187/2017 of CAT/Hyderabad Bench)

Sri Yogendra Babu Sharma s/o Late Shri R.K.Sharma,
Aged 49 years, R/o 85-D, GPRA, Indira Nagar,
Gachibowli, Hyderabad-500032

- APPLICANT

(By Advocate – Applicant in person)

Versus

1. Union of India through the Secretary, Ministry of Water
Resources RD & GR, Government of India,
Sharam Shakti Bhawan, Rafi Marg, New Delhi-110 001

2. Union Public Service Commission Rep.by its Secretary,
Dholpur House, Shahajahan Road, New Delhi-110 069

3. Central Ground Water Board, Rep.by its Chairman,
Bhujal Bhawan, N.H.-IV, Faridabad:121001

- RESPONDENTS

(By Advocate – Shri D.S.Baghel for respondents nos.1& 3
Shri Mohan Sasurkar for respondent no.2)

(Date of reserving the order:13.11.2018)

(2) ORIGINAL APPLICATION NO.200/1156/2017

Sri Yogendra Babu Sharma, Type-V/4, GPRA, Income Tax Colony,
Bharat Nagar, Bhopal-462039

- APPLICANT

(By Advocate – Applicant in person)

Versus

1. Union of India through the Secretary, Ministry of Water

Resources RD & GR, Government of India,
Sharam Shakti Bhawan, Rafi Marg, New Delhi-110 001

2. Secretary, Union Public Service Commission,
Dholpur House, Shahajahan Road, New Delhi-110 069

3. Chairman, Central Ground Water Board,
Bhujal Bhawan, N.H.-IV, Faridabad:121001

4. Shri Satish Kumar SE, Central Ground Water Board,
Bhujal Bhawan, N.H.-IV, Faridabad:121001

5. Shri Hiranya Kumar Das, SE, Central Ground Water Board,
Bhujal Bhawan, N.H.-IV, Faridabad:121001

6. Shri Shiv Shankar, SE, Central Ground Water Board,
Bhujal Bhawan, N.H.-IV, Faridabad:121001 - **RESPONDENTS**

**(By Advocate – Shri S.P.Singh, for respondents nos.1& 3
Shri Mohan Sausarkar for respondent no.2
Shri A.P.Khare for intervenor)**

(Date of reserving the order:13.11.2018)

ORDER

By Navin Tandon, AM.-

We find that both these Original Applications have been filed by the same applicant against the same official respondents. Since the issue involved in both these Original Applications is somewhat common and facts are identical, both these Original Applications are being disposed of by this common order.

2. Firstly, we shall deal with **Original Application No.200/00552/2018** –

2.1 This Application was originally filed as Original Application No.021/00187/2017 with Hyderabad Bench of this Tribunal. On the request of the applicant, Hon'ble Chairman of this Tribunal ordered on 20.04.2018 in PT/100/00311/2017 to transfer it to Jabalpur Bench, where it was registered as OA No.200/00552/2018.

2.2 This Original Application has been filed against the recommendations of the review DPC held on 02.08.2016 for the post of Superintending Engineer (Group-A post) in PB-3 of Rs.15600-39100 + GP Rs.7600/- in Central Ground Water Board (for brevity 'CGWB') for the vacancy year 2013-2014. The review DPC has assessed the applicant as Unfit as he could not achieve the requisite benchmark grading in the ACRs.

3. The applicant has submitted as under:-

3.1 He joined the respondent-organisation as Assistant Executive Engineer (Group-A) Service on 28.07.1993, and was regularised with effect from 27.07.1995 vide order dated 08.09.1997. He was subsequently appointed as Assistant Executive Engineer in a substantive capacity with effect from 28.07.1995 vide Gazette Notification dated 12.10.1998 and got next cadre promotion as Executive Engineer (Group-A) on regular basis with effect from 17.07.2003.

3.2 Vide order dated 11.06.2014, the respondent No.1 promoted three Executive Engineers, namely, A.N.Gunjkar, G.L.Meena and J.C.Borogohain to the post of Superintending Engineer (Group-A) in PB-3 Rs.15600-39100 + GP Rs.7600/- on regular basis depriving the applicant from his promotion and promoting his junior J.C.Borogohain.

3.3 Aggrieved by his non-promotion, the applicant submitted a representation to the Additional Secretary, Ministry of Water Resources and also filed an Original Application No.2090 of 2014 before the Principal Bench of this Tribunal. The said Original Application was disposed of vide order dated 12.03.2015 (Annexure A-2) with a direction to the respondents to hold a review DPC treating the ACR for the year 2007-08 as no ACR, and in place thereof to consider the ACR for the year 2003-04. It was further directed in the said order that the DPC should also consider the ACR for the year 2005-06 as it is there on record, and give specific finding as to how it has been treated.

