

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No.1829/2010**

% **Date of Decision: 17.03.2010**

UNION OF INDIA PETITIONER
Through Mr. A.K. Bhardwaj, Advocate

Versus

B.P. SINHA & ANR. RESPONDENTS
Through Mr. Naresh Kaushik, Ms. Amita Kalkal,
Advocates for R-2/UPSC

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

MOOL CHAND GARG, J.

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1. The short point involved in this petition is as to whether “*the review D.P.C. was justified in downgrading the ACR of the respondent for the year 1999-2000, i.e., from rating the respondent from ‘very good’ to ‘good’.*”

2. The Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as ‘the Tribunal’) while disposing of the O.A. No.640/2009 filed by the respondent aggrieved from the decision of the Review DPC, has been allowed in favour of the respondent

No.1(hereinafter referred to as 'the respondent') by holding that as per the office memorandum dated 10.04.1989 the remarks of the later authority, i.e., reviewing or the accepting authority to whom the comments of the reporting officer are placed for consideration are final.

3. Briefly stating the facts of this case are:

a) DPC for filling up four posts of Controller of Mines (COM) pertaining to vacancy, year 2005-2006, was held on 17.01.2007. Respondent No.1, Sh. B.P. Sinha, Regional Controller of Mines (RCOM), along with other eligible officers was considered for promotion to the said post. There were certain adverse remarks in the ACR of the respondent for the period from 01.07.2002 to 31.03.2003, which were though expunged vide order dated 17.02.2006, remained unexpunged in his original ACR Dossier sent with proposal for DPC. As the DPC dated 17.01.2007 did not recommend the respondent for his promotion to the post of Controller of Mines (COM), he filed O.A. No.66/2007 before the Tribunal (Patna Bench). By order dated 28.03.2008, the Tribunal directed for holding of review DPC to consider the respondent for his promotion on the basis of complete ACR, ignoring the adverse entry in the ACR for the period 01.07.2002 to 31.03.2003. Accordingly, a review DPC was held on 03.10.2008, in compliance of the aforesaid order of the Tribunal. However, the DPC assessed the respondent as unfit for promotion to the post of COM.

4. It is against the aforesaid order, the respondent filed O.A. as aforesaid wherein relief was also sought for quashing the Minutes of Review DPC dated 03.10.2008. The Tribunal has allowed the aforesaid O.A. and has directed promotion of the respondent from the date of promotion of his junior. While doing so, the Tribunal specifically noted that normally it would have remitted the matter once again to review DPC but since the Review DPC has changed the grading of the respondent as given by the original DPC, therefore, it was not doing so.

5. At this juncture, it would be appropriate to take note of certain observations made by the Tribunal in the impugned order:

7. Having seen the confidential report of the applicant for the year 1999-2000 in all its regards, be it self-assessment of the applicant or remarks of the reporting and reviewing authorities, we may now deal with the relevant rules. The guidelines/instructions contained in para 5.3(f) of OM dated 10.4.1989, reproduced hereinbefore, would clearly reveal that in case the reviewing or the accepting authority may overrule the reporting officer, the remarks of the latter authority should be taken as final remarks for purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. Once, the reviewing authority had given adequate reasons to come to a conclusion different than the reporting officer with regard to overall grading of the applicant, in our considered view, it is the later overall grading of reviewing authority which had to be taken into consideration by the review DPC, more so when the original DPC while considering the same

aspect, had chosen to go by the remarks of the reviewing authority. Insofar as, the proceedings of review DPC are concerned, it is clearly stated in para 18.1 of the OM referred to above that proceedings of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC, or if there have been grave errors in the procedure followed by the DPC. Only unintentional mistakes such as mentioned in para 18.1, which are not exhaustive, can be corrected. We are of the view that when the original DPC had taken into consideration ACR of the applicant for the year 1999-2000, which would be obviously in the context of the gradings given both by the reporting and the reviewing authorities, and assessed as very good, the same could not be taken as grave error in the procedure followed by the DPC, or an unintentional apparent mistake which may need correction. Surely, as mentioned above, the DPC had taken all material facts into consideration with regard to ACR of the applicant for 1999-2000. Even if one is to go by the remarks of the reviewing authority as quite good without even referring to other attributes of the applicant, as mentioned by the said authority, according to which the applicant was assessed as very good, the same to be only good, could at the most, be a perception of the review DPC. It could not be termed to be unintentional apparent mistake which may need correction. A simple case of change in perception or different perceptions would not be covered under parameters of differing with the view of the earlier DPC. In view of the instructions contained in para 18.2 of OM dated 10.4.1989, review DPC should restrict its scrutiny to the CRs for the period relevant to the first DPC, and the CRs of subsequent periods should not be considered.

