

(10)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO. 2978/2003

New Delhi, this the 19th day of March, 2004

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN
HON'BLE SHRI S.K.NAIK, MEMBER (A)

Shri Vinod Kumar Misra
s/o Shri Ganesh Misra
Addl. Controller General of Defence Accounts
Ministry of Defence
Union of India
r/o 56/1 Friends Colony East
New Delhi. ... Applicant

(By Advocate: Shri A.K.Singhvi, Sr. Advocate with
Sh. Ciccu Mukhopadhyaya, Sh. V.K.Rao,
Sh. Satish Kumar, Ms. Lovleen Bhuller
and Ms. Geetanjali Lakhota)

Versus

1. Union of India through
its Secretary
Ministry of Defence
South Block
New Delhi.
2. Union Public Service Commission
Through its Chairman
Shahjahan Road
Dholpur House
New Delhi.
3. Ms. Anjali Ahluwalia
working as Principal IFA
Office of the CGDA
West Block V
R.K.Puram
New Delhi. ... Respondents

(By Advocate: Sh. Mohar Singh and Mrs. B.Rana)

O R D E R

Justice V.S. Aggarwal:-

Applicant (Shri Vinod Kumar Misra) joined Indian Defence Accounts Service in 1969. Presently he is holding the post of Additional Controller General of Defence Accounts (for short Additional CGDA).

2. By virtue of the present application, the applicant seeks setting aside of the report of the Reviewing Officer for the period 2000-2001 and also of

MS Ag

the reports of the reporting and reviewing officers for the year 1999-2000. He further seeks setting aside the recommendations of the DPC meeting held on 28.11.2003 and direct the respondents to consider the claim of the applicant for promotion to the post of Controller General of Defence Accounts (for short CGDA) for convening a review DPC without taking into consideration the two down graded ACRs of the years 2000-2001 and 1999-2000. He also prays to direct the respondents to follow the uniform benchmark criteria of 3 'Verygoods' in the last 5 years which is the past practice.

3. Some of the other relevant facts are that the normal practice followed by the Union Public Service Commission for Departmental Promotion Committee Meetings held under its aegis was to benchmark the merit of the eligible candidates on the basis of a minimum 3 "Very Good" reports out of five.

4. It is asserted that contrary to the same, the DPC met and decided that the persons must have four 'Verygood' reports out of five. Furthermore, according to the applicant, he has learnt that grading given in the last six years reports are:

"Year	Reporting Officer	Reviewing Officer
1997-1998	Outstanding	Very Good
1998-1999	Outstanding	Outstanding
1999-2000	Good	Good
2000-2001	Very Good+	Good
2001-2002	Very Good	Very Good
2002-2003	Outstanding	Outstanding"

Ms Ag

5. It is asserted that his down grading of the Annual Confidential Records (in short, 'ACRs') from Outstanding to Good should have been communicated to him, the same have not been done. As such the same cannot be taken into consideration. It is on these broad facts that the reliefs referred to above are being claimed.

6. The Union Public Service Commission (in short 'UPSC') had filed its reply. It is contended that the Tribunal could not interfere with the Selection Committee's recommendations, which consists of experts on the subject. The Union Public Service Commission is an advisory body set up under Article 315 of the Constitution. The DPC Meeting herein was chaired by the Chairman of the UPSC. Secretary, Ministry of Defence and Financial Advisor (Defence Services) attended the meeting as departmental members of the DPC. As per the DoPT's instructions of 10.4.1989, the DPC considered five officers for one vacancy pertaining to the year 2003-04. The method adopted was 'selection by merit' amongst the officers in the feeder cadre. The revised guide-lines of Department of Personnel & Training of 8.2.2002 were taken into consideration. Accordingly, the meeting had been held and the name of the applicant was considered. The names were considered and assessed on the basis of their service record with particular reference to the performance as reflected in various attributes of their ACRs. So far as non-communication of some of the ACRs is concerned, the UPSC pleads that it is the responsibility of the concerned administrative Ministry.