3.4 As there were certain typographical errors in the aforementioned order dated 12.03.2015, the applicant filed M.A.No.935/2015, which was allowed vide order dated 06.04.2015 (Annexure A-3).

3.5 In view of aforesaid orders passed by the Principal Bench of this Tribunal on 12.03.2015 and 06.04.2015, the respondents were directed to hold the review DPC treating the ACR of the applicant for the year

2007-2008 as no ACR and in place thereof to consider the ACR of the applicant for the year 2002-2003, and further it was also directed that the DPC should also consider the ACR for the year 2006-2007 as it is there on record and give specific finding as to how it has been treated.

3.6 Meanwhile, on 19.05.2015, after the DPC and before convening of review DPC, the respondent No.3 considered the representation of the applicant for upgradation of his ACR for the year 2005-2006. The competent authority found that the applicant's performance during the year 2005-2006 was highest in the country. Therefore, the competent authority upgraded the applicant's ACR for the period 2005-2006 to "very good".

3.7 The respondent No.2 filed a review application bearing RA No.73 of 2016 for recalling the order dated 12.3.2015 as modified vide order dated 06.04.2015. However, the said RA was dismissed by the Principal Bench of this Tribunal vide order dated 31.05.2016 (Annexure A-6).

3.8 The findings and minutes of the review DPC (Annexure A-1) held on 02.08.2016 are contradictory to the orders passed by the Principal Bench of this Tribunal in Original Application No.2090/2014 and RA No.73/2016. The review DPC neither considered the upgraded ACR of 2005-2006 nor the final grading of the ACR of 2006-2007.

3.9 The finding of the review DPC downgrading the applicant's ACR of 2006-2007 was against the principle of natural justice. The Principal Bench of this Tribunal had directed to consider it as it is there on record. Non-consideration of the direction by the review-DPC is unlawful act on the part of the respondent No.2.

3.10 The competent authority did not approve the recommendations of the review DPC and expressed complete disagreement with the minutes and asked the respondent No.2 to review the decision vide letter dated 12.08.2016 (Annexure A-9). The competent authority had specifically written the following in concluding para of the letter dated 12.08.2016 :
“In the instant case, there is no consideration of upgraded ACR of 2005-2006 and the non-acceptance of final grading of 2006-07 and denial of opportunity of communication of the assessed below benchmark ACRs by the DPC is affecting the career prospects of the individual. This is against the principle of natural justice. In view of the reasons as detailed above, this Ministry does not agree with the recommendation of the UPSC and requests the UPSC to review their decision by considering Sh.Y.B.Sharma's upgraded ACR of 2005-06 and final grading of 2006-07”.

3.11 The respondent No.2 vide their letter dated 19.09.2016 (Annexure A-10) did not consider the remarks of the competent authority and instead

advised the following to the competent authority “Accordingly, the request of the Ministry of Water Resources, RD&GR for review of decision of the DPC has not been found to be acceptable. The Ministry is, therefore, advised that they may also take up the matter with DoP&T bringing out the facts of the case and the specific recommendations of the DPC. Thereafter, in case it is decided by the competent authority not to accept the recommendations of the DPC, the Ministry may take necessary action as per the extant procedure prescribed in the relevant DoP&T instructions for non-acceptance of the DPC recommendations”.

3.12 On receipt of the above reply, the competent authority accepted the recommendations of the review DPC as communicated vide letter dated 07.10.2016 (Annexure A-11).

3.13 The applicant filed another M.A.No.3815/2016, however, the same was withdrawn.

3.14 The applicant had also filed Contempt Petition No.157 of 2016 against non-implementation of the order of the Principal Bench of this Tribunal dated 12.3.2015 passed in OA No.2090/2014. The same was closed vide order dated 25.10.2016 (Annexure A-12) by stating that the respondents have substantially complied with the orders of the Principal Bench of this Tribunal.

3.15 There is a major error in Para 1 of the order dated 25.10.2016 (Annexure A-12) inasmuch as the Principal Bench of this Tribunal did not consider the supplementary order. The Review DPC had to consider the ACR of the applicant for the year 2006-2007 “as it is there on record”. However, in Para 1 of the order dated 25.10.2016 the year has been mentioned as 2005-2006 which has changed the real meaning of the operative part of the order.

3.16 The applicant filed M.A.No.3527 of 2016 on the ground that the respondent No.2 had not complied with the second direction as set by the Principal Bench of this Tribunal stating that “the DPC should also consider the ACR for the year 2006-07 as it is there on record and give specific finding as to how it has been treated”. However, the Principal Bench of this Tribunal dismissed the M.A No.3527/2016 vide order dated 09.12.2016 (Annexure A-13) on the following ground –

“Once this Tribunal records its satisfaction about the substantial compliance of the orders of this Tribunal by the respondents and closed the Contempt Proceedings, the same cannot be reopened or revived except on showing any valid ground, such as fraud or bona fide mistake in recording the said satisfaction. The applicant failed to show any such valid reason”.