Further, if any adverse remarks relating to the relevant period were toned down or expunged, the modified CRs should be considered as if the original adverse remarks did not exist at all. Para 18.3 which also has a bearing upon the controversy in issue, reads as follows:

“Review DPC is required to consider the case again only with reference to the technical or factual mistakes that took place earlier and it should neither change the grading of an officer without any valid reason (which should be recorded) nor change the zone of consideration nor take into account any increase in the number of vacancies which might have occurred subsequently.”

The review DPC, as per para 18.3, would have power and jurisdiction to change the grading of an officer, but that, it again appears to be in the overall context of the rules with regard to technical or factual mistakes, and that too by recording reasons. Surely, there was no technical or factual mistake in assessing the ACR of the applicant for the period 1999-2000 as very good by the original DPC. The only reason given for assessing the said entry as only good, as mentioned above, is that whereas the reporting officer assessed the applicant as good but the same was upgraded as very good by the reviewing officer, and that the reviewing officer had assessed the quality of output as quite good. It was not a case of technical or factual mistake. As mentioned above, that the remark quite good would be good was only a perception of the review DPC, and that too without taking into consideration other attributes recorded in the ACR by the reviewing authority. Assuming that the review DPC could go beyond the technical and factual mistakes, the same ought to have

been done while considering the relevant aspect of the case and in particular, the remarks given by the reviewing authority, which necessitated upgradation of the report from good to very good. The review DPC, we may repeat, downgraded the ACR of the applicant for the year 1999-2000 to good only, simply mentioning that the upgradation done by the reviewing authority was not justified, even though it was so said after stating that it was after reviewing the work done by the applicant during the year and the attributes recorded in his ACR, but as mentioned above, his commendable attributes mentioned by the reviewing authority do not find even a remote mention.

8. We are conscious that no court or tribunal would normally interfere with the gradings done by a duly constituted DPC. It would not substitute its views and come to a conclusion contrary to the one arrived at by the DPC. The counsel representing the respondents has cited some judicial precedents on that count, but once, we accept this to be a settled proposition of law, there would be no need to make a mention of the judicial precedents relied upon by the learned counsel. Present is, however, not a case of the court substituting its view for the one expressed by the review DPC. It is a case of transgression of the instructions or guidelines required to be followed by the Government itself. If perhaps, it would have been a simple case of the review DPC not taking into consideration the relevant factors, we might have remitted the matter once again to the review DPC to reconsider the matter, but in the present case, however, as mentioned above, the review DPC has changed the grading of the applicant as given by the original DPC for the year 1999-2000, for which there was no scope as per instant instructions.

9. Finding considerable merit in this Application, we allow the same. Consequently, we direct the respondents to consider promoting the applicant from the date his juniors were promoted, as fully indicated above. There shall, however, be no order as to costs.

6. The petitioner while assailing the impugned order has submitted that the DPC is empowered to evolve its methodology and can give its own grading. The DPC is not bound by the overall grading given in the ACR. In the case of UPSC Vs. K. Rajaiah & Ors. JT 2005 (11) 1, The Supreme Court while reversing the order of the High Court viewed as under:

“5.....

That being the legal position, the Court should not have faulted the so called down gradation of the 1st respondent for one of the years. Legally speaking, the term 'down gradation' 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 1993-94. 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.