A handwritten signature in black ink, appearing to read 'lsAg'.

-4-

7. In the separate reply filed by the Union of India the broad facts were not in dispute. It was admitted that the ACRs of the applicant were mostly 'Outstanding' in the last 34 years, however, that cannot be a guiding principle for Departmental Promotion Committee. The ACRs as indicated by the applicant were not disputed. According to the respondents, certain events had perhaps occurred, which prompted the same Reporting Officer and Reviewing Officer, who had earlier graded him as 'Outstanding' had to sharply downgrade the applicant. The applicant was promoted as PCDA (Pension) on 11.10.2000. As such, no ACR could be written for the entire period from 3.4.2000 and 10.10.2000. The Reporting Officer for the rest of the period gave him 'Verygood'. But reviewing officer did not fully agree and commented that the period of absence need to be seen in full background. The Reviewing Officer categorically commented that the report was 'Overpitched' and observed that there was a 'lack of willingness' on the part of the officer to proceed to his place of posting and disagreed with the grading.

8. Plea has been raised that the reports need not be communicated. It has further been asserted that there was some delay on the part of the Reporting and Reviewing Officers. The Reviewing Officer reviewed the reports for the year 1999-2000 on 18.2.2002, while he superannuated on 28.2.2002.

18 Ag

-5-

9. During the course of the submissions learned counsel for the respondents alleged that the relief pertaining to quashing of the decision of the DPC, cannot be granted, because no decision as yet of the appointing authority, which in the present case is the Appointments Committee of the Cabinet (in short ACC), has been taken.

10. We find that these submissions must be accepted. The DPC is only a recommendatory body. The decision so taken is not binding. In other words, at present as the ACC has not taken a decision, to that extent, the Original Application must be held to be premature.

11. A similar question had come up before the Division Bench of the Delhi High Court in the case of Maj. Gen. Surendra Kumar Sahni v. Union of India & Others, 2004(1) AISLJ Page 80. The High Court held:

"10. The allegations of incorrect transfer of contract carrying capacity directed against the petitioner pertains to a period prior to the date of holding the Selection Board to fill up the vacancy occurring in the post of Lt. General ASC. Admittedly, the Selection Board has already made its recommendations in respect of the said vacancy which awaits approval by ACC. It lies within the domain of ACC's jurisdiction to accept or reject the recommendations of the Selection Board in that respect for any valid reason and until any such decision is taken it is pre-mature to interfere with the process. There is thus no justification to issue a direction to 1st and 2nd respondents to declassify the result of the Selection Board pertaining to the promotion of the petitioner to the rank of Lt. General. Further, until ACC's approval of recommendations by the Selection Board there is no occasion to issue a direction to the respondents to effectuate the

Ms Ag

)

-6-

promotion of the petitioner and, accord ...
him seniority in terms of his prayer in
that regard."

To that extent, therefore, the plea of the applicant
cannot be accepted. Instructions can only govern if
at all a final decision is taken.

12. Applicant further seeks another relief to
direct the respondents to follow the uniform benchmark
criteria of 3 "Verygoods" in the last five years as
has been the practice mentioned in the guide-lines of
the DoPT's O.M. dated 8.2.2002. In this regard also
the decision once again is as above.

13. In the present case, there are no
statutory rule, providing such guide-lines. In the
absence of the same and as yet no final decision has
been taken by the ACC, it is unnecessary for this
Tribunal to express any opinion in this regard on the
subject.

14. The main controversy herein was as to
whether the downgraded reports of the applicant had to
be communicated to him or not? It was not disputed as
already referred to above that in the ACR pertaining
to the year 1998-99, the applicant had been adjudged
as 'Outstanding' officer and in the next year there
was a steep fall and he was adjudged as 'Good' by the
reviewing officer as well as by the Reporting Officer.
In subsequent year he was again adjudged after
Reporting Officer's 'Verygood' report to 'Good' by the
Reviewing Officer.