3.17 The Principal Bench of this Tribunal failed to consider that in the instant case there were a series of bona fide errors in the findings of the review DPC on the ACR of 2005-2006 and 2006-07, which clearly

amount to fraud, forgery and perjury. Non-consideration of upgraded ACR of 2005-2006 confirms the fact that the findings of the review DPC on the ACR 2005-2006 are wrong and unlawful.

3.18 The respondent No.2 downgraded the applicant's ACR of 2006-2007 to 'Good', and did not provide any opportunity to the applicant as required under the DoP&T's OM dated 13.04.2010.

3.19 The review DPC provided the following reason for not considering the upgraded ACR of 2005-2006 : *"The Committee noted that as certified by the Ministry at the time of Regular DPC held on 15.05.2014, Shri Y.B. Sharma was given the opportunity to represent against the below benchmark ACRs but he did not make any representation at that time. The extant instructions clearly provide that the representation can be given by the concerned officer within 15 days of receipt of the ACR. Shri Sharma, however, did not represent within the time limit prescribed. In this case Shri Sharma represented much later that too after (i) the ACR had attained finality and (ii) the Regular DPC had already been held on 15.05.2014"*.

3.20 The above observations of the review DPC are completely incorrect, as the ACR of 2005-06 was, in fact, missing from the official record and it was never communicated to the applicant. Also, the ACR of 2005-06 was upgraded by the Respondent No.3 after verifying the fact

that the performance of the applicant was highest in the country during 2005-06 and that the ACR of 2005-06 was never communicated to the applicant. The official records, pertaining to registered posts, maintained in the office of Respondent No.3 confirmed the fact that there was no such registered post sent to the applicant. Consequently, the ACR of 2005-06 as submitted at the time of original DPC held on 15.05.2014 cannot be treated as final.

4. The applicant has, therefore, sought for the following reliefs in this Original Application:-

“8. Main Relief: In view of the facts stated above, the applicant humbly pray that this Hon’ble Tribunal may be pleased (i) to declare the review DPC proceedings in F.No.1/64(14)2015-AP.I (STF) dated 02.08.2016 as illegal and arbitrary and consequently set aside the same and (ii) to direct the respondents to convene a review DPC duly treating ACR of the applicant for the year 2005-06 and 2006-07 as very good in the review DPC and (iii) to direct the respondents to promote the applicant to the post of Superintending Engineer from the date of his eligibility in the year 2014 on par with others who were promoted in the DPC held on 15.05.2014 with consequential benefits and (iv) pass such further or other order or orders as the Hon’ble Tribunal deems fit and proper in the circumstances of the case”.

5. The respondent No.2-UPSC in their reply have submitted as under:

5.1 The Committee in view of the observations of the Principal Bench of this Tribunal in their orders dated 12.03.2015 & 06.04.2015 revisited the issue of assessment of the ACR for the year 2007-2008 at the time of regular DPC held on 15.05.2014 as also re-examined the ACRs for the

years 2005-06 and 2006-07, while adopting the assessment of the original DPC in respect of ACRs for the year 2003-04 and 2004-05.

5.2 After considering comprehensively all the relevant ACRs, the Review DPC assessed the applicant 'UNFIT' as he could not achieve the requisite benchmark grading in the ACRs. On the basis of the said assessment the Committee did not find the applicant suitable for promotion to the post of Superintending Engineer against the vacancy year 2013-14 in the Review DPC conducted by the Commission in compliance of orders dated 12.3.2015, 06.04.2015 and 31.05.2016 of the Tribunal.

5.3 The Ministry of Water Resources, River Development and Ganga Rejuvenation while conveying their disagreement with recommendations of the Review DPC, requested the Commission for review of decision of the Review DPC by considering the upgraded ACR for the year 2005-06 and final grading of ACR for the year 2006-07 in respect of the applicant. The request of the Ministry was examined in the Commission in detail and Ministry, with the approval of the Commission was advised vide the Commission's letter dated 19.09.2016 (Annexure-III) to take up the matter with DoP&T, the nodal authority, and take further action as per the extant procedure prescribed in the relevant DoP&T instructions for non-acceptance of the DPC recommendations. However, subsequently, the

recommendations of the Review DPC held on 02.08.2016, were accepted by the Ministry.