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9. We have also gone through the records of assessment placed before us by the learned counsel for the UPSC. The arguments in the additional affidavit coupled with the contents of the record make it clear that the 1st respondent could not be selected for the reason that he did not get the gradation of 'outstanding' for four years in a block of five years that was taken into account for the purpose of evaluating the merits of the candidates. The learned counsel for the 1st respondent points out that for the year 1993-94 which falls within the five year range, the first respondent ought to have been graded as 'outstanding' in conformity with the grading in the ACR. However, the selection Committee graded him as 'very good' in view of the difference of opinion expressed by the reporting officer and the reviewing officer. We do not find any unfairness or arbitrariness in grading the 1st respondent as 'very good' for the year 1993-94. If so, as he gets 'outstanding' grading only for three years, his overall grading cannot be 'outstanding' in view of the existing guidelines adopted by the Commission. Normally, the Court will not interfere with the evaluation done by the Commission on a consideration of relevant material. However, we have some doubts on the validity of guidelines evolved in this behalf. The procedure of assigning the overall grading as 'outstanding', only if an officer was classified as such in the ACRs of four out of five years, seems to dilute the procedure of selection by merit and give primacy to seniority to some extent. For instance, if a junior officer gets three 'outstanding' grades and two 'very good' grading, the officers senior to him, though they might not have got 'outstanding' even for one year, will be selected by virtue of their seniority. Whether this result that follows from the application of the criterion that is being adopted by the Commission is contrary to the statutory

Regulations or whether such criteria would be violative of Articles 14 & 16, is a matter which might deserve serious consideration. But, in the absence of specific challenge to the rule or the procedural guidelines spelt out in the additional affidavit filed by the UPSC and the arguments not having been advanced on this aspect, we are not inclined to express a definite opinion on this aspect.

7. However, this judgment does not help the case of the petitioner for the reason that in the present case, the Review DPC has not bifurcated the petitioner in one of the category as contemplated in the judgment of the Supreme Court. Here the Review DPC specifically downgraded the ACR of the respondent for the year 1999-2000 from 'very good' to 'good'. Even though the accepting/reviewing authority of the respondent in the relevant year, after the report was sent to him by that of the reporting officer, had assessed the officer as 'very good' which was in accordance with the guidelines/instructions contained in paragraph 5.3(f) of O.M. dated 10.04.1989.

8. Moreover, in the present case, the original DPC had taken the ACR for the year 1999-2000 of the respondent as 'very good'. As observed by the Tribunal, for the purpose of reviewing the proceedings by an earlier DPC, Review DPC can do so if the earlier DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there is any grave error in the procedure followed by DPC. However, nothing of that sort was brought to the notice of the Tribunal.

9. It will be appropriate to take note of the averments made by the respondent in his O.A. in paragraph 4.15 which reads as under:

“4.15. That as far as the entry in the applicant’s ACR for the year 1999-2000 is concerned the Reporting Authority had assessed the applicant as good. The Reviewing authority was of the opinion that the applicant’s performance during the year was ‘quite good’ and accordingly took a conscious decision after due application of mind that the applicant should be graded as ‘very good’ for the said year 1999-2000. As such the remark of the reviewing authority had to be taken as final for the purposes of assessment. In the circumstances, it was not open to the Review DPC to downgrade the applicant’s ACR and assess him as only good for the year 1999-2000.”

10. The petitioner while replying to the aforesaid averments in their counter affidavit has not denied the allegations made by the respondent specifically. The reply given by them was as under:

“Para-4.15. That in reply to the contents of corresponding para, it is submitted that para 6.12 of DOPT’s O.M. No.22011/5/86-Estt(D) dated 10.4.89 as amended from time to time empowers DPCs to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them. Para 6.2.1(e) further provides that “The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters of attributes.” As such, it was open to the DPC to make its own assessment while considering the case of the applicant in Review DPC.”

11. The Tribunal has considered all the aspects of the matter including the office memorandums applicable for the guidance of the Review DPC in relation to writing of ACRs by the competent authority and the reasons for taking a different view about the ACR by the Review DPC as prescribed in paragraph 18.2 of the office memorandum dated 10.04.1989.

12. We have also gone through the judgment cited on behalf of the petitioner in the case of *UPSC Vs. K. Rajaiah & Ors. (supra)*. For the reasons given by the Tribunal in paragraph 8 of its order quoted above, we feel that the order of the Tribunal cannot be faulted with, in the peculiar facts of this case.

13. For the foregoing reasons, we do not find any such illegality or irregularity in the order of the Tribunal which would entail any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

14. The writ petition is without any merit and is, therefore, dismissed. All the pending applications are also dismissed.

15. No costs.

MOOL CHAND GARG, J.

MARCH 17, 2010

'anb'

ANIL KUMAR, J.