/s Ag

- 7 -

15. The learned counsel for UPSC has drawn our attention to certain precedents to contend that in such like situation, the ACRs record, which had 'Good' report, need not be communicated. She relied on the decision of the Punjab and Haryana High Court in the case of Union of India & Others v. M.S. Preeti & Others, Civil Writ Petition No.13024-CAT of 2002, decided on 22.11.2002. The said court, as is apparent from the following passage which we have reproduced below, was not concerning itself with downgrading of the ACRs. The findings of the Punjab and Haryana Court, which are specific, reads:

"In our opinion, the reason assigned by the Tribunal for entertaining the plea of respondent No.1 is per se erroneous and legally unsustainable and the direction given by it for re-consideration of his case for promotion under BCR Scheme is liable to be set aside. It seems to us that the Tribunal laboured under a mistaken impression that the rules/instructions which regulate recording of ACRs provide for communication of even those entries which are not adverse. During the course of hearing, Shri I.S.Sidhu placed before us the instructions issued by the Government of India for recording the ACRs to show that only adverse remarks are required to be communicated to the officer/employee. This position was not contested by Shri R.K.Sharma. Unfortunately, the Tribunal completely over-looked this important aspect of the matter and interfered with the recommendations of the Departmental Promotion Committee by erroneously assuming that average entries were required to be communicated to respondent No.1.

The judgment of the Supreme Court in U.P. Jal Nigam's case (supra) relied upon by the Tribunal has no bearing on the case of respondent No.1. In that case, the Supreme Court considered the question whether the entries recorded in the ACR can be down-graded without giving notice and opportunity of hearing to the affected employee. Their Lordships of the Supreme Court answered the question in favour of the employee and observed as under:-

As Ag

"All what is required by the Authority recording confidential in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must in all events, be not reflected in such variations as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case, we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain."

As already mentioned above, the present one is not a case of down-grading the ACRs but consideration of properly recorded ACRs for the purpose of adjudging the suitability of the employee. Therefore, the Tribunal was clearly wrong in placing reliance on the judgment of the Supreme Court.

(Emphasis supplied)

16. The other decision relied upon by the learned counsel was in the case of Union of India & Another v. Col. Tilak Raj and Others, Civil Writ Petition No.18833-CAT of 2002, decided on 13.5.2003. As would be noticed hereinafter, the Court was not concerning itself with the downgrading of the ACRs. It held:

"The judgment of the Supreme Court in U.P.Jal Nigam's case (supra) on which reliance has been placed by the Principal Bench of the Tribunal for granting relief to B.L.Srivastava, R.K.Anand and A.K.Gupta and which has also been relied upon in the impugned order has no bearing on the case of respondent no.1. The question which fell for consideration before the Supreme Court in U.P.Jal Nigam's case (supra) was

Al Ag

-9-

whether the entries recorded in the Annual Confidential Reports can be down-graded without giving notice and opportunity of hearing to the affected employee."

17. The same was the view taken by this Bench in OA 2967/2002, decided on 25.4.2003 in the case of Tarun Kumar v. Union of India & Others. The said decision does not come to the rescue of the respondents because therein also there is no downgradation of the Confidential reports. The notings read:

"9. To resolve the said controversy as to whether the applicant has been downgraded to take advantage of the decision in the case of the U.P. Jal Nigam (supra), we had called for the Confidential Reports of the applicant. A perusal of the same reveals that for the years in question, to begin with, the applicant had "Average"/"Good" reports. In the later years, he had improved his performance and his work was assessed as "Very Good". The Departmental Promotion Committee taking note of the overall assignment had assessed the work of the applicant for the years in question as "Good". Therefore, it is not a question of downgrading or steep fall that the applicant can press into service the decision of the Supreme Court in the case of U.P. Jal Nigam (supra). Therefore, the decision of the Punjab and Haryana High Court in peculiar facts would certainly apply."