5.4 Subsequently, the Ministry of Water Resources, in response to representation of the applicant, requesting for holding of a fresh review DPC, took a decision and asked the applicant to submit fresh self-appraisals for the year 2005-06 & 2006-07 and based on the fresh self-appraisals thus received, requested the Commission for advice whether a fresh Review DPC can be held on the basis of revised/upgraded ACRs of the said years. The Commission vide its letter dated 16.05.2017 (Annexure-IV) has advised the Ministry as under:-

“(2).....In this regard, it is not clear as to under which rules/instructions of the Govt. of India, the Ministry has sought fresh self-appraisal and graded the officer afresh at this stage. Such an action neither seems to be in consonance with the extant instructions of the Govt. as laid down by the DoP&T, the Nodal Department in the subject matter, nor based on any Court/CAT order in this regard.

(3). In view of the above, the Ministry of Water Resources, River Development and Ganga Rejuvenation was requested to take decision in the matter in consultation with DoP&T. In case it is decided to refer the matter for convening of DPC on the basis of fresh ACRs for the aforesaid years, views of the DoP&T, i.e. nodal Department may be obtained before referring the proposal to the Commission.

5.5 The matter presently falls within the domain of the Ministry of Water Resources, River Development and Ganga Rejuvenation and that the action can be taken in the Commission only after the proposal is

referred by the Ministry after obtaining the advice of DoP&T, the nodal authority in the matter.

6. The respondents Nos.1 & 3 in their reply have submitted as under:

6.1 The applicant had submitted his ACR for the year 2005-06 duly filled Part-II and submitted it to his reporting officer Shri N.Varadaraj, the then HOO, CGWB, SECR, Chennai. Shri N.Varadaraj sent the same, along with ACRs of seven other officers to Shri Shobh Nath Ram, the then Member (ED&MM) for reviewing it vide letter dated 12.5.2006 (Annexure R-3). However, Shri Shobh Nath Ram did not review any of the ACRs and sent the same to Shri A.K.Sinha, the then Member (SML), CGWB vide letter dated 15.05.2006 (Annexure R-4) for reviewing, but Shri Sinha neither reviewed these ACRs nor submitted these ACRs to the Board before his retirement. He retired from Government service on 31.01.2007. The ACRs which were not reviewed/returned by Shri A.K.Sinha pertain to six scientific officers and two Engineering Officers. The ACR of seven officers were dealt in Scientific Establishment Section separately and were recorded "No Receiving Certificate" for each of the officer.

6.2 The ACR of the applicant was dealt in the Engineering Section. The Engineering Section issued letter to the then reporting officer Shri N.Varadaraj, HOO, CGWB, SECR, Chennai to send the ACR pertaining

to the year 2005-06 of the applicant vide letter dated 11.7.2006 and subsequent reminders dated 13.11.2007, 31.01.2008, 18.02.2008 and 10.7.2008. Lastly, when a D.O. letter was issued from CHQ on 11.11.2008, then said Shri Varadaraj initiated the ACR of the applicant for the year 2005-06 on 21.11.2008 without resume in Part-II.

6.3 There is no provision to communicate the ACR before 2008-09, but if the ACR of the previous period is required for DPC after 2008-09, the same has to be communicated as per rule. Accordingly, the ACR of the applicant for the year 2005-06 was communicated to him vide confidential letter dated 27.4.2011 at his UK address.

6.4 In respect of dispatch of ACRs for the period 2005-2006 and 2006-2007, as per records available in dispatch section of Central Headquarters, Faridabad Office, there is an entry in the name of the applicant, although no records are traceable in CGWB office to confirm its dispatch by registered post. As such it is not confirmed whether the said letter was dispatched by ordinary post or by registered post.

6.5 The DPC enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of the candidates who are to be considered by them and make its own assessment on the basis of entries in the APARs.

6.6 The minutes of the review DPC held on 02.08.2016 is valid and legal as per law and there is no violation of principles of natural justice.

7. Though it has not been mentioned in this OA, on perusal of Para 8 of the order of the Principal Bench of the Tribunal dated 12.03.2015 (Annexure A-2) we find that the applicant proceeded to University of Oxford, U.K. for pursuing Ph.D study programme from 10.10.2007 to 09.10.2010. For the first year of the study from 10.10.2007 to 09.10.2008, the applicant had been treated as on duty under the Scheme on Partial Funding of Foreign Study vide DoP&T OM dated 05.12.2008. He has availed EL for 123 days from 10.10.2008 to 09.02.2009 and EOL (without medical) for 1289 days from 10.02.2009 to 20.08.2013.

8. Heard the applicant in person as well as the learned counsel for the respondents and perused the pleadings of the respective parties and the documents annexed therewith.

9. The whole thrust of the contentions of the applicant is for ACRs of 2005-06 and 2006-07. As far as ACR for 2005-2006 is concerned he has submitted that the same was never communicated to him. As far as ACR for 2006-2007 is concerned the contention of the applicant is that in terms of the earlier directions of the Principal Bench of the Tribunal, the Review DPC had to consider his ACR for the year 2006-2007 “as it is there on record” i.e. ‘Very Good’ as recorded by the accepting authority.

10. We find that the Contempt Petition No.157 of 2016 in Original Application No.2090 of 2014, filed by the applicant, alleging violation of the orders of the Principal Bench of the Tribunal, as corrected in Misc. Application No.935 of 2015, was closed on 25.10.2016 (Annexure A-12) after recording satisfaction about the substantial compliance of the orders of the Principal Bench of the Tribunal, in review DPC, as under:

“(5). The Committee found that apart from the specific entries mentioned above, entries that have been retained in the relevant columns also mostly did not reflect performance/ability that could be treated as more than ‘Good’. Hence, with regard to the ACR for 2006-07, the review DPC again found that there has been interpolation in the record in the following terms:-

“5.2 Again in Column 4, which relates to general remarks given by the Reporting Authority and mentioned work of the Officer and the Grading, the Review Officer has noted “I agree with the general remarks as well as ‘Average’ grading recorded by the Reporting Officer. Thereafter, what appears to be interpolation and overwriting it has been written “He cannot be graded below V.Good and is graded V.Good. Apart from the last word ‘Good’ the rest of this sentence appears to be subsequent additions and, therefore, suspicious. In any case, while the Reporting Officer has given detailed remarks on each attribute/parameter, the Reviewing Officer has not given any reason/justifications to contradict. The ACR does not bear any remarks of an Accepting Authority”.

Consequent of the DPC was that in view of the remarks given and discounted for the interpolation, the applicant could not have been awarded more than ‘Good’. Hence, the Committee found the applicant ‘Unfit’ as he could not achieve the requisite benchmark grading in the ACRs.

On the basis of the above, we are satisfied that the respondents have substantially complied with the orders of this Tribunal and the CP is thus closed. Notices are discharged. No costs”.

11. On perusal of the above extract, we find that the Principal Bench of this Tribunal has already considered and examined the same issue in the earlier order passed in the Contempt Proceedings and has clearly held that the respondents have substantially complied with the orders of the Tribunal. Thus, the whole thrust of the argument of the applicant that in terms of the direction of the Principal Bench of the Tribunal, the Review DPC had to consider the ACR of the applicant for the year 2006-2007 “as it is there on record” i.e. ‘Very Good’ as recorded by the accepting authority, and should not have downgraded the same as ‘Good’, has already been considered by the Principal Bench of the Tribunal, with which we are in full agreement and, therefore, there remains nothing for further consideration.

12. In Para 4.20 this Original Application, the applicant has averred that the ACR of 2005-2006 “was never communicated to the Applicant”, whereas we find that in the Order dated 12.03.2015 (Annexure A-2) passed in OA No.2090/2014 by Principal Bench of the Tribunal it has been clearly stated in Para 6 of the Order that “The applicant further submits that the ACRs for the year 2005-06 and 2007-08 were communicated after an interval of 4 ½ years by the respondent vide letter dated 27.04.2011”. These two stands of the applicant are contradictory to each other.

13. We also find that the applicant had not raised any dispute about non-communication of ACR for 2005-2006 in his earlier OA No.2090/2014 filed before the Principal Bench of the Tribunal. Rather he had admitted in the said OA that said ACR for the year 2005-2006 was communicated to him in the year 2011. The said OA was disposed of vide order dated 12.03.2015 by the Principal Bench of the Tribunal and the said order has attained finality. Now, after the disposal of said OA on 12.03.2015 and before holding of review DPC on 02.08.2016, the Chairman of the CGWB had upgraded the applicant's ACR for the year 2005-2006 as "very good"(Annexure A-5), which has been duly examined by the review DPC. Therefore, the applicant by filing the present OA has tried to develop his argument by saying that the ACR of 2005-2006 had never been communicated. Now, the applicant has raised these arguments at this belated stage as an after-thought.

14. We also find that two issues arise in respect of ACR of 2005-2006.

15. Firstly, this ACR of 2005-06 was considered by the main DPC held on 15.05.2014. At that time the applicant was rated as 'Good' by the DPC. The applicant had challenged the recommendations of said DPC in OA No.2090 of 2014 before the Principal Bench of the Tribunal, but in the said OA he had not questioned about non-communication/missing/ below bench mark of rating of this ACR of 2005-06. After considering

arguments raised by the applicant in respect of other ACRs, the Principal Bench of the Tribunal vide its order dated 12.03.2015 directed holding of a review DPC to reconsider applicant's case. Therefore, he can not be permitted to raise these issues as the same is hit by the principle of constructive res judicata.