18. It is therefore, clear that the precedents referred to by the learned counsel by the UPSC do not come to the rescue because there was no downgradation of the ACRs.

19. The Supreme Court in the case of U.P. Jal Nigam and Others v. Prabhat Chandra Jain and Others, (1996) 2 SCC 363 was concerned with a matter pertaining to the U.P. Jal Nigam. In the cited case there was downgradation of the ACRs. The Supreme Court held:

MS Ag

-10-

"3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any aduerseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of aduerseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

20. This decision of the Supreme Court was followed by the Bench of the Gauhati High Court in Donatus Engzanang v. State of Mizoram, 2001 (2) ATJ 467. In the cited case also the confidential reports had been downgraded. It was held that in that event the remarks should have been communicated.

18 Ag

-11-

21. The Full Bench of the Delhi High Court in the case of J.S.Garg v. Union of India & Others, 2002

(65) Delhi Reported Judgments 607 (FB) again took up the matter wherein the Annual Confidential Reports of the applicant after being 'Verygood' have been downgraded. The Judgement of the U.P. Jal Nigam (supra) was referred to by the Full Bench and held that the uncommunicated downgraded remarks could not have been considered. The findings of the Full Bench of the Delhi High Court reads:

"13. The learned Tribunal, in our opinion, committed a serious misdirection in law in so far as it failed to pose unto itself a right question so as to enable it to arrive at a correct finding of fact with a view to give a correct answer. The question which was posed before the learned Tribunal was not that whether the petitioner had been correctly rated by the DPC? The question, as noticed hereinbefore, which arose for consideration before the learned Tribunal as also before us was as to whether having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors. (supra), as also Rule 9 of the CPWD Manual the concerned respondents had acted illegally in not communicating his 'fall in standard'. It is now trite that the Court of the Tribunal cannot usurp the jurisdiction of the Statutory Authority but it is also a settled principle of law that the jurisdiction of this Court to exercise its power of judicial review would arise in the event it is found that the concerned authority has, in its decision making process, taken into consideration irrelevant fact not germane for the purpose of deciding the issue or has refused to take into consideration the relevant facts. The learned Tribunal, in our opinion, while holding that having regard to the decision of the Apex Court in U.P.Jal Nigam and Ors. the DPC could ignore categorisation, committed a serious error in usurping its jurisdiction. Once such categorisations are ignored, the matter would have been remitted to the DPC for the purpose of consideration of the petitioner's case again ignoring the remarks 'Good' and on the basis of the

LS Ag

other available remarks. This position stands settled by various judgments of the Supreme Court."

22. From the aforesaid, it is clear that when there is a steep fall as in the present case that officer with 'Outstanding' record was downgraded as 'Good', the remarks should have been communicated.

23. Another limb of the argument was that representation has already been filed with the Defence Minister and therefore, to that count the petition must be held to be premature. According to the applicant's learned counsel a representation had been filed to the Defence Minister by the applicant praying that his case should be considered in accordance with his entire Annual Confidential Reports and further that the Defence Minister could not have expunged the remarks.

24. Since the representation pertaining to a better deal so far as promotion is concerned regarding which we have already held that it is for the Appointments Committee of Cabinet to consider, the Original Application on that count necessarily is not succeeding. So far as setting aside of the remarks which have not been communicated, indeed the prayer could not have been made nor granted by the Defence Minister.

25. Resultantly, we dispose of the present application holding:

ls Ag

a) the recommendations of the Departmental Promotion Committee Meeting as yet have not been approved by the Appointments Committee of Cabinet, therefore, to that extent the relief prayed is premature.

b) For the reasons which we have recorded in the preceding paragraphs, we direct that uncommunicated Annual Confidential Reports, where there is a downgrading in the Annual Confidential Reports of the applicant, should be ignored while considering his claim for promotion.

Naik
(S.K. Naik)
Member (A)

Ag
(V.S. Aggarwal)
Chairman

/NSN/