15.1 The Hon'ble Supreme Court in the matters of **Commissioner of Income Tax Vs. T.P.Kumaran**, (1996) 10 SCC 561 has clearly held such claims are barred by constructive res judicata under Section 11, Explanation IV, CPC which envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, the applicant should have or might have sought and secured orders in that regard. He did not set and, therefore, it operates as constructive res judicata. Even otherwise, when he filed the earlier OA and specifically did not claim the same, Order 2, Rule 2, CPC prohibits him to seek the remedy separately.

15.2. Therefore, we are of the considered opinion that the applicant could have raised whatever issues pertaining to ACR for the year 2005-06, (which are being raised by him in this OA), in his earlier OA No.2090/2014 which was disposed of by the Principal Bench of the

Tribunal vide order dated 12.03.2015. But he chose not to do so. He can not raise these issues now.

16. Secondly, after the main DPC held on 15.05.2014 and before conducting the review DPC on 02.08.2016, the Chairman of the CGWB upgraded the applicant's ACR of 2005-2006 as "very good". Therefore, in respect of the ACR of 2005-06, the review DPC which met on 02.08.2016 has observed thus:

“(4.1) (ii) In the ACR for the year 2005-06, several new pages have now been found interspersed with the original ACR and the pages in the said and subsequent ACRs have been renumbered.

(iii) It has been observed that the Reporting Officer assessed the ACR as 'Good' on 21.11.2008 and 'No Reviewing Certificate' has been attached to the effect that the 'Reviewing Officer has retired. Further while as per the certificate in compliance of DoP&T OM dated 13.04.2010 from the Ministry, the ACR for the year 2005-06 had attained the finality at the time of Regular DPC held on 15.05.2014, a fresh entry dated 19.05.2015 has now been found made by the Chairman, CGWB to the effect that "Considering the achievement against the target of the division his grading is upgraded as 'Very Good'. It has been noted from the papers now attached with the ACR, that Shri Y.B.Sharma had made a representation for upgradation of his ACR (for the year 2005-06) on 22.12.2014 i.e. well after the original DPC (which was held on 15.05.2014) and after it had attained finality.

(4.2) The Committee was informed that when the issue of the above upgradation was raised with the Ministry before convening the Review DPC, the Ministry furnished the following clarification:-

“.....that clarifications in the matter were called from the Central Ground Water Board. The CGWB have clarified that the Hon'ble CAT Principal Bench New Delhi in its judgment dated 12.03.2015 had not specifically ordered to receive and consider any representation from Shri Yogendra Babu Sharma for upgradation of his ACR for the year 2005-06. However, since the Hon'ble Tribunal had ordered to

convene Review DPC, the Board felt that representation from Shri Yogendra Babu Sharma regarding below bench mark ACR for the year 2005-06 could be entertained in terms of DoP&T's OM No.21011/1/2010-Estt(A) dated 13.4.2010. Accordingly, representation dated 22.11.2014 of Shri Yogendra Babu Sharma was considered and his ACR for the year 2005-06 was upgraded from 'Good' to 'Very Good' by Chairman, CGWB being the competent Authority. The CGWB have also stated that if deemed fit, earlier ACR of Shri Yogendra Babu Sharma for the year 2005-06 with grading 'Good' which was considered during regular DPC held on 15.05.2014 may please again be considered for the Review DPC to be held".

From the above clarification it has transpired that the upgradation of ACR for the year 2005-06, after it had already attained finality prior to convening of Regular DPC on 15.05.2014, has neither been done under any specific rule/instructions on the subject nor as per any court/CAT order.

(4.3) The Committee noted that as certified by the Ministry at the time of Regular DPC held on 15.05.2014, Shri Y.B.Sharma was given the opportunity to represent against the below benchmark ACRs but he did not make any representation at that time. The extant instructions clearly provide that the representation can be given by the concerned officer within 15 days of receipt of the ACR. Shri Sharma, however, did not represent within the time limit prescribed. In this case Shri Sharma represented much later that too after (i) the ACR had attained finality and (ii) the Regular DPC had already been held on 15.05.2014.

(4.4) The DPC further noted that the ACR was upgraded without any Speaking Order and that the following entries in respect of certain vital parameters have been retained.

Part-III (nature and quality of work)

S.No.2 Quality of output: The quality of performance was satisfactory.

Part-III (Attributes)

S.No.10 Supervisory Ability

10(4) Review of Performance: Satisfactory

Part-IV –General

S.No.3 General Assessment: He is having strong liking and disliking and able to manage the office work.

S.No.4 Grading: Good.

The Committee found that apart from the specific entries mentioned above, entries that have been retained in other relevant

columns also mostly did not reflect performance/ability that could be treated as more than 'Good'.

(4.5) In view of the above, the Review DPC decided to retain the grading for the year 2005-06 as 'Good'."

(emphasis supplied)

16.1 From a perusal of the above extract of the minutes of the review DPC we find that at the time of Regular DPC held on 15.05.2014, the Ministry had certified that the applicant was duly given the opportunity to represent against the below benchmark ACRs but he did not make any representation at that time. In the minutes it has been clearly mentioned that the extant instructions clearly provide that the representation can be given by the concerned officer within 15 days of receipt of the ACR. Since the applicant, did not represent within the time limit prescribed, his upgradation of his ACR by the Chairman, CGWB had rightly been not agreed upon by the Review DPC on the ground that the ACR had attained finality and (ii) the Regular DPC had already been held on 15.05.2014.

16.2 In the matters of *M.V. Thimmaiah Vs. UPSC, (2008) 2 SCC 119* the Hon'ble Supreme Court has observed that it is within the power of the Selection Committee to record its own assessment about the selection which may be at variance with that of the reporting officer or reviewing officer. *Relevant paragraph of the said order read thus:*

“(35). *Our attention was invited to a decision of this Court in Anil Katiyar v. Union of India (1997) 1 SCC 280 wherein it was observed as follows: (SCC pp. 282-83, para 5)*

“5. The question is whether the action of DPC in grading the appellant as ‘very good’ can be held to be arbitrary. Shri G.L. Sanghi, the learned Senior Counsel appearing for the Union Public Service Commission, has placed before us the confidential procedure followed by DPCs in the Union Public Service Commission for giving overall gradings, including that of ‘outstanding’, to an officer. Having regard to the said confidential procedure which is followed by the Union Public Service Commission, we are unable to hold that the decision of DPC in grading the appellant as ‘very good’ instead of ‘outstanding’ can be said to be arbitrary. No ground is, therefore, made out for interference with the selection of Respondent 4 by DPC on the basis of which he has been appointed as Deputy Government Advocate. But, at the same time, it must be held that the Tribunal was in error in going into the question whether the appellant had been rightly graded as ‘outstanding’ in the ACRs for the years 1990-1991 and 1991-1992. The observations of the Tribunal that out of the two ‘outstanding’ gradings given to the appellant one ‘outstanding’ grading does not flow from various parameters given and the reports entered therein, cannot, therefore, be upheld....”

(36). *Therefore, in view of a catena of cases, courts normally do not sit as a court of appeal to assess ACRs and much less the Tribunal can be given this power to constitute an independent Selection Committee over the statutory Selection Committee. The guidelines have already been given by the Commission as to how ACRs to be assessed and how the marking has to be made. These guidelines take care of the proper scrutiny and not only by the Selection Committee but also the views of the State Government are obtained and ultimately the Commission after scrutiny prepares the final list which is sent to the Central Government for appointment. There also it is not binding on the Central Government to appoint all the persons as recommended and the Central Government can withhold the appointment of some persons so mentioned in the select list for reasons recorded. Therefore, if the assessment of ACRs in respect of Shri S. Daya Shankar and Shri R. Ramapriya should have been made as “outstanding” or “very good” it is within the domain of the Selection Committee and we cannot sit as a court of appeal to assess whether Shri R.*

Ramapriya has been rightly assessed or Shri Daya Shankar has been wrongly assessed. The overall assessment of ACRs of both the officers were taken; one was found to be “outstanding” and the second one was found to be “very good”. This assessment cannot be made subject of court’s or Tribunal’s scrutiny unless actuated by mala fide.

(37). In the case of Shri S.B. Kolhar, Shri R.S. Phonde and Shri Puttegowda, the assessment of the reporting officers and the reviewing officers in the State have been found to be “outstanding”. But the Selection Committee downgraded the assessment to “very good” and this has provided grounds to the Tribunal to interfere with the selection of others. The Selection Committee normally abides by the assessment made by the reporting officer and the reviewing authority. But the Selection Committee is not powerless. After reviewing the candidates’ performance, the Selection Committee can certainly make its own assessment. The guidelines which have been issued by the Commission also enable the Selection Committee to assess the remarks made by the reporting officer or the reviewing officer and after taking into consideration various factors like the meritorious work done or any punishment or adverse remarks made or subsequently expunged on representation can review the assessment about the candidates. Such review of the assessment is fully within the competence of the Selection Committee and in this connection the observations of this Court may be relevant in Ramanand Prasad Singh v. Union of India (1996) 4 SCC 64 which read as under: (SCC p. 69, para 14)

“(14). ... The Committee applies its mind to the service records and makes its own assessment of the service records of the candidates marking them as outstanding, very good, good and so on. The Selection Committee does not necessarily adopt the same grading which is given by the reporting/reviewing officer in respect of each of the candidates. In fact the Selection Committee makes an overall relative assessment of the confidential report dossiers of the officers in the zone of consideration. It thus does not evaluate the confidential report dossier of an individual in isolation. It is after this comparative assessment that the best candidates are put in the select list.”

(38.) *Our attention was invited to a decision of this Court in UPSC v. K. Rajaiah—(2005) 10 SCC 15 wherein it has been held as follows: (SCC pp. 20-21, para 9)*

“9. ... That being the legal position, the Court should not have faulted the so-called downgradation of the first respondent for one of the years. Legally speaking, the term ‘downgradation’ is an inappropriate expression. The power to classify as ‘outstanding’, ‘very good’, ‘good’ and ‘unfit’ is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-1994. Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government’s decision.”

Therefore, the view taken by the High Court is correct that it is always within the power of the Selection Committee to record its own assessment about the selection which may be at variance with that of the reporting officer or reviewing officer.

(39.) *It was also pointed out that in the case of Shri N. Sriraman and Shri K. Ramanna Naik, the Selection Committee downgraded their reports from “outstanding” to “very good” yet they were selected. Similar is the case with Shri K.L. Lokanatha who has not been selected. Likewise the Selection Committee upgraded the assessment for the year 2001-2002 from “very good” to “outstanding” yet he could not be selected. Therefore, this is also the process of selection and the Selection Committee is constituted by the Commission and headed by the member of the Commission, we have to trust their assessment unless it is actuated with malice or apparent mistake committed by them. It is not the case of pick and choose, while selection has been made rationally. The selection by expert bodies*

unless actuated with malice or there is apparent error should not be interfered with. Lastly, the High Court considered the case of the two candidates who were eliminated by the Selection Committee and their cases were not sent to the Commission for selection to the IAS cadre. The High Court found that this was the selection process by the Screening Committee headed by the Chief Secretary and these persons were not found more meritorious to be recommended for appointment. This assessment of the Screening Committee was found by the High Court to be proper and there was nothing on record to show that the candidates who were shortlisted were not meritorious”.

16.3 We find that the Review DPC was headed by Member of the UPSC, along with other members. As held by the Hon’ble Supreme Court, we have to trust their assessment unless it is actuated with malice or apparent mistake committed by them, and that the selection by expert bodies unless actuated with malice or there is apparent error should not be interfered with.

17. In the instant case we find that after considering comprehensively all the relevant ACRs, the Review DPC which met on 02.08.2016 (Annexure A-1) assessed the applicant ‘unfit’ as he could not achieve the requisite benchmark grading in the ACRs. On the basis of the said assessment the Committee did not find the applicant suitable for promotion to the post of Superintending Engineer against the vacancy year 2013-14 in the Review DPC conducted by the Commission in compliance of orders dated 12.3.2015, 06.04.2015 and 31.05.2016 of the Principal Bench of the Tribunal. Therefore, in view of aforementioned

judgements of the Hon'ble Supreme Court, we do not find any ground to interfere with the findings of the review DPC.

18. Having considered all pros and cons of the matter, we are of the considered opinion that the applicant has failed to make out his claim. Accordingly, Original Application No.200/00552/2018 is dismissed.

19. Original Application No.200/01156/2017 – This Original Application has been filed by the applicant for not granting him promotion to the post of Superintending Engineer against the vacancy years 2014-15 and 2015-2016. On perusal of Para 9.1 of the minutes of the meeting of the DPC held on 01.09.2017 (Annexure A-1) we find that the APARs of the applicant had not been written for the years 2007-08 to 2013-14, hence the ACRs available for the years 2006-2007 to 2002-2003 had been taken into consideration for completion of five year matrix for both the vacancy years 2014-15 and 2015-16, as per the DoP&T instructions. The Committee after considering comprehensively all the relevant ACRs assessed the applicant as 'unfit' as he could not achieve the requisite benchmark grading in the ACRs.

19.1 We further find that the ACRs of the same period of the applicant have been considered by the DPC, which met on 01.09.2017 i.e. 2002-03 to 2006-07, as have been considered by the review DPC which met on 02.08.2016, as is evident from para 4 of the minutes of the review DPC.

19.2 In this Original Application the applicant has reiterated the same grounds as have been raised by him in OA No.200/00552/2018, and narrated above. Therefore there is nothing new to discuss. Therefore, we find no substance in this Original Application as well. Accordingly, Original Application No.200/01156/2017 is also dismissed.

20. In the result, both the above Original Applications are dismissed.

No costs.

(Ramesh Singh Thakur)
Judicial Member

(Navin Tandon)
Administrative Member